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**KF
133
A346**

**Vol.
17**

NOTES

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NOTES

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CASES IN 29 AM. REP.

29 AM. REP. 1, TAYLOR v. LITTLE ROCK, M. R. & T. R. CO. 32 ARK. 393.

Validity of limitation of carrier's liability.

Cited in *St. Louis, I. M. & S. R. Co. v. Pitcock*, 82 Ark. 441, 118 A. S. R. 84, 101 S. W. 725, 12 A. & E. Ann. Cas. 582; *Merchants' Despatch Transp. Co. v. Bloch Bros.* 86 Tenn. 392, 6 A. S. R. 847, 6 S. W. 881,—holding stipulation exempting carrier from liability for loss of goods void.

— Loss on connecting line.

Cited in *Chicago, R. I. & P. R. Co. v. Slaughter*, 84 Ark. 423, 106 S. W. 208, holding stipulation exempting carrier from loss on connecting line, valid; *Smeltzer v. St. Louis & S. F. R. Co.* 158 Fed. 649; *Packard v. Taylor*, 35 Ark. 402, 37 A. R. 37; *Taylor v. Little Rock, M. R. & T. R. Co.* 39 Ark. 148; *Pittsburgh, C. C. & St. L. R. Co. v. Bryant*, 36 Ind. App. 340, 75 N. E. 829; *Fremont, E. & M. Valley R. Co. v. New York, C. & St. L. R. Co.* 66 Neb. 159, 59 L.R.A. 939, 92 N. W. 131,—holding stipulation in bill of lading limiting carrier's liability for loss on connecting line, valid.

Cited in reference note in 2 A. S. R. 325, on liability of connecting carriers.

Cited in notes in 72 A. D. 232; 2 A. S. R. 62,—on power of carrier to limit liability to its own line; 31 L.R.A.(N.S.) 69, on liability of connecting carrier for loss beyond own line.

29 AM. REP. 3, FITZGERALD v. BLOCHER, 32 ARK. 742.

Right of pledgee to sell.

Cited in reference note in 2 A. S. R. 631, on liability of pledgee for selling more than necessary of divisible pledge.

Cited in notes in 79 A. D. 501, on pledgee's remedy by nonjudicial sale of pledge; 4 L.R.A. 586, on power of sale of negotiable instruments by pledgee; 43 L.R.A. 744, on implied authority of pledgee to sell stocks and bonds pledged; 43 L.R.A. 761, on ratification of sale and waiver of pledgee's conversion of pledged property; 43 L.R.A. 770, on measure of damages for pledgee's

Am. Rep. Vol. XVII.—1.

conversion of stocks, bonds, and other securities by invalid sale; 53 L.R.A. 865, 866, on remedy of pledgeor in respect to sale of collateral bonds and commercial paper.

29 AM. REP. 11, D'ARCY v. MILLER, 86 ILL. 102.

Liability for damage by trespassing stock.

Cited in *Birket v. Williams*, 30 Ill. App. 451, holding owner liable for injury to nursery stock by trespassing animals; *Selover v. Osgood*, 52 Ill. App. 260, holding owner liable for destruction of hay by trespassing stock; *Collins v. Cochran*, 121 Ga. 785, 49 S. E. 771; *McKowan v. Harmon*, 56 Ill. App. 368; *O'Riley v. Diss*, 41 Mo. App. 184,—holding owner liable for trespassing of stock through his portion of division fence; *Lorance v. Hillyer*, 57 Neb. 266, 77 N. W. 755, holding owner liable for damage caused by trespassing cattle; *Barber v. Cleave*, 2 Ont. L. Rep. 213, to point that when it is not the duty of either party to keep up any particular defined portion of division fence, the one whose cattle trespasses on his neighbor's land is answerable for trespass.

Cited in notes in 68 A. D. 637, on liability for trespasses of cattle, etc., for want of partition fence; 81 A. S. R. 452, on liability of owner of cattle in common inclosure with no division fence; 22 L.R.A. 62, on liability for trespassing cattle where partition fence was defective.

Right to impound trespassing stock.

Cited in *Hopkins v. Ott*, 57 Mo. App. 292; *Field v. Bogie*, 72 Mo. App. 185,—denying right of party to partition fence to impound hogs of other party escaping into former's premises.

What constitutes partition fence.

Cited in *Dixon v. Messer*, 136 Ill. App. 488, holding that division fence built entirely by one owner is not partition fence within statute regulating same.

Rights of owner of partition fence.

Cited in *Hill v. Tohill*, 225 Ill. 284, 80 N. E. 253, 8 A. & E. Ann. Cas. 423, sustaining right of owner of portion of partition fence to remove same; *Albright v. Bruner*, 14 Ill. App. 319, holding parties to partition fence entitled to waive requirements as to statutory height.

Cited in note 68 A. D. 627, on establishment of partition fence by agreement.

29 AM. REP. 14, KING v. HALEY, 86 ILL. 106.

Liability incurred by furnishing liquor to another.

Cited in *Kennedy v. Whittaker*, 81 Ill. App. 605, holding one injured by negligent driving of intoxicated person entitled to recover of one furnishing liquors; *Dunlap v. Wagner*, 85 Ind. 529, 44 A. R. 42, holding one illegally furnishing another with liquors in consequence of which latter is unable to manage horse, liable for death of horse in runaway; *Nagle v. Keller*, 237 Ill. 431, 86 N. E. 694 (affirming 141 Ill. App. 444), sustaining right of pauper sister to maintain action against one furnishing liquor to brother, thereby depriving her of support; *Eddy v. Courtright*, 91 Mich. 264, 51 N. W. 887, sustaining right of mother supported by son to maintain action against saloon keeper supplying son with liquor in consequence of which she loses support.

Cited in notes in 52 A. R. 160, on application of proximate and remote cause

to cases arising under civil-damage act; 36 A. S. R. 831, on liability for causing bodily incapacity by supplying intoxicating liquors; 13 L.R.A.(N.S.) 1159, on necessity, in order to support a recovery under civil-damage act, that intoxication be the proximate cause of the injury.

Distinguished in *Judson v. Parry*, 38 Wash. 37, 80 Pac. 194, denying right of one injured in fight between intoxicated persons to maintain action against saloon keeper for damages.

—For death of person furnished with liquor.

Cited in *Nelson v. State*, 32 Ind. App. 88, 69 N. E. 298, holding widow of one freezing to death while intoxicated entitled to recover from one furnishing liquors; *Bistline v. Ney Bros.* 134 Iowa, 172, 13 L.R.A.(N.S.) 1158, 111 N. W. 422, 13 A. & E. Ann. Cas. 196, holding one selling liquors liable in damages to wife of one committing suicide when intoxicated; *Brockway v. Patterson*, 72 Mich. 122, 1 L.R.A. 708, 40 N. W. 192, sustaining right of widow to recover damages from saloon keeper for death of husband resulting from liquor furnished.

—For killing of another by person furnished with liquor.

Cited in *Pickard v. Teatro*, 34 Ill. App. 398; *Munz v. People*, 90 Ill. App. 647; *Sauter v. Anderson*, 112 Ill. App. 580; *England v. Cox*, 89 Ill. App. 551,—holding saloon keeper furnishing one with liquor in consequence of which latter kills another, liable to wife of one killed.

Cited in note in 85 A. S. R. 450, on liability of liquor sellers for personal injuries committed by persons becoming intoxicated.

—Joint liability.

Cited in *O'Halloran v. Kingston*, 16 Ill. App. 659; *O'Leary v. Frisbey*, 17 Ill. App. 553; *Keller v. Lincoln*, 67 Ill. App. 404,—holding all furnishing liquors jointly liable to wife thereby deprived of husband's support.

29 AM. REP. 17, JOLIET v. HARWOOD, 86 ILL. 110.

Liability for act of contractor, etc.

Cited in *Northern Trust Co. v. Palmer*, 70 Ill. 93, holding landlord liable to tenant for injury to premises by acts of one contracting with landlord for removal of building; *Sherman House Hotel Co. v. Gallagher*, 129 Ill. App. 557, holding that fact that removal of heavy objects on crowded street was done by independent contractor is no defense to action for injuries due to failure to erect guards; *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66, holding gas company liable for explosion of gas caused by negligence of construction company in making connection and former company in forcing gas therein; *Capital Electric Co. v. Hauswald*, 78 Ill. App. 359, holding one authorizing work necessarily dangerous liable to third persons injured thereby; *Hoffman v. Walsh*, 117 Mo. App. 278, 93 S. W. 853, holding contractor blasting rock in construction of sewer for city is not liable to mason injured 500 feet away, where blasting not negligently done; *Moline v. McKinnie*, 30 Ill. App. 419; *Hill v. Schneider*, 13 App. Div. 299, 43 N. Y. Supp. 1,—denying responsibility of owner for negligence of contractor in excavating so as to injure adjoining property.

Cited in reference note in 79 A. D. 337, on landowner's liability for building contractor's negligence.

Cited in notes in 55 A. D. 318, on liability of employer for acts or negligence of contractor; 76 A. S. R. 396, on doctrine of respondeat superior as

applied to liability for negligence and other torts of independent contractor; 76 A. S. R. 402, on employer's liability for negligence and other torts of independent contractor where work is dangerous; 76 A. S. R. 421; 14 L.R.A. 830,—on employer's liability for injuries caused by independent contractor through blasting; 65 L.R.A. 847, on employer's liability for injuries to persons in highway by construction of sewer by independent contractor; 65 L.R.A. 854, on employer's liability for joint owner's injuries resulting from blasting operations by independent contractor; 65 L.R.A. 836, 837, on employer's liability for injuries caused by performance of work by independent contractor which is dangerous unless certain precautions are observed.

—Liability of municipal corporation.

Cited in *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Jefferson v. Chapman*, 127 Ill. 438, 11 A. S. R. 136, 20 N. E. 33 (affirming 27 Ill. App. 43); *Sterling v. Schiffmacher*, 47 Ill. App. 141,—holding city liable for injuries resulting from failure of independent contractor to guard excavation in street; *Fitz Simmons & C. Co. v. Braun*, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 429 (affirming 94 Ill. App. 533), holding independent contractor, not city, liable for injuries resulting from former's use of dynamite in excavating tunnel in street at place where explosives unnecessary; *Chicago v. Murdock*, 212 Ill. 9, 103 A. S. R. 221, 72 N. E. 46 (affirming 113 Ill. App. 656), holding city liable for contractors use of explosives in street to knowledge of city officer in charge although such use prohibited by contract; *Symons v. Allegany County*, 105 Md. 254, 65 Atl. 1067, holding that county is not liable to one injured by rock thrown by blast set off by independent contractor, where blasting unnecessary to remove stone; *Harding v. Boston*, 163 Mass. 14, 39 N. E. 411, holding one constructing sewer under contract requiring work to be satisfactory to city superintendent of sewers, independent contractor for whose acts of trespass city is not liable; *Wetherbee v. Partridge*, 175 Mass. 185, 78 A. S. R. 486, 55 N. E. 894, holding one entitled to recover of city for injuries caused by blast set off by independent contractor where blasting contemplated by contract.

Cited in reference notes in 36 A. R. 166, on liability of city for negligence of its contractor; 2 A. S. R. 613, on liability of municipal corporation for acts of contractor employed by it; 37 A. S. R. 436, on municipal liability for acts of independent contractor.

Cited in notes in 89 A. D. 401, on city's power over streets; 27 A. R. 649, on liability of municipality for negligence of contractor; 30 A. S. R. 412, on municipal liability for negligence or misconduct of contractors; 76 A. S. R. 419, on liability for negligence of independent contractors in performing work for cities; 66 L.R.A. 131, on liability of municipality for acts of independent contractor employed on municipal duties resulting from municipality's non-performance of absolute duties.

Liability for injuries to adjoining property from blasting.

Cited in *Probst v. Hinesley*, 133 Ky. 64, 117 S. W. 389, holding question whether injury to adjoining premises from blasting was proximate cause of injury was one for jury.

Cited in reference notes in 35 A. R. 381, on municipal liability for injury by blasting in street; 123 A. S. R. 581, on duty and liability to adjoining proprietor as to blasting which merely causes concussion.

Liability of one using property of another.

Distinguished in *Coal Run Coal Co. v. Strawn*, 15 Ill. App. 347, denying liability of coal company maintaining switch, for death of one caused by negligent operation of trains over which it had no contract.

29 AM. REP. 20, MECHANICS' NAT. BANK v. FRAZER, 86 ILL. 133.**Contract as separable or entire.**

Cited in *Cranat v. Kruse*, 114 Ill. App. 488, holding that contract is not void in toto when illegal portion separable; *Spring v. Slayden-Kirksey Woolen Mills*, 106 Ill. App. 579, holding that contract for sale of various articles at different prices is not entire; *T. M. Gilmore & Co. v. W. B. Samuels & Co.* 135 Ky. 706, 123 S. W. 271, holding intention of parties criterion whether contract is to be treated as entirety or as severable.

Cited in reference note in 35 A. S. R. 882, on severability of contracts.

Sufficiency of consideration of guaranty.

Cited in reference note in 1 A. S. R. 584, on consideration of guaranty.

29 AM. REP. 25, BROWN v. PEOPLE, 86 ILL. 239.**Forgery of worthless instruments.**

Cited in notes in 22 A. D. 318, on instrument having no legal efficacy not subject of forgery; 24 L.R.A. 38, on forgery of instruments void on their face; 24 L.R.A. 33, on forgery of worthless instruments.

29 AM. REP. 28, WESTERN U. TELEG. CO. v. CHICAGO & P. R. CO. 86 ILL. 246.**Contract within statute of frauds.**

Cited in *Tyler v. St. Louis S. W. R. Co.* 99 Tex. 491, 91 S. W. 1, 13 A. & E. Ann. Cas. 911, holding agreement to construct railroad is not within statute, as capable of performance within year.

Right to specific performance of contract.

Cited in *Hall v. Peoria & E. R. Co.* 143 Ill. 163, 32 N. E. 598, sustaining right to specific performance of oral contract to convey land, after payment of purchase price; *Quinn v. Stark County Teleph. Co.* 122 Ill. App. 133, denying specific performance of verbal contract for telephone service within statute of frauds, notwithstanding rendition of services in part payment.

Illegality of contract in restraint of trade.

Cited in *Menacho v. Ward*, 23 Blatchf. 502, 27 Fed. 529, holding agreement for discrimination in shipping rates, illegal; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, 46 A. R. 527, holding grant by landowner of exclusive right to lay pipe line through tract of 2,000 acres, void as in restraint of trade.

Cited in reference notes in 2 A. S. R. 135, on validity of contracts partially in restraint of trade; 72 A. S. R. 453, on contracts in restraint of trade.

Cited in notes in 92 A. D. 762, on miscellaneous cases of restraints in contracts in restraint of trade; 54 A. R. 866, on injunction against discriminations by carrier extending into other states; 74 A. S. R. 255, on unlawful combinations and contracts among carriers; 2 L.R.A. 33, on conspiracies to injure trade; 41 L. ed. U. S. 1010, on monopoly and contracts in restraint of trade.

Correspondence as contract.

Cited in *Kransz v. Uedelhofen*, 193 Ill. 477, 62 N. E. 239, holding extension of time of payment binding upon trustee in trust deed although signed only by makers of deed and note; *Dyrenforth v. Palmer Tire Co.* 240 Ill. 25, 88 N. E. 290, holding letter of acceptance sufficient signing of contract; *Francis v. Barry*, 69 Mich. 311, 37 N. W. 353, holding correspondence sufficient to complete binding contract.

29 AM. REP. 32, PEOPLE EX REL. HUCK v. GRACELAND CEMETERY CO. 86 ILL. 336.**Property subject to taxation.**

Cited in *Re Swigert*, 119 Ill. 83, 59 A. R. 789, 6 N. E. 469, holding that grain elevator built by railroad and leased to private person is not exempt from taxation as property used in transportation.

— Cemetery.

Cited in *Rosehill Cemetery Co. v. Kern*, 147 Ill. 483, 35 N. E. 243; *State ex rel. Evangelical Lutheran Cemetery Asso. v. Lange*, 16 Mo. App. 468,—holding cemetery lands exempt from taxation; *Lima v. Lima Cemetery Asso.* 42 Ohio St. 128, 51 A. R. 809, holding cemetery association liable for cost of street improvement.

Cited in notes in 10 L.R.A. 365, on exemption of cemeteries from general taxations; 19 L.R.A. 296, on exemption from taxation of unused land of charitable or cemetery association; 35 L.R.A. 37, on liability to local assessment for benefits, of property set aside for cemeteries exempt from general taxation.

29 AM. REP. 35, JOLIET v. SEWARD, 86 ILL. 402.**Liability of municipality for defects in streets.**

Cited in notes in 5 L.R.A. 255, on showing knowledge of defect to charge municipality for injury by defect in highway; 20 L.R.A.(N.S.) 549, 672, 689, on liability of municipality for defects or obstructions in streets; 21 L.R.A.(N.S.) 673, on contributory negligence as affecting municipal liability for defects and obstructions in streets; 23 L.R.A.(N.S.) 637, 645, on liability of municipality for failure to prevent improper conduct in or use of streets.

Liability of municipality for negligence of contractors.

Cited in reference note in 29 A. R. 20, on liability of city for acts of contractor.

Cited in notes in 76 A. S. R. 417, on liability for negligence of independent contractors in performing work for cities; 76 A. S. R. 422, on liability for negligence of independent contractors in blasting.

Imputed negligence.

Cited in *Atlanta & C. Air Line R. Co. v. Gravitt*, 93 Ga. 369, 44 A. S. R. 145, 26 L.R.A. 553, 20 S. E. 550, holding gross negligence of mother in taking child upon dangerous trestle imputable to father intrusting child to her; *Chicago & A. R. Co. v. Vipond*, 212 Ill. 199, 72 N. E. 22, holding that right to recover for negligent death of fireman is not defeated by negligence of engineer; *Pennsylvania R. Co. v. Goodenough*, 55 N. J. L. 577, 22 L.R.A. 460, 28 Atl. 3, holding action by husband and wife for personal injuries to latter defeated by husband's contributory negligence; *Abbitt v. Lake Erie & W. R. Co.* 150 Ind. 498, 50 N. E. 729 (dissenting opinion), on imputed negligence.

Cited in note in 22 L.R.A. 460, on husband's negligence as bar to recovery for wife's personal injury.

— Of driver.

Cited in *Carmi v. Ervin*, 59 Ill. App. 555, holding that negligence of driver over dangerous road cannot be imputed to one riding by invitation; *Donnelly v. Chicago City R. Co.* 131 Ill. App. 302, holding that negligence of driver cannot be imputed to companion having no authority over former; *Nonn v. Chicago City R. Co.* 232 Ill. 378, 122 A. S. R. 114, 83 N. E. 934, holding that negligence of driver of delivery wagon is not imputable to coemployee going with him to help in making deliveries.

Cited in notes in 8 L.R.A.(N.S.) 657, on imputing driver's negligence to his wife when riding with him; 10 L.R.A.(N.S.) 854, on question for jury as to negligence in leaving horse unhitched in highway.

Doctrine of comparative negligence.

Cited in note in 55 A. D. 671, on rule as to comparative negligence.

Contributory negligence of intoxicated person.

Cited in *Reed v. Baggott*, 5 Ill. App. 247, holding one voluntarily using intoxicating liquor so as to become helpless, guilty of contributory negligence by going into place of danger.

29 AM. REP. 37, CRAIN v. McGOON, 86 ILL. 431.

Sufficiency of tender.

Cited in *Healy v. Protection Mut. F. Ins. Co.* 213 Ill. 99, 72 N. E. 678, holding tender of sum due on foreclosure of trust deed not including attorney's fees, unavailable.

Cited in reference note in 78 A. D. 159, on tender of amount due on mortgage at any time before foreclosure as discharge of lien.

Cited in note in 6 E. R. C. 596, as to what constitutes tender of payment.

Necessity of keeping tender good.

Cited in *Matthews v. Lindsay*, 20 Fla. 962; *Irwin v. Brown*, 44 Ill. App. 612,—holding that tender not kept good, unavailable; *Aulger v. Clay*, 109 Ill. 487, holding that tender on sum due on note must be kept good to stop interest; *Glos v. Evanston & N. C. County Bldg. & L. Asso.* 86 Ill. App. 651, holding that sum tendered in payment of taxes must be kept good by paying same into court; *Blain v. Foster*, 33 Ill. App. 297, holding that tender by mortgagor after default must be kept good in order to discharge mortgage.

Cited in reference notes in 77 A. D. 482, on necessity of keeping tender good; 38 A. R. 361, on necessity for keeping tender good after amount on chattel mortgage is due.

Time for acceptance of tender.

Cited in *Hyams v. Bamberger*, 10 Utah, 1, 36 Pac. 202, holding creditor entitled to reasonable time within which to accept tender.

Cited in notes in 33 L.R.A. 232, on effect of unaccepted tender on lien of real-estate mortgage after maturity; 18 E. R. C. 577, on unaccepted tender after default revesting title.

Effect of tender.

Cited in *Hudson Bros. Commission Co. v. Glencoe Sand & Gravel Co.* 140 Mo. 103, 62 A. S. R. 722, 41 S. W. 450; *Knollenberg v. Nixon*, 171 Mo. 445, 94 A. S. R. 790, 72 S. W. 41; *Parker v. Beasley*, 116 N. C. 1, 33 L.R.A. 231, 21

S. E. 955,—holding tender of sum due on mortgage made after maturity available only to stop interest and further costs; *Grommet v. Sawyer*, 133 Ill. App. 249, holding one keeping tender good discharged from future liability for costs.

Cited in reference note in 19 A. S. R. 252, on discharge of lien by tender.

Cited in notes in 77 A. D. 489, on effect of tender upon liens; 59 A. S. R. 600, on liability of corporations for exemplary damages for trespass.

Distinguished in *Fisher v. Stockebrand*, 26 Kan. 565, holding surety on note discharged by maker's tender of full sum due after maturity.

29 AM. REP. 43, SINGER MFG. CO. v. HOLDFORD, 86 ILL. 455.

Liability of principal for act of agent.

Cited in *Louisville & N. R. Co. v. Whitman*, 79 Ala. 328, holding railroad company liable for punitive damages for wrongful ejection of passenger by employees; *People's Bldg. & L. Asso. v. McElroy*, 79 Ill. App. 266, holding corporation liable in exemplary damages for trespass by agent; *New York L. Ins. Co. v. People*, 95 Ill. App. 136; *Franklin L. Ins. Co. v. People*, 200 Ill. 619, 66 N. E. 378 (affirming 113 Mo. App. 554),—holding insurance company liable for acts of agent in violation of statute against unjust discrimination between policy holders; *Partridge v. Brady*, 7 Ill. App. 639, holding partner ratifying wilful trespass by copartner in removing property sold, liable for exemplary damages; *Aygarn v. Rogers Grain Co.* 141 Ill. App. 402; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53,—holding corporation liable for punitive damages for acts of agent.

Notice to agent as binding principal.

Cited in *Nash v. Classen*, 163 Ill. 409, 45 N. E. 276, holding principal bound by notice to agent as to transaction in which latter engaged; *Mullanphy Sav. Bank v. Schott*, 137 Ill. 655, 25 A. S. R. 401, 26 N. E. 640; *Fischer v. Touhy*, 186 Ill. 143, 57 N. E. 801,—holding principal bound by notice of lien given agent making investment for former.

Cited in note in 2 E. R. C. 390, on binding effect of person openly and notoriously exercising agency of corporation.

Liability of conditional vendor for removal of property.

Cited in *Jenks v. Howe Sewing Mach. Co.* 34 La. Ann. 1241, denying liability of sewing machine company under statute for removal of machine for default in installments; *Mansur-Tebbetts Implement Co. v. Smith*, 65 Ill. App. 319, holding that conditional vendor taking property after default is not liable for punitive damages.

Distinguished in *Wheeler & W. Mfg. Co. v. Barrett*, 70 Ill. App. 222, holding sewing machine company liable for exemplary damages for retaking machine after full payment.

Right to punitive damages.

Cited in notes in 27 A. D. 689, on injuries to personal property for which vindictive damages are allowed; 62 A. D. 381, on liability of corporation for wilful torts of its servants and agents and in exemplary damages; 37 L. ed. U. S. 100, as to when railroad or other corporations are liable for punitive or exemplary damages.

29 AM. REP. 47, OSBORN v. FARWELL, 87 ILL. 89.**Punctuation of statute or bond.**

Cited in *Crawford v. Burke*, 201 Ill. 581, 66 N. E. 833, sustaining right to consider punctuation in construing statute; *Hawes v. Sternheim*, 57 Ill. App. 126, holding that punctuation of bond will not be permitted to overrule plain meaning of contract.

29 AM. REP. 49, SHEAFE v. PEOPLE, 87 ILL. 189.**Establishment of highway.**

Cited in *Nichols v. State*, 89 Ind. 298, holding highway established by user for twenty years although same terminates on private property.

—Cul de sac.

Cited in *Moore v. Auge*, 125 Ind. 562, 25 N. E. 816, holding cul de sac highway within statute authorizing establishment of highways; *Greene v. O'Connor*, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692, holding cul de sac highway within statute as to conveyance to public authorities for such purpose; *Adams v. Harrington*, 114 Ind. 66, 14 N. E. 603, denying injunction restraining public authorities from laying out cul de sac as highway; *State ex rel. Thomas v. Superior Ct.* 42 Wash. 521, 85 Pac. 206, denying power of court to interfere with city's establishment of cul de sac; dissenting opinion in *Rock Island v. Starkey*, 189 Ill. 515, 59 N. E. 971 (reversing 91 Ill. App. 592), on right of public authorities to establish cul de sac as highway.

Cited in note in 12 E. R. C. 558, on common highway in cul de sac.

Service of writ of mandamus.

Cited in *People ex rel. Kelly v. Raymond*, 186 Ill. 407, 57 N. E. 1066, holding that writ of mandamus granted against county must be served upon members of county board although they are not made parties.

Parties to mandamus.

Cited in *Norwalk & S. N. Electric Light Co. v. South Norwalk*, 71 Conn. 381, 42 Atl. 82, holding that change in membership of common council is no ground for denial of writ against common council; *People ex rel. German Ins. Co. v. Getzendaner*, 137 Ill. 234, 34 N. E. 294, denying necessity of making town officers parties to writ of mandamus against town to compel payment of bonds; *Scott v. Artman*, 237 Ill. 394, 86 N. E. 595 (affirming 142 App. Div. 489), holding plea in mandamus proceeding against highway commissioners to compel them to perform duty as body, that term of office has expired is not good.

Strict compliance with statute.

Cited in *Hebb v. County Ct.* 49 W. Va. 733, 37 S. E. 676 (dissenting opinion), on strict compliance with statute.

29 AM. REP. 53, NUSSBAUMER v. BECKER, 87 ILL. 281.**What is a partnership.**

Cited in *Dawson v. Pogue*, 18 Or. 94, 6 L.R.A. 176, 22 Pac. 637 (dissenting opinion), on what constitutes partnership.

Necessity of notice of dissolution of firm.

Cited in notes in 26 A. D. 292, on notice of dissolution of partnership; 56 A. D. 150, on necessity of dormant partner's giving notice on retiring from firm.

29 AM. REP. 55, TRUSTEES OF SCHOOLS v. PEOPLE, 87 ILL. 303.**Right to mandamus as to school matters.**

Cited in *Indianapolis v. State*, 129 Ind. 14, 13 L.R.A. 147, 28 N. E. 61 (dissenting opinion), on right to mandamus to compel school authorities to teach german.

Cited in note in 89 A. D. 737, on mandamus against school officers.

— To compel reinstatement of student.

Cited in *Board of Education v. Purse*, 101 Ga. 422, 65 A. S. R. 312, 41 L.R.A. 593, 23 S. E. 896, denying right to mandamus to compel readmission of student expelled from insulting conduct of parent in presence of school; *State ex rel. Andrew v. Webber*, 108 Ind. 31, 58 A. R. 30, 8 N. E. 708, denying right to mandamus to compel reinstatement of student refusing to comply with rule requiring study of music; *State ex rel. Stallard v. White*, 82 Ind. 278, 42 A. R. 496, sustaining right to mandamus to compel reinstatement of student expelled for membership in Greek letter society; *State ex rel. Clark v. Osborn*, 24 Mo. App. 309, sustaining right to mandamus to compel reinstatement of student suspended for attending social function without permission; *State ex rel. Sheibley v. School Dist. No. 1*, 31 Neb. 552, 48 N. W. 393, sustaining right to mandamus to compel reinstatement of student refusing to take subject ordered by school authorities and not desired by parent; *Com. v. McCauley*, 2 Pa. Co. Ct. 459, sustaining right to writ of mandamus to compel reinstatement of student suspended for offense of which he was innocent.

Validity of rules or statute relating to schools.

Cited in *Potts v. Breen*, 167 Ill. 67, 59 A. S. R. 262, 39 L.R.A. 152, 47 N. E. 81, holding rule of school authorities requiring vaccination as condition to attending school, void as unreasonable; *O'Connor v. Hendrick*, 184 N. Y. 421, 7 L.R.A.(N.S.) 402, 77 N. E. 612, 6 A. & E. Ann. Cas. 432, holding rule of school board forbidding teachers from wearing religious garb while teaching, valid; *School Bd. Dist. No. 18 v. Thompson*, 24 Okla. 1, 24 L.R.A.(N.S.) 221, 103 Pac. 578, holding that parent has right to make reasonable selection from prescribed course of study; *Leeper v. State*, 103 Tenn. 500, 48 L.R.A. 167, 53 S. W. 962, holding act providing for uniformity of text books used in public schools, constitutional.

Cited in reference note in 32 A. R. 128, on right of teacher to chastise pupil.

Cited in notes in 35 A. S. R. 339, on grounds for exclusion from public schools; 36 L.R.A. 278, on rights of parent as to text book to be used by children; 41 L.R.A. 593, on right to exclude, suspend, or expel pupils from school for misconduct of parent affecting child; 41 L.R.A. 600, 601, on right to exclude, suspend, or expel pupils for failure to participate in certain studies and exercises.

Validity of tax for school purposes.

Cited in *Greenwood v. Gmelich*, 175 Ill. 526, 51 N. E. 565, denying power of town board to levy tax for high school purposes without vote of people as required by statute.

Cited in note in 34 A. D. 633, on invalidity of unreasonable municipal ordinances.

29 AM. REP. 60, CLARK v. WEIS, 87 ILL. 438.**Mutual and dependent contracts.**

Cited in *Manistee Lumber Co. v. Union Nat. Bank*, 143 Ill. 490, 32 N. E.

449; *Bennett v. Roys*, 211 Ill. 232, 72 N. E. 380; *Osgood v. Skinner*, 111 Ill. App. 606,—holding vendor's tender of stock excused by vendee's inability to perform his part; *Scott v. Beach*, 172 Ill. 273, 50 N. E. 196; *Nathan v. Rehkopf*, 57 Ill. App. 212,—holding vendor's tender of deed unnecessary after vendor's refusal to perform; *Shouse v. Doane*, 39 Fla. 95, 21 So. 807; *Frenzer v. Dufrene*, 58 Neb. 432, 78 N. W. 719; *Primm v. Wise*, 126 Iowa, 528, 102 N. W. 427,—holding that vendee is not bound to tender performance when vendor is unable to make title; *Comstock v. Lager*, 78 Mo. App. 390, holding that one tendering money for deed is not bound to part with money before delivery of deed; *Davis v. Jeffris*, 5 S. Dak. 352, 58 N. W. 815, holding that one agreeing to construct creamery and furnish patent is not entitled to recover from subscribers to undertaking until proof of compliance with contract.

Cited in reference note in 79 A. D. 383, on vendee's right to rescind and recover back money paid, if vendor is unable to make title.

Cited in note in 18 E. R. C. 619, on independent and dependent covenants.

Tender of price or performance.

Cited in *Neely v. Williams*, 79 C. C. A. 82, 149 Fed. 60, holding interest on purchase money notes stopped by tender on condition that covenant to remove incumbrances be kept; *Maxwell v. Gregory*, 53 Neb. 5, 73 N. W. 220, holding vendor failing to make title bound to return sum paid by vendee on contract.

Distinguished in *Henderson v. Wheaton*, 139 Ill. 581, 28 N. E. 1100, holding one entitled to return of purchase money upon return of stock, bound to tender stock before action for money.

29 AM. REP. 63, MINKE v. HOPEMAN, 87 ILL. 450.

What constitutes a "nuisance."

Cited in reference note in 40 A. R. 738, on slaughterhouse as nuisance.

Cited in notes in 42 A. R. 542, on acts constituting nuisance; 107 A. S. R. 242, on hogpens, tanneries, slaughterhouses, rendering plants, and the like as public nuisances.

Right to injunction.

Cited in *Redway v. Moore*, 3 Idaho, 312, 29 Pac. 104, denying right to injunction against maintenance of disorderly house in absence of proof of intention to continue; *Christie Street Commission Co. v. Board of Trade*, 92 Ill. App. 604, denying right to enjoin board of trade from refusing to furnish market quotations; *Hartley v. Hendretta*, 35 W. Va. 222, 13 S. E. 375, denying right to enjoin sales of liquors not declared illegal; *State ex rel. Vance v. Crawford*, 28 Kan. 726, 42 A. R. 182, sustaining right to enjoin illegal sales of intoxicating liquors.

Cited in reference note in 1 A. S. R. 54, on what constitutes nuisance and right to enjoin same.

Cited in notes in 12 L.R.A. 754, on remedy by injunction to restrain monopoly; 3 L.R.A. (N.S.) 623, on injunction against commission of crime where property rights are invaded.

—Against nuisance.

Cited in *Carmichael v. Texarkana*, 94 Fed. 561, sustaining right to enjoin city's maintenance of sewer on ground of nuisance; *Barrett v. Mt. Greenwood Cemetery Asso.* 59 Ill. 385, 50 A. S. R. 168, 31 L.R.A. 109, 42 N. E. 891, sustaining right to enjoin pollution of stream rendering waters unfit for use; *Canal Melting Co. v. Columbia Park Co.* 99 Ill. App. 215, sustaining right to enjoin operation of rendering works as nuisance; *Cella v. People*, 112 Ill. App. 276, sustaining right to enjoin maintenance of pool room as nuisance; *People v. Kizer*,

151 Ill. App. 6, holding that court having jurisdiction to declare and abate nuisance, is not deprived of jurisdiction because maintenance of such nuisance constitutes criminal offense; *Com. v. Mahoning Powder Co.* 30 Pa. Co. Ct. 324, 14 Pa. Dist. R. 481, sustaining right to enjoin maintenance of dangerous nuisance; *Weakley v. Page*, 102 Tenn. 178, 46 L.R.A. 552, 53 S. W. 551, sustaining right to enjoin maintenance of disorderly house as nuisance injuring adjoining property; *Oehler v. Levy*, 139 Ill. App. 294, denying right to enjoin maintenance of manure piles as nuisance, where no injury shown; *Evans v. Reading Chemical Fertilizing Co.* 160 Pa. 209, 28 Atl. 702, on injunction against maintenance of bone boiling establishment as nuisance.

Cited in reference notes in 31 A. R. 535, on the right of equity to enjoin a nuisance; 3 A. S. R. 23, on injunction against business so conducted as to constitute nuisance.

Validity of statute against nuisance.

Cited in *Carleton v. Rugg*, 149 Mass. 550, 14 A. S. R. 446, 5 L.R.A. 193, 22 N. E. 55, holding statute authorizing injunction against unlawful sales of intoxicating liquors as nuisance, valid.

Cited in note in 14 A. S. R. 454, on constitutionality of statute authorizing abatement of nuisance of place where liquor is unlawfully kept for sale.

29 AM. REP. 66, LUDEKE v. SOUTHERLAND, 87 ILL. 481.

Parol evidence as to writing.

Cited in *Harman v. Harman*, 17 C. C. A. 479, 34 U. S. App. 316, 70 Fed. 894; *Laffin v. Howe*, 112 Ill. 253; *Re Casners*, 86 Ill. App. 469; *Birks v. Gillett*, 13 Ill. App. 369,—holding parol evidence admissible to explain contract only part of which was reduced to writing; *Hill v. Hatfield*, 72 Ill. App. 534, holding evidence of oral agreement as to shortage of land inadmissible to change written contract; *Levine v. Carroll*, 121 Ill. App. 105, holding parol evidence inadmissible to limit deed by showing easement; *Lloyd v. Sandusky*, 203 Ill. 621, 68 N. E. 154, holding parol evidence admissible to explain recitals in deed; *Hartford L. Ins. Co. v. Sherman*, 123 Ill. App. 202, holding parol evidence admissible to contradict receipt; *Platt v. Aetna Ins. Co.* 153 Ill. 113, 46 A. S. R. 877, 26 L.R.A. 853, 38 N. E. 580, holding that written submission of question of loss to arbitrators will not render inadmissible parol proof of waiver of right to rebuild; *Beckman v. Beckman*, 86 Wis. 655, 57 N. W. 1117, holding parol evidence competent to explain inadequate consideration for deed of homestead to son; *Green v. Batson*, 71 Wis. 54, 5 A. S. R. 194, 36 N. W. 849, holding proof of breach of parol warranty of quantity competent in action on purchase money note.

Cited in note in 14 E. R. C. 753, on right to show by extrinsic evidence a consideration not expressed or additional to that expressed in deed.

Recovery for failure of quantity purchased.

Cited in *Butt v. Smith*, 121 Wis. 566, 105 A. S. R. 1039, 99 N. W. 328, sustaining right to recover overpayment for land sold at certain price per acre.

29 AM. REP. 69, BALLINGER v. BOURLAND, 87 ILL. 513.

Commissions or bonus as making loan usurious.

Cited in *Vahlberg v. Keaton*, 51 Ark. 534, 14 A. S. R. 73, 4 L.R.A. 462, 11 S. W. 878, holding sum paid to agent of borrower as bonus not usury; *Fowler v. Equitable Trust Co.* 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1; *Payne v. Newcomb*, 100 Ill. 611, 39 A. R. 69; *Hoyt v. Pawtucket Inst. for Sav.* 110 Ill.

390; *Sanford v. Kane*, 133 Ill. 199, 23 A. S. R. 602, 8 L.R.A. 724, 24 N. E. 414; *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. 47; *Haldeman v. Massachusetts Mut. L. Ins. Co.* 21 Ill. App. 146,—holding that loan is not rendered usurious by broker's commissions; *Cobe v. Guyer*, 139 Ill. App. 580, holding that loan is not rendered usurious by bonus from which lender receives no benefit; *Cox v. Massachusetts Mut. L. Ins. Co.* 113 Ill. 382, holding that loan is not made usurious by agent's unauthorized act in extracting bonus from borrower; *Williams v. Bryan*, 68 Tex. 593, 5 S. W. 401, holding that loan is not made usurious by bonus to agent negotiating same.

Cited in reference notes in 78 A. D. 144, on effect of agent exacting bonus from borrower without lender's knowledge as usury; 33 A. R. 140, on effect of husband, as agent, for loaning wife's money taking commission for self beyond legal interest without her knowledge; 14 A. S. R. 81, on bonus paid to agent of borrower as usury; 24 A. S. R. 239, on bonus paid to agent as usury.

Cited in notes in 55 A. D. 395, on compensation for services and expenses, bonuses, etc.; 46 A. S. R. 197, on commissions paid to agents as usury; 46 A. S. R. 197, on usury in payment of commission or bonus to lender's agent; 19 L.R.A. (N.S.) 391, on commissions charged borrower by lender's agent as usury.

Right to and recovery of surplus on mortgage sale.

Cited in *Gair v. Tuttle*, 49 Fed. 198; *Brown v. Croogston Agri. Asso.* 34 Minn. 545, 26 N. W. 907; *Moss v. Robertson*, 56 Neb. 774, 77 N. W. 403,—holding second mortgagee entitled to surplus arising upon sale under prior mortgage; *Yager v. Exchange Nat. Bank*, 52 Neb. 321, 72 N. W. 211; *Reynolds v. Hennessy*, 15 R. I. 215, 2 Atl. 701,—holding action at law maintainable to recover surplus arising on mortgage sale.

Validity of mortgage sale.

Cited in *Chase v. First Nat. Bank*, 1 Tex. Civ. App. 595, 20 S. W. 1027, holding that sale under trust deed is not avoided by agreement of trustee, who is mortgagee, to allow bidder credit as inducement to purchase.

29 AM. REP. 76, SMALLMAN v. WHILTER, 87 ILL. 545.

Exclusion by carrier of persons selling merchandise.

Cited in 1 *Fetter, Carr. Pass.* p. 637, on carrier's right to exclude persons selling merchandise without permission.

29 AM. REP. 77, MORRISON v. HINKSON, 87 ILL. 587.

What use of street is proper.

Cited in *Barrows v. Sycamore*, 150 Ill. 588, 41 A. S. R. 400, 25 L.R.A. 535, 37 N. E. 1096, holding use of street for water pipes, lawful; *St. Louis, A. & T. H. R. Co. v. Belleville*, 20 Ill. App. 580, holding use of public street for railroad tracks, lawful; *Clingman v. World's Columbian Exposition*, 3 Ill. C. C. 452, holding that legislature has right to divert use of land fee of which has been acquired for public park to other than park purposes.

Cited in notes in 27 A. D. 569, on change of use of land dedicated for particular purpose; 15 A. S. R. 846, on liability of municipal corporation for maintaining a nuisance; 106 A. S. R. 240, on hydrants, watertanks, and pumping plants as additional servitudes on streets and highways; 6 L.R.A. 280, on restriction to particular use of land dedicated to public; 61 L.R.A. 77, on right of public to use of highway for municipal water supply; 4 L.R.A. (N.S.) 572, on right of municipality to place polling booth in street; 20 L.R.A. (N.S.) 622, on

liability of municipality for defects or obstructions in streets; 33 L. ed. U. S. 335, on liability of municipalities and individuals for obstructions or nuisances in street or want of repair thereof; 12 E. R. C. 581, on limitations as to dedication of land for road.

Abatement of nuisance.

Cited in *Pettit v. Grand Junction*, 119 Iowa, 352, 93 N. W. 381, holding public buildings erected by city in street, removable as nuisance; *Platte & D. Ditch Co. v. Anderson*, 8 Colo. 131, 6 Pac. 515, denying lot owner's right to compel abatement of public ditch as nuisance where same exists by lawful authority.

Oral dedication of land.

Cited in *Farney v. Calhoun County*, 84 Ala. 215, 4 So. 153, holding oral dedication of land to county for courthouse, valid.

Execution against municipal corporation.

Cited in *Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *Virden v. Fishback*, 9 Ill. App. 82,—holding execution against city, void; *Indiana Grave Drainage Dist. v. Root*, 28 Ill. App. 596, holding that where execution has been erroneously awarded without any mistake of fact, the proper remedy, after term, is by appeal or writ of error; *Emery County v. Burren*, 14 Utah, 328, 60 A. S. R. 898, 37 L.R.A. 732, 47 Pac. 91, holding issuance of execution against county, error.

Cited in note in 85 A. D. 544, on remedy by mandamus to compel levy of tax to pay municipal obligations where judgment cannot be enforced by execution.

29 AM. REP. 80, LANGE v. BENEDICT, 73 N. Y. 12, Writ of error dismissed in 99 U. S. 68, 25 L. ed. 469.

Liability of judicial officer.

Cited in *Kraft v. De Verneuil*, 105 App. Div. 43, 94 N. Y. Supp. 230, holding justice of peace not liable for fining on Sunday one accused of assault, under statute providing that court shall not transact business on Sunday except to receive verdict or discharge jury; *Hughes v. McCoy*, 11 Colo. 591, 19 Pac. 674, denying liability of judge for entering order within his jurisdiction without notice as required by statute; *Terry v. Wright*, 9 Colo. App. 11, 47 Pac. 905, denying liability of judge for causing arrest of one obtaining property wrongfully, before giving notice to produce same; *Chelsea Sav. Bank v. Slater*, 77 Conn. 137, 61 Atl. 69, denying liability of justice of peace for rendering voidable judgment in criminal case; *State ex rel. Egan v. Wolever*, 127 Ind. 306, 26 N. E. 762, denying liability of magistrate for giving judgment in criminal case after erroneously denying motion for change of venue; *Mervin v. Rogers*, 15 Daly, 334, 6 N. Y. Supp. 882 (affirming 18 N. Y. S. R. 949, 2 N. Y. Supp. 396), denying liability of justice of peace for loss sustained by adjournment of case in which verified complaint but no answer is filed; *People v. Jackson*, 121 App. Div. 856, 106 N. Y. Supp. 1046, denying liability of coroner for issuance of warrant for arrest of one charged with murder of man in another state; *Stewart v. Fonda*, 19 Hun, 191, denying liability of assessors for assessing tax to non-resident instead of to occupant; *Nowak v. Waller*, 31 N. Y. S. R. 458, 10 N. Y. Supp. 199, denying liability of justice of peace for false imprisonment because of failure to reduce complaint to writing; *Bocock v. Cochran*, 32 Hun, 521, denying liability of police justice for issuance of warrant based upon insufficient complaint; *Ontario v. Hill*, 33 Hun, 250, denying liability of railroad com-

missioners for error in judgment in issuing bonds under belief that requisite number of consents had been given; *Ayers v. Russell*, 50 Hun, 282, 3 N. Y. Supp. 383, denying liability of judge for error in judgment in commitment of lunatic; *People ex rel. Patrick v. Frost*, 133 App. Div. 179, 117 N. Y. Supp. 524, holding acts complained of in judge or court, whatever motive behind them, judicial acts; *Sweeney v. O'Dwyer*, 197 N. Y. 499, 90 N. E. 1129, holding that erroneous decision by judge, of matters within his jurisdiction, does not render warrant, issued in pursuance thereof, void; *Root v. Rose*, 6 N. Dak. 575, 72 N. W. 1022, denying liability of judge of superior court for corrupt act within his jurisdiction; *Ross v. Griffin*, 53 Mich. 5, 18 N. W. 534; *Banister v. Wakeman*, 64 Vt. 203, 15 L.R.A. 201, 23 Atl. 585,—denying liability of justice of peace for judicial act; *Handshaw v. Arthur*, 89 Hun, 179, 34 N. Y. Supp. 1034 (dissenting opinion), on liability of justice of peace for error in issuance of execution.

Cited in reference note in 32 A. R. 609, on civil liability of judge for judicial act.

Cited in notes in 6 A. D. 303, on liability of judicial officers for acts performed in judicial capacity; 79 A. D. 473, on distinction between judicial and ministerial acts; 67 A. S. R. 422, on liability of judicial officer for false imprisonment; 14 L.R.A. 138, on civil liability of judicial officer for acts of judicial nature; 27 L.R.A. 92, on personal liability of inferior judicial officer; 15 E. R. C. 48, on civil liability of judge for his judicial acts.

— Acts beyond jurisdiction.

Cited in *Wilcox v. Williamson*, 61 Miss. 310, holding magistrate liable for sentencing prisoner on charge over which he has no jurisdiction; *Marsh v. Bowen*, 12 Abb. N. C. 1, holding member of board of supervisors adding tax in case beyond jurisdiction, liable to owner in trespass; *Vaughn v. Congdon*, 56 Vt. 111, 48 A. R. 758, holding justice of peace committing prisoner on complaint showing on face that offense is barred by statute, liable; *Jones v. Brown*, 54 Iowa, 74, 37 A. R. 185, 16 N. W. 140, denying liability of arbitrators for making award after setting aside of order of appointment; *Burns v. Norton*, 35 N. Y. S. R. 416, 15 N. Y. Supp. 75, denying liability of justice of peace for excess of fine over amount authorized by statute.

Cited in note in 42 A. R. 648, on civil liability of judge for act in excess of jurisdiction.

Distinguished in *Austin v. Vrooman*, 128 N. Y. 229, 14 L.R.A. 138, 28 N. E. 477, denying liability of justice of peace in issuing warrant of arrest in case over which he erroneously thought he had jurisdiction.

— Acts under void ordinance.

Cited in *Calhoun v. Little*, 106 Ga. 336, 71 A. S. R. 254, 43 L.R.A. 630, 32 S. E. 86, denying liability of municipal judge convicting prisoner under void, ordinance adjudged by him to be valid; *Gilbert v. Satterlee*, 101 App. Div. 313, 91 N. Y. Supp. 960, denying liability of town magistrate for issuance of warrant under void ordinance for arrest of one peddling without license.

— As to licenses.

Cited in *Burkharth v. Stephens*, 117 Mo. App. 425, 94 S. W. 720, holding court not liable for granting void dram shop license; *Sargent v. Little*, 72 N. H. 555, 58 Atl. 44, holding state board of license commissioners not liable for error in judgment as to license fees.

Jurisdiction of court or officer.

Cited in *Ex parte Perkins*, 29 Fed. 900, denying jurisdiction of United States commissioner to examine person arrested on charge not constituting offense against U. S.; *Welch v. People*, 30 Ill. App. 399, on distinction between court having jurisdiction of subject-matter and of person, but not of mode of procedure; *Osterhont v. Hyland*, 27 Hun, 167, denying jurisdiction of board of town auditors to allow claim disallowed by former board; *Bergman v. Wolff*, 33 N. Y. S. R. 499, 11 N. Y. Supp. 591, holding court's jurisdiction of defendant acquired by valid service of summons; *Cherry Creek v. Becker*, 123 N. Y. 161, 25 N. E. 369, holding that jurisdiction of county judge to determine whether petition to issue bonds in aid of railroad was signed by majority of tax payers is not affected because based on two separate petitions; *Marvin v. Town*, 56 Hun, 510, 10 N. Y. Supp. 148, holding that town trustees have jurisdiction under statute of property for assessment purposes; *Roosevelt v. Edson*, 7 N. Y. Civ. Proc. Rep. 5, 1 How. Pr. N. S. 231, 19 Jones & S. 238, sustaining power of judge of court of common pleas to grant injunction order; *O'Donoghue v. Boies*, 159 N. Y. 87, 53 N. E. 537 (dissenting opinion), on sale of property contrary to terms of will as jurisdictional defect.

Proceedings judicial in nature.

Cited in *Crisfield v. Perine*, 15 Hun, 200, holding coroner's inquest judicial proceeding with power in coroner to determine who shall be present; *People ex rel. Devery v. Jerome*, 36 Misc. 256, 73 N. Y. Supp. 306, holding that deputy police commissioner acts judicially in trying members of police force for violation of rules.

Collateral attack on decree.

Cited in *Chapman v. Phenix Nat. Bank*, 12 Jones & S. 340, 5 Abb. N. C. 118, holding that decree of court confiscating property used for insurrection purposes is not subject to collateral attack; *Re Leggat*, 47 App. Div. 381, 62 N. Y. Supp. 208, 30 N. Y. Civ. Proc. Rep. 108, holding that discharge of prisoner on habeas corpus on ground of invalidity of commitment is not subject to collateral attack.

Sufficiency of complaint.

Cited in *Clark v. Bowe*, 60 How. Pr. 98; *Pease v. Freiwald*, 39 Misc. 549, 80 N. Y. Supp. 402 (affirming 38 Misc. 805, 78 N. Y. Supp. 1130),—holding complaint in action for false imprisonment failing to allege facts showing that same caused by unlawful means, insufficient; *Kent v. Binghamton*, 94 App. Div. 532, 88 N. Y. Supp. 34, holding sufficiency of complaint to be determined by facts stated, not by conclusions.

Right to discharge on habeas corpus.

Cited in *People ex rel. Devos v. Kelly*, 32 Hun, 536, 2 N. Y. Crim. Rep. 428, holding that prisoner in custody under void sentence upon valid judgment of conviction of assault is not entitled to discharge on habeas corpus.

Cited in note in 22 A. S. R. 425, on means of relief from contempt.

29 AM. REP. 97, BOOTH v. BOSTON & A. R. CO. 73 N. Y. 38.**Liability of master for injury to or death of servant.**

Cited in *Carter v. McDermott*, 29 App. D. C. 145, 10 L.R.A.(N.S.) 1103, holding street car company liable to motorman for failure of conductor to set signal lights; *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430, 29 L.R.A. 104, 38 N.

E. 67, holding railroad company liable for death of sectionman by backing without signals of train left in sole charge of fireman while rest of crew at lunch; *Dell v. McGrath*, 92 Minn. 187, 99 N. W. 629, holding master liable for failure to inform servant of danger of working near logs piled high on skidway; *Crowell v. Thomas*, 90 Hun, 193, 35 N. Y. Supp. 936, holding master turning stream into barrel to heat water liable to servant directed to draw water and injured by explosion of barrel; *Sheehan v. New York, C. & H. R. R. Co.* 91 N. Y. 332, holding railroad company liable for injury to fireman of "wild-cat" train due to failure of telegraph operator to communicate orders; *O'Loughlin v. New York, C. & H. R. R. Co.* 87 Hun, 538, 34 N. Y. Supp. 297, 9 N. Y. S. R. 384, holding railroad company liable for injuries to switchman by negligent act of incompetent switchman; *Cone v. Delaware, L. & W. R. Co.* 15 Hun, 172, holding railroad company liable to servant repairing car and injured by engine backing against it; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, 3 A. S. R. 92, holding master liable to boy hired to carry water and sweep but injured while working machine at direction of foreman; *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226, holding railroad company liable for injury to trainman due to improper inspection of brakes and other appliance of car; *Fiak v. Central P. R. Co.* 72 Cal. 38, 1 A. S. R. 22, 13 Pac. 144, denying liability of master for injury to young servant directed to do dangerous work by foreman without authority; *Berns v. Gaston Gas Coal Co.* 27 W. Va. 285, 55 A. R. 304, denying liability of master for injury to servant by explosion of fire damp in mine by another servant's use of watch against rules.

Cited in notes in 67 A. D. 591, on liability of master for negligence of servant entrusted with full control of the business or with duties master is personally bound to perform; 18 A. S. R. 456, on railroad's liability for employee's death caused by despatcher's negligence; 2 L.R.A. 192, on liability of master for injury to servant from negligence of vice principal; 41 L.R.A. 118, on non-assignability of employer's duty as to inspection; 43 L.R.A. 330, on sufficiency of rules to prevent automatic or unauthorized movements of engines or cars; 54 L.R.A. 86, on nondelegability of master's duty to employ servants sufficient in number for the work in hand; 5 A. S. R. 245; 48 L.R.A. 393; 17 L.R. A.(N.S.) 773,—on duty of master to provide sufficient help.

— Due to failure to furnish safe appliances or safe place to work.

Cited in *Choctaw, O. & G. R. Co. v. Holloway*, 52 C. C. A. 260, 114 Fed. 458, holding railroad company liable to fireman for injury caused by failure to provide engine with brakes; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210, holding master liable to servant for injuries resulting from failure to support roof of mine; *Franklin v. Winona & St. P. R. Co.* 37 Minn. 409, 5 A. S. R. 856, 34 N. W. 898, holding master liable for death of brakeman killed while making coupling by falling between open ties in culvert; *Jaques v. Great Falls Mfg. Co.* 66 N. H. 482, 13 L.R.A. 824, 22 Atl. 552, holding master liable for loss of servant's eye caused by shutter flying from loom which foreman, who made repairs thought necessary, said was all right; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546, holding railroad company liable to brakeman injured by collision because of defect in buffing apparatus of car; *McArdle v. Smith*, 1 Misc. 3, 20 N. Y. Supp. 612, 48 N. Y. S. R. 507, holding master liable for injury to servant due to failure to provide safe place to unload wagon; *Stephens v. Hudson Valley Knitting Co.* 69 Hun, 375, 23 N. Y. Supp. 656, holding master liable for injury to servant in mill set to work near piles of rolls of cloth which

one in charge assures him are safe; *Stevenson v. Jewett*, 16 Hun, 210, holding railroad company liable for death of engineer due to explosion of locomotive boiler from defects discoverable by superintendent of repair shop; *Fuller v. Jewett*, 80 N. Y. 46, 36 A. R. 575, holding railroad company liable for death of engineer killed by explosion of locomotive boiler through negligence of master mechanic in making repairs; *Smith v. New York, C. & H. R. R. Co.* 9 N. Y. S. R. 612, holding railroad company liable for injury to servant due to defective brake; *McNamara v. Brooklyn City R. Co.* 11 Misc. 667, 32 N. Y. Supp. 913, holding railway company liable to servant injured due to failure to furnish safe brakes for cars; *Deresant v. Cerillos Coal R. Co.* 178 U. S. 409, 44 L. ed. 1127, 20 Sup. Ct. Rep. 967; *Wilson v. Willimantic Linen Co.* 50 Conn. 433, 47 A. R. 653; *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149; *Texas, Mexican R. Co. v. Whitmore*, 58 Tex. 276,—holding master liable for injury to servant due to failure to furnish safe machinery; *Ransier v. Minneapolis & St. L. R. Co.* 32 Minn. 331, 20 N. W. 332; *South West Improv. Co. v. Smith*, 85 Va. 306, 17 A. S. R. 59, 7 S. E. 365,—holding master liable for injury to servant due to failure to provide sufficient brake to car; *Sherman v. Menominee River Lumber Co.* 72 Wis. 122, 1 L.R.A. 173, 39 N. W. 365, holding that master is not released from liability for injury to servant from defective machine by fact that operator thereof was negligent in management.

Cited in reference note in 37 A. R. 491, on master's liability for injury through defective machinery accompanied by servant's negligence.

Question for court or jury.

Cited in *Franklin Bank Note Co. v. Mackey*, 158 N. Y. 140, 52 N. E. 737, holding question as to existence of agency for court when facts undisputed.

—As to master's liability for injury to servant.

Cited in *Supple v. Agnew*, 191 Ill. 439, 61 N. E. 392, holding it question for jury whether master is liable to servant for injury for failure to employ sufficient force of men; *Griffin v. Boston & A. R. Co.* 148 Mass. 143, 12 A. S. R. 526, 1 L.R.A. 698, 19 N. E. 166, holding liability of railroad company for death of servant not seeing train on adjoining track because of steam and smoke a question for jury; *McGovern v. Central Vermont R. Co.* 123 N. Y. 280, 25 N. E. 373, holding question as to negligence of master in directing servant to enter elevator bin when grain is sticking to sides and likely to bury one, for jury.

Proximate cause of injury to servant.

Cited in *Lutz v. Atlantic & P. R. Co.* 6 N. M. 496, 16 L.R.A. 819, 30 Pac. 912, holding that failure of railroad company to furnish caboose with windows through which approaching danger may be seen is not proximate cause of injury to brakeman by collision.

Cited in note in 16 L.R.A. 820, on relation of proximate cause doctrine to rule of liability of master for injuries to servant caused by combined negligence of himself and fellow servant.

Who are fellow servants.

Cited in *Rosney v. Erie R. Co.* 68 C. C. A. 155, 135 Fed. 311, holding employees of colliding trains, fellow servants; *Cudahy Packing Co. v. Anthes*, 54 C. C. A. 504, 117 Fed. 118, holding elevator inspector and operator of elevator are not fellow servants; *Union P. R. Co. v. Callaghan*, 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988, holding that conductor of repair train on main line and section foreman on branch are not fellow servants; *Brann v. Chicago, R.*

I. & P. R. Co. 53 Iowa, 595, 36 A. R. 243, 6 N. W. 5, holding that car inspector and brakeman are not fellow servants; *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502, holding train despatcher and train employee are not fellow servants; *Brown v. Minneapolis & St. L. R. Co.* 31 Minn. 553, 18 N. W. 834, 2 Del. Co. Rep. 155, holding station agent and engineer, fellow servants; *Edge v. Southwest Missouri Electric R. Co.* 206 Mo. 471, 104 S. W. 90, holding that car-despatcher and motorman are not fellow servants; *McCosker v. Long Island R. Co.* 59 How. Pr. 258, 21 Hun, 500, holding that yard-master and driller in repair shop are not fellow servants; *Clavin v. William Tinkham Co.* 29 R. I. 599, 132 A. S. R. 836, 73 Atl. 392, holding loom fixer not fellow servant of weaver.

Cited in notes in 36 A. D. 289; 53 A. R. 46; 1 A. S. R. 33,—on who are fellow servants; 75 A. S. R. 630, on railroad employees as vice principals; 75 A. S. R. 638, 639, on train despatcher as vice principal; 25 L.R.A. 386, on train despatcher and telegraph operator as fellow servants of trainmen; 46 L. R.A. 391, on train despatcher as fellow servant of trainmen; 54 L.R.A. 39, on vice principalship as determined with reference to the character of the act which caused the injury.

Distinguished in *Hart v. New York Floating Dry Dock Co.* 16 Jones & S. 460, holding foreman in charge of raising vessel and laborer fellow-servants.

Assumption of risk by servant.

Cited in *Southern P. Co. v. Lafferty*, 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. 536, holding that risk of collision resulting from failure to guard engines is not assumed by employees; *Georgia P. R. Co. v. Davis*, 92 Ala. 300, 25 A. S. R. 47, 9 So. 252, holding that injury by rod projecting over track is not assumed by brakeman; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R.A. 215, 32 N. E. 285, holding risk of injury assumed by servant attempting to rescue master's property from fire; *Swift v. Ronan*, 103 Ill. App. 475, holding that risk of injury to laborer in refrigerator car by engine pushing cars in not assumed by servant; *Cincinnati, I. & St. L. & R. Co. v. Lang*, 118 Ind. 579, 21 N. E. 317, holding that risk of injury by collision with "wild cat" train is not assumed by sectionman sent on hand car on special mission; *Drinkhorn v. Bubel*, 85 Mich. 519, 48 N. W. 710, holding that risk of injury is not assumed by servant remaining under assurance that defect will be removed; *Craig v. Chicago & A. R. Co.* 54 Mo. App. 523, holding risk of injury by tipping of timbers assumed by servant repairing bridge; *Kiras v. Nichols Chemical Co.* 59 App. Div. 79, 69 N. Y. Supp. 44, holding that risk of injury not created by work is not assumed by servant; *James v. Cranford*, 123 App. Div. 558, 108 N. Y. Supp. 142, holding risk of injury by contact with live wire assumed by one hired to paint elevated railroad structure; *Windover v. Troy City R. Co.* 4 App. Div. 202, 38 N. Y. Supp. 591, holding risk of injury by defective brake assumed by motorman continuing to work after knowledge of defect; *Newell v. Ryan*, 40 Hun, 286; *Sweeney v. New York Steam Co.* 15 Daly, 312, 6 N. Y. Supp. 528,—holding that servant does not assume risk of injury by incompetent fellow servant; *Mann v. Delaware & H. Canal Co.* 91 N. Y. 495, holding risk of injury resulting from incompetency of extra flagman is not assumed by engineer; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24, holding that risk of injury from falling mass of rock in mine due to insufficient support is not assumed by servant; *Slacer v. Field Engineering Co.* 4 Misc. 493, 24 N. Y. Supp. 550, holding that risk of injury by slip-

ping on oil thrown by machinery on step near fly wheel of engine is not assumed by servant who had been employed about 10 days; *Young v. Sycouse*, B. & N. Y. R. Co. 166 N. Y. 227, 59 N. E. 828, holding that risk of injury by collision with train resulting from failure to guard switch is not assumed by engineer on main track; *Kaare v. Troy Steel & I. Co.* 46 N. Y. S. R. 451, 19 N. Y. Supp. 759, holding that risk of injury by hole in platform is not assumed by servant ordered to go thereon at night; *Eastland v. Clarke*, 165 N. Y. 420, 70 L.R.A. 751, 59 N. E. 202, holding that risk of injury by falling into hole in dark cellar is not assumed by servant instructed to store wood in cellar; *Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 450, 28 Pac. 497, holding risk of injury by giving away of bridge assumed by servant hired to repair track; *Union P. R. Co. v. Novak*, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 573; *Johnson v. Ashland Water Co.* 71 Wis. 553, 5 A. S. R. 243, 37 N. W. 723,—holding that risk of injury from master's failure to furnish sufficient number of men is not assumed by employees.

Liability in case of concurrent negligence.

Cited in *Chicago, St. P. & K. C. R. Co. v. Chambers*, 15 C. C. A. 327, 32 U. S. App. 253, 68 Fed. 148; *Chicago, R. I. & P. R. Co. v. Sutton*, 11 C. C. A. 251, 27 U. S. App. 310, 63 Fed. 394,—holding railroad company liable for injury caused by concurring negligence of itself and third party; *Northwestern Fuel Co. v. Danielson*, 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915, holding master liable to servant for injury caused by negligence of vice principal and concurrent negligence of fellow servant; *Clyde v. Richmond & D. R. Co.* 59 Fed. 394, holding railroad company liable for injuries to fireman by derailment of train caused by worn condition of track when engineer running at excessive rate of speed; *Pacific Teleph. & Teleg. Co. v. Parmenter*, 95 C. C. A. 382, 170 Fed. 140; *Dailey v. New York, N. H. & H. R. R. Co.* 167 Fed. 592,—holding that master cannot escape liability for injuries to servant on ground that injury was caused by acts of fellow servant, if there was concurrent negligence on part of master; *Quill v. New York, C. & H. R. R. Co.* 16 Daly, 313, 11 N. Y. Supp. 80, holding person injured by negligence of railroad and driver of coal cart entitled to recover of either; *Carney v. Caraket R. Co.* 29 N. B. 425, holding it no defense to railway that injury was caused by negligence of fellow servant concurring with railroad's proximate negligence in sending out train with inadequate force of hands.

Cited in notes in 4 L.R.A. 851, on liability of master for injury to servant when his negligence concurred with that of others; 54 L.R.A. 173, on master's liability where his own negligence concurs with that of a fellow servant in respect to employing an adequate number of servants.

Sufficiency of exception to charge.

Cited in *Harding v. New York, L. E. & W. R. Co.* 36 Hun, 72, holding general exception to charge, insufficient.

29 AM. REP. 105, BIRDSALL v. CLARK, 73 N. Y. 73.

Delegation of powers.

Cited in note in 27 L.R.A.(N.S.) 658, on validity of agreement to elect "dummy" directors.

—By state officers.

Cited in *State ex rel. Rusk v. Budge*, 14 N. D. 532, 105 N. W. 724, holding that power to determine what use shall be made of public land cannot be

delegated; *Cope v. Hastings*, 183 Pa. 300, 38 Atl. 717, holding commissioners appointed by legislature to select plans for state buildings cannot delegate such power to board of experts.

—By county officers.

Cited in *Green County v. Shortell*, 116 Ky. 108, 75 S. W. 251, holding court order directing clerk to make subscription to railroad stock on behalf of county not void as delegation of power; *Cunningham v. Shea*, 111 App. Div. 624, 97 N. Y. Supp. 884, holding that keeper of county house could not delegate his authority over inmates; *Bradford County v. Horton*, 6 Lack. Leg. News, 306, holding that county commissioners have no power to authorize architect to make material changes in construction of court house; *Dorey v. Boston*, 146 Mass. 336, 15 N. E. 897, as to whether common council can authorize committee to contract for construction of city sewer; *People ex rel. Vaughn v. Rensselaer County*, 52 Hun, 446, 5 N. Y. Supp. 600, as to whether county board of supervisors may authorize committee to contract for construction of fence around county property.

—By municipal corporations generally.

Cited in *People ex rel. Astor v. Stillings*, 124 App. Div. 195, 108 N. Y. Supp. 903, holding that powers devolving by law upon council are nondelegable; *Burge v. Rockwell City*, 120 Iowa, 495, 94 N. W. 1103, holding that city council may delegate all functions purely ministerial to committees; *Whalen v. Willis*, 18 App. Div. 350, 46 N. Y. Supp. 52, holding invalid, ordinance permitting commissioner to impose conditions, not prescribed by ordinance, in granting permission to drive over sidewalks.

Cited in reference notes in 30 A. R. 776, on right of municipal corporation to delegate its legislative powers; 56 A. S. R. 533; 61 A. S. R. 715,—on delegation of municipal powers.

Cited in notes in 53 A. S. R. 331; 55 A. D. 386; 40 A. S. R. 653; 50 A. S. R. 118,—on power of municipal officers to delegate their authority; 20 L.R.A. 655, on delegation by city council of power to determine width, grade, and material for sidewalk improvements.

Distinguished in *Re Guerrero*, 69 Cal. 88, 10 Pac. 261, sustaining city ordinance authorizing clerk to issue excise licenses upon certain conditions and payment of specified fees; *People ex rel. Cochrane v. Tracy*, 35 App. Div. 265, 54 N. Y. Supp. 1070, holding poor committee of city council without authority to remove assistant overseer; *Arnold v. Pawtucket*, 21 R. I. 15, 41 Atl. 576, holding city unauthorized to establish water rates for district included therein, under statute imposing duty on district; *Com. v. Plaisted*, 148 Mass. 375, 12 A. S. R. 566, 2 L.R.A. 142, 19 N. E. 224, sustaining statute authorizing common council to grant to board of police power to adopt rules regulating itinerant musicians.

—To city board of health.

Cited in *Jacksonville v. Ledwith*, 26 Fla. 163, 23 A. S. R. 558, 9 L.R.A. 69, 7 So. 885, holding void, ordinance delegating to board of health establishment of rules for construction and maintenance of markets.

—In respect to local improvements generally.

Cited in *Horton v. Avondale*, 147 Ala. 450, 41 So. 934, holding ordinance delegating to officer or committee power of selecting kind of paving material to be used, void; *Baltimore v. Gahan*, 104 Md. 145, 64 Atl. 716, holding that ordinance giving board power to select one of three kinds of paving materials is

not void as delegation of power; *Morey v. Buffalo*, 59 Misc. 603, 111 N. Y. Supp. 463, holding assessments levied for public improvement directed by board of public works instead of by resolution of common council as required by charter, void; *Chase v. Scheerer*, 136 Cal. 248, 68 Pac. 768, holding invalid, assessment under city contract for grading which authorizes superintendent of streets to determine allowance for settling of bill; *Phelps v. New York*, 112 N. Y. 216, 2 L.R.A. 626, 19 N. E. 408; *Re Emigrant Industrial Sav. Bank*, 75 N. Y. 388,—holding that council cannot delegate to commissioner discretion conferred by charter requiring work to be done by lowest bidder, unless otherwise authorized by three-fourths of council; *Anderson v. Equitable Gaslight Co.* 12 Daly, 462, holding void, resolution of council authorizing city officers to prescribe conditions for laying gas pipes, which charter requires common council to regulate.

— **Delegation of power as to local improvements to city engineer.**

Cited in *Buffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989, holding contract for street improvements delegating to city engineer duty of selecting material to be used, void; *Montgomery v. Capital City Water Co.* 92 Ala. 361, 9 So. 339, holding that city council cannot delegate to hydraulic engineer authority to determine where and how water pipes shall be laid; *Baltimore v. Scharf*, 54 Md. 499, holding street paving ordinance void which provides that city engineer shall make pro rata assessment upon abutting property; *Providence Retreat v. Buffalo*, 29 App. Div. 160, 51 N. Y. Supp. 654, vacating assessment for sewer when district and property benefited was determined by city engineer and not board of sewer assessors; *Smith v. Duncan*, 77 Ind. 92, holding street paving ordinance void which provides that grade, materials and details shall be determined by city engineer.

— **Contracts for fitting up city offices.**

Distinguished in *Kramrath v. Albany*, 53 Hun, 206, 6 N. Y. Supp. 54, holding resolution authorizing committee to furnish city offices complies with charter requiring contract by common council; *Edwards v. Watertown*, 24 Hun, 426, 61 How. Pr. 463, holding city liable for fitting up and furnishing council room contracted for by committee of council.

— **By school board.**

Cited in *Kinney v. Howard*, 133 Iowa, 94, 110 N. W. 282, denying right of school board to delegate to committee statutory duty of selecting site for school house.

Right to enjoin void ordinance.

Cited in note in 118 A. S. R. 373, on injunction against enforcement of void municipal ordinances.

29 AM. REP. 111, NEW v. NICOLL, 73 N. Y. 127.

Liability of trustee, receiver, etc.

Cited in *Pike v. Thomas*, 65 Ark. 437, 47 S. W. 110, holding estate, not administrator, liable for necessary attorney's fees; *Man v. Katz*, 40 Misc. 645, 83 N. Y. Supp. 941, holding assignee for creditors taking lease with other effects of assignor, liable thereon in representative capacity; *Van Slyke v. Bush*, 123 N. Y. 47, 25 N. E. 196, holding sureties on bond of assignee for creditors liable for assignee's wrongful refusal to pay attorney's fees for services rendered in care of estate; *Meyer v. Lexow*, 1 App. Div. 116, 37 N. Y. Supp. 67, denying liability of temporary receiver on contract for services.

— Personally.

Cited in *Union T. Co. v. Illinois Midland R. Co.* 11 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809, denying personal liability of receiver of railroad for moneys borrowed to preserve road; *Wooster v. Trowbridge*, 115 Fed. 722, denying personal liability of trustee of insolvent corporation on contract acquiesced in by creditors for 20 years; *Johnson v. Leman*, 131 Ill. 609, 19 A. S. R. 63, 7 L.R.A. 656, 23 N. E. 435, holding trustee personally liable for compensation of one employed to look after estate; *Johnson v. Leman* 30 Ill. App. 370, holding trustee personally liable for claim for commissions for procuring loan for trust estate; *Gill v. Carmine*, 55 Md. 339, holding trustees for creditors completing houses in process of erection by debtor, personally liable for materials; *Yonkers Sav. Bank v. Kinsley*, 78 Hun, 186, 28 N. Y. Supp. 925; *Moniot v. Jackson*, 40 Misc. 197, 81 N. Y. Supp. 688; *Horling v. Allee*, 31 N. Y. S. R. 412, 10 N. Y. Supp. 97,—holding trustee of trust estate personally liable for injuries sustained through his failure to keep same in repair; *Warren v. Banning*, 50 N. Y. S. R. 810, 21 N. Y. Supp. 883, holding executor personally liable for false representations in sale of property of estate; *United States Trust Co. v. Stanton*, 139 N. Y. 531, 34 N. E. 1098 (affirming 50 N. Y. S. R. 676, 21 N. Y. Supp. 229), holding that substituted trustee is not personally liable for debt for which original trustee liable; *Hull v. Enoch Morgan Sons Co.* 2 N. Y. City Ct. Rep. 69, holding trustees of corporation defending regularity of election personally liable for attorney's fees; *Bostwick v. Beach*, 31 Hun, 343, holding executors personally liable on covenant to pay incumbrances against trust property sold by them; *Noyes v. Turnbull*, 54 Hun, 26, 7 N. Y. Supp. 114, holding that trustees continuing business of testator as directed by will are not liable as partners; *Clapp v. Clapp*, 44 Hun, 451, holding that executor managing business of testator as directed by will is not personally liable for services rendered by employee; *Rogers v. Wendell*, 54 Hun, 540, 7 N. Y. Supp. 781, holding receiver of corporation employing one to look after property of corporation, personally liable for compensation in absence of agreement to look to corporation therefor; *Douglass v. Leonard*, 44 N. Y. S. R. 293, 17 N. Y. 591, holding executor personally liable for compensation of accountant for services rendered in settlement of accounts of estate; *Foland v. Dayton*, 40 Hun, 563, holding administrator personally liable for services rendered without agreement as to liability of estate; *O'Brien v. Jackson*, 42 App. Div. 171, 58 N. Y. Supp. 1044, holding that trustees are not personally liable on contract for necessary repair of trust property entered into in representative capacity; *Dunlevie v. Spangenberg*, 66 Misc. 354, 121 N. Y. Supp. 299, holding that mere use of name "trustee" will not discharge trustee from personal liability; *Blewitt v. Olin*, 14 Daly. 351; *Kedian v. Hoyt*, 33 Hun, 145,—holding trustee personally liable for work done and materials furnished to estate; *Morgan v. Stevens*, 6 Abb. N. C. 356, holding trustees under will signing contract for erection of house, personally liable thereon; *Hoctor v. Lavery*, 51 App. Div. 74, 64 N. Y. Supp. 518, holding administrator under will giving sum for monument personally liable for sum expended for such purpose where estate insufficient to pay claims; *Moran v. Risley*, 1 N. Y. City Ct. Rep. 229, holding assignee in bankruptcy personally liable on note given by him; *Carr v. Dooley*, 19 Misc. 553, 43 N. Y. Supp. 399, holding executor personally liable on contract which he had no power to make; *Re Kirkpatrick*, 9 Misc. 228, 20 N. Y. Supp. 283, 1 Gibbons, Sur. Rep. 71, holding executor personally liable on vote given for repairs in absence of agreement

to make same charge on estate; *Roger Williams Nat. Bank v. Groton Mfg. Co.* 16 R. I. 504, 17 Atl. 170, holding trustees personally liable on notes indorsed; *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L.R.A. 252, 75 N. W. 911; *Connally v. Lyons*, 82 Tex. 664, 27 A. S. R. 935, 18 S. W. 799,—holding trustee conducting mercantile business for benefit of others, personally liable for goods purchased; *McIntyre v. Williamson*, 72 Vt. 183, 82 A. S. R. 929, 47 Atl. 786, holding trustee personally liable on dealings in behalf of trust in absence of definite understanding that estate liable; *Fehlinger v. Wood*, 134 Pa. 517, 19 Atl. 746, on personal liability of trustee on contract.

Cited in reference note in 82 A. S. R. 930, on personal liability of trustee.

Liability of trust estate for repairs.

Cited in *Mulrein v. Smillie*, 25 App. Div. 135, 48 N. Y. Supp. 994, holding that trust estate held under will making no provision as to repairs is not liable for repairs in absence of proof of agreement by parties that expense shall be charge on estate.

Lien on property or trust fund.

Cited in *Burling v. Newlands*, 112 Cal. 476, 44 Pac. 810, holding that lien on trust estate is not created by loan to trustee to pay liens on trust property; *Kennedy v. Steele*, 35 Misc. 105, 71 N. Y. Supp. 237, holding attorney prosecuting actions under agreement with administratrix for part of recovery for services, entitled to enforce lien in equity; *Charter Oak L. Ins. Co. v. Gisborne*, 5 Utah, 319, 15 Pac. 253, holding lien on property itself created by declaration of trust to pay claim from rents and profits of land; *Re King*, 34 Misc. 10, 69 N. Y. Supp. 399, sustaining right of attorney to lien on trust fund for services in preserving trust estate; *Connolly v. Bouck*, 98 C. C. A. 184, 174 Fed. 312, on meaning of words "rents, issues, and profits."

Cited in notes in 19 A. S. R. 70, on liens against trust estates in favor of creditors or trustees; 7 L.R.A. 656, on trustee's power to create lien upon trust estate.

Right of trustee, etc., to reimbursement or allowance.

Cited in *Gillam v. Nussbaum*, 95 Ill. App. 277, holding receiver's expenses in winding up affairs of partnership payable before claims of creditors; *Warren v. Union Bank*, 28 App. Div. 7, 51 N. Y. Supp. 27, holding guardian making advancements of own money for expenditures for ward's benefit as court would have approved had application been made, entitled to reimbursement from proceeds of mortgage; *Re Ginsburg*, 27 Misc. 745, 59 N. Y. Supp. 656, holding that assignee for creditors is not entitled to allowance for attorney's fees on motion for compulsory accounting rendered after time when accounting should, under statute, have been made; *Wells-Stone Mercantile Co. v. Aultman M. & Co.* 9 N. D. 520, 84 N. W. 375, holding trustee entitled to compel reimbursement by beneficiaries under trust deed for expenses where large dividends paid to latter.

29 AM. REP. 115, ULSTER COUNTY SAV. INST. v. LEAKE, 78 N. Y. 161.

Rights of mortgagor and mortgagee under policy.

Cited in *Insurance Co. of N. A. v. Martin*, 151 Ind. 209, 51 N. E. 361; *Allen v. Watertown F. Ins. Co.* 132 Mass. 480; *Sterling F. Ins. Co. v. Beffrey*, 48 Minn. 9, 50 N. W. 922,—holding that mortgagor is not entitled to compel application to debt of proceeds of policy void as to him by reason of sale, but

valid as to mortgagee; *Watts v. Fire Asso.* 87 Mo. App. 83; *Ebensburg Bldg. & L. Asso. v. Westchester F. Ins. Co.* 28 Pa. Super. Ct. 341,—holding mortgagee for whose benefit policy taken out entitled to receive proceeds; *Thorp v. Croto*, 79 Vt. 390, 118 A. S. R. 961 note, 10 L.R.A.(N.S.) 1166, 65 Atl. 562, 9 A. & E. Ann. Cas. 58, holding mortgages for whose benefit insurance effected by mortgagor, bound to apply proceeds on mortgage debt; *Gillespie v. Scottish Union & Nat. Ins. Co.* 61 W. Va. 169, 11 L.R.A.(N.S.) 143, 56 S. E. 213, holding that mortgagor has no interest in proceeds of policy taken out by mortgagee to protect own interest.

Cited in notes in 58 A. S. R. 672, on applicability, against mortgagee to whom loss is payable, of condition of forfeiture in insurance policy; 11 L.R.A. (N.S.) 144, on interest of mortgagor in insurance secured by mortgagee to protect his own interest.

Avoidance of policy.

Cited in *Burnham v. Royal Ins. Co.* 75 Mo. App. 394, holding contract of insurance avoided by failure to complete house within stipulated time; *Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. 445, holding that policy is not avoided by clause making loss payable to mortgagee; *Loewenstein v. Queen Ins. Co.* 227 Mo. 100, 127 S. W. 72 (dissenting opinion), on waiver of provisions in policy as to proof of loss.

Rights of insurance company as to subrogation.

Cited in *Thomas v. Montauk F. Ins. Co.* 43 Hun, 218, holding insurance company paying loss entitled to be subrogated pro tanto to rights of mortgagee; *Utter use of Franklin F. Ins. Co. v. Lewis*, 10 Pa. Dist. R. 50, holding company paying policy to mortgagee entitled to be subrogated to his rights and enforce mortgage against mortgagor.

Cited in reference note in 3 A. S. R. 314, on right of insurer to be subrogated to rights of insured under executory contract of sale.

Cited in notes in 118 A. S. R. 974, on application of proceeds of insurance where mortgagor has forfeited; 3 L.R.A.(N.S.) 80, on right of insurer to subrogation to mortgage on payment of mortgage debt from proceeds of insurance on mortgagee's interest.

Right to recovery under policy.

Cited in *Hanover F. Ins. Co. v. Johnson*, 26 Ind. App. 122, 57 N. E. 277, holding one bringing action on policy as assignee of owner not entitled to recover under mortgage clause.

29 AM. REP. 119, FAIRFAX v. NEW YORK C. & H. R. R. CO. 73 N. Y. 167.

Liability of carrier as baggage or goods.

Cited in *Wald v. Pittsburg, C. C. & St. L. R. Co.* 162 Ill. 545, 53 A. S. R. 332, 35 L.R.A. 356, 44 N. E. 888, holding carrier neglecting to ship baggage on same train taken by passenger liable for loss by unprecedented flood; *Texas & P. R. Co. v. Taylor*, 3 Tex. App. Civ. Cas. (Willson) 234; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 518, 43 N. E. 163,—holding carrier liable for failure to deliver baggage; *Golden v. Romer*, 20 Hun, 438, holding carrier and warehouseman *prima facie* liable for failure to deliver goods upon demand; *Trimble v. New York C. & H. R. R. Co.* 39 App. Div. 403, 57 N. Y. Supp. 437, holding carrier receiving sample trunk and charging excess baggage, liable for negligent loss; *Wheeler v. Oceanic Steam Nav. Co.* 52 Hun, 75, holding that car-

rier is not liable for loss of pictures shipped as baggage; *Beers v. Boston & A. R. Co.* 67 Conn. 417, 52 A. S. R. 293, 32 L.R.A. 535, 34 Atl. 541, denying liability of carrier for negligent loss of trunks received from another carrier, going by rail, where passenger traveled by different route; *Simpson v. New York, N. H. & H. R. Co.* 16 Misc. 613, 38 N. Y. Supp. 341, denying liability of carrier for loss of merchandise carried as baggage.

Cited in notes in 55 L.R.A. 653, on liability of carrier for baggage not accompanied by passenger; 36 L.R.A. 787, on liability of common carrier as warehouseman for baggage after reaching destination; 37 L.R.A. 177, on delivery to imposter by carrier.

What is baggage.

Cited in *Knieriem v. New York C. & H. R. R. Co.* 109 App. Div. 709, 96 N. Y. Supp. 602; *Carpenter v. New York, N. H. & H. R. Co.* 124 N. Y. 53, 21 A. S. R. 644, 11 L.R.A. 759, 26 N. E. 277,—holding money necessary for journey baggage.

Cited in notes in 71 A. D. 160, on wearing apparel as baggage; 71 A. D. 161, on money as baggage; 11 L.R.A. 760, on what constitutes baggage.

Measure of damages for destruction or detention of property.

Cited in *Parmalee v. Raymond*, 43 Ill. App. 609, holding value of buggy as second hand article not proper measure of damages for negligent loss; *Barker v. Lewis Storage & Transfer Co.* 78 Conn. 198, 61 Atl. 363, 3 A. & E. Ann. Cas. 889; *Head v. Becklenberg*, 116 Ill. App. 576,—holding value of household goods as second hand furniture not proper measure of damages for conversion; *Hoff v. Frank Parmelee Co.* 140 Ill. App. 458, holding value of use of goods during time withheld, measure of damages for unlawful possession; *Gulf, C. & S. F. R. Co. v. Vancil*, 2 Tex. Civ. App. 427, 21 S. W. 303, holding value of use of property to owner during delay, measure of damages for delay in delivery of trunk; *Turner v. Southern R. Co.* 75 S. C. 58, 7 L.R.A.(N.S.) 189, 54 S. E. 825; *Lake Shore & M. S. R. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724, holding value of clothing at destination, measure of damages for failure to deliver trunk containing same; *Brooks v. State*, 28 Neb. 389, 44 N. W. 436 (dissenting opinion), on measure of damages for nondelivery of baggage.

Cited in note in 62 A. S. R. 794, on measure of damages for destruction of property having no market value at time and place of destruction; 99 A. S. R. 385, on measure of damages for loss or destruction of baggage.

— Destruction of buildings.

Cited in *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270, holding real value of buildings measure of damages for negligent burning by railroad company.

29 AM. REP. 123, MULLER v. McKESSON, 73 N. Y. 195.

Liability for injury by animals generally.

Cited in *O'Neill v. Blase*, 94 Mo. App. 648, 68 S. W. 764, holding owner of vicious cow, which was being led through public street, absolutely liable for injuries inflicted by it upon person exercising ordinary care, and while latter was on his own premises; *Kinmouth v. McDougall*, 46 N. Y. S. R. 211, 19 N. Y. Supp. 771, holding owner liable for bodily injuries inflicted by vicious ram while trespassing; *Parsons v. Manser*, 119 Iowa, 88, 97 A. S. R. 293, 62 L.R.A. 132, 93 N. W. 86, holding liability of owner of bees attacking horses hitched near hives a question for jury; *Benoit v. Troy & L. R. Co.* 154 N. Y. 223, 48 N. E. 524, holding owner not liable, in absence of negligence, for in-

juries inflicted by ordinarily gentle and manageable horse while running away after having been frightened by third party, though he has knowledge of their having previously done so under similar circumstances; *Lawlor v. French*, 2 App. Div. 140, 37 N. Y. Supp. 807, holding owner not liable for bodily injuries inflicted by horse, when it did not appear that same was vicious, or that master had any knowledge or reason to believe that such was its nature; *Johnston v. Mack Mfg. Co.* 65 W. Va. 544, 131 A. S. R. 979, 24 L.R.A.(N.S.) 1189, 64 S. E. 841, denying liability of owner of boar for personal injury inflicted by him.

Cited in note in 6 L.R.A.(N.S.) 1165, on liability for injury by animals known to be dangerous in the absence of negligence in restraining the same.

Distinguished in *Molloy v. Starin*, 191 N. Y. 21, 16 L.R.A.(N.S.) 445, 83 N. E. 588, 14 A. & E. Ann. Cas. 57 (reversing 113 App. Div. 852, 99 N. Y. Supp. 603), denying liability of common carrier free from negligence for injuries by trained bears to one visiting its freight house from curiosity.

— **Effect of knowledge of viciousness.**

Cited in *Gooding v. Chutes Co.* 155 Cal. 620, 23 L.R.A.(N.S.) 1071, 102 Pac. 819, 18 A. & E. Ann. Cas. 671, holding duty of protection against animals known to be vicious is owing to public generally; *Hunter v. Metropolitan Exp. Co.* 50 Misc. 158, 98 N. Y. Supp. 234, holding one keeping animal known to be vicious in consequence of which another is injured, liable therefor; *Rogers v. Rogers*, 4 N. Y. S. R. 373, holding owner of vicious bull bound to restrain same when advised of his ferocious and ugly nature, and negligence conclusively presumed from his failure to do so; *Lettis v. Horning*, 67 Hun, 627, 22 N. Y. Supp. 565, holding owner who has been notified of the vicious and dangerous nature of bull liable for injuries inflicted by it upon employee of bailee thereof.

Cited in note in 3 E. R. C. 119, on liability for keeping mischievous animal with knowledge of its propensities.

— **What will charge owner with knowledge of viciousness.**

Cited in *Coope v. Kollstade*, 33 Misc. 113, 67 N. Y. Supp. 181, holding proof that horse would kick and balk while drawing load in snow not sufficient evidence of viciousness to render owner liable for injuries inflicted by it while confined in stall.

— **Contributory negligence as a defense.**

Cited in *Ervin v. Woodruff*, 119 App. Div. 603, 103 N. Y. Supp. 1051, denying liability of owner to one injured by unnecessarily going within reach of bear known to be ferocious.

Distinguished in *Barlow v. McDonald*, 39 Hun, 407, denying recovery for injuries inflicted by ram where party was guilty of contributory negligence; *Brown v. Green*, 1 Penn. (Del.) 535, 42 Atl. 991, holding that party seeking to recover for injuries received from vicious horse while harnessing it must show that he did not voluntarily contribute to such injury, and that owner had knowledge of its dangerous nature.

Liability for injury by dog.

Cited in *Peck v. Williams*, 24 R. I. 583, 61 L.R.A. 351, 54 Atl. 381, holding owner liable for injury to trespasser by vicious dog; *Grissom v. Hofius*, 39 Wash. 51, 80 Pac. 1002, 4 A. & E. Ann. Cas. 125, holding partnership liable for bite of vicious dog owned by it.

Distinguished in *Woodbridge v. Marks*, 17 App. Div. 139, 45 N. Y. Supp. 156, holding owner not liable for bodily injuries inflicted by ferocious dog kept chained at night in rear of dwelling and away from regular approaches thereto.

—Effect of absence of knowledge of viciousness.

Cited in *Feick v. Andel*, 1 N. Y. City Ct. Rep. Supp. 61, holding owner not liable for injuries inflicted by dog in absence of proof that he knew animal to be vicious.

Cited in note in 24 L.R.A. (N.S.) 460, on scienter necessary to owner's liability for injury by dog.

Distinguished in *Laherty v. Hogan*, 13 Daly, 533, denying recovery for personal injuries inflicted by dog not shown to be vicious, where there is no proof that owner knew that such was its nature.

—Effect of knowledge of viciousness.

Cited in *McGhee v. Norfolk & S. R. Co.* 147 N. C. 142, 60 S. E. 912 (dissenting opinion), on owner's knowledge of viciousness of dog as affecting liability for injury; *Conway v. Grant*, 88 Ga. 40, 30 A. S. R. 145, 14 L.R.A. 196, 13 S. E. 803, holding owner of ferocious dogs, who permits them to run loose with knowledge that they are accustomed to bite, liable for injuries inflicted by them upon person who, without notice of their presence, lawfully entered backyard through open gate; *Melsheimer v. Sullivan*, 1 Colo. App. 22, 27 Pac. 17, holding owner of vicious dog, who, knowing of its dangerous propensities, kept it chained in private alley, liable for injuries inflicted by it upon policeman who came on premises in pursuit of thief; *Speckmann v. Kreig*, 79 Mo. App. 376, holding owner of vicious dog, who permits it to run at large with knowledge of its ferocious nature, liable for injuries inflicted by it upon boy who entered yard to deliver goods; *Fake v. Addicks*, 45 Minn. 37, 22 A. S. R. 716, 47 N. W. 450, holding owner of vicious dog, with knowledge of its evil propensities, liable for injury inflicted by it upon one who inadvertently steps upon it; *Caldwell v. Snook*, 35 Hun, 73, holding owner liable for injuries inflicted by dog, when having knowledge that it had previously bitten another person; *Lynch v. McNally*, 73 N. Y. 347, holding owner of vicious dog with knowledge of its propensities liable for injuries inflicted by it upon person offering it candy while lying unfastened in front of store; *Woodbridge v. Marks*, 5 App. Div. 604, 40 N. Y. Supp. 728, holding complaint sufficient on demurrer when alleging injury by one of several dogs kept with knowledge that they were of ferocious, vicious and mischievous disposition and accustomed to attack and bite mankind; *Schilling v. Smith*, 76 App. Div. 464, 78 N. Y. Supp. 586, sustaining recovery for injuries inflicted by dog, known to be vicious, upon weak minded child, who had excited its animosity by having tantalized it at some previous time.

—What will charge owner with knowledge of viciousness.

Cited in *Robinson v. Marino*, 3 Wash. 434, 28 A. S. R. 50, 28 Pac. 752, holding owner of ferocious dog chargeable with knowledge of its disposition and liable for injuries inflicted by it while running at large, after having broken its fastenings, or having been untied by third party without master's knowledge or consent; *Brice v. Bauer*, 108 N. Y. 428, 2 A. S. R. 454, 15 N. E. 695, holding one who keeps vicious dog chargeable with knowledge of its disposition and liable for injuries inflicted thereby, when failing to take proper measures to restrain it; *Keenan v. Gutta Percha & Rubber Mfg. Co.* 46 Hun, 544, holding one who harbors vicious dog chargeable with knowledge of its savage disposition, and liable for injuries inflicted thereby; *Laguttuta v. Chisholm*, 65 App. Div. 326, 72 N. Y. Supp. 905 (dissenting opinion), to point that owner of premises is chargeable with knowledge of his servant in possession of same that latter is keeping a dog and that it is vicious.

— **Contributory negligence as a defense.**

Cited in *Kelley v. Killourey*, 81 Conn. 320, 129 A. S. R. 220, 70 Atl. 1031, 15 A. & E. Ann. Cas. 163, denying right of recovery to one who wilfully, persistently and knowingly provokes dog until it bites him; *Werner v. Winterbottom*, 24 Jones & S. 126, 1 N. Y. Supp. 417, holding owner of vicious dog kept chained not liable for injuries inflicted by it upon employee who, with knowledge of its evil propensities, attempts to feed it at suggestion of fellow servant.

Cited in reference note in 39 A. R. 76, on necessity for negating contributory negligence in complaint for injury by vicious animal.

— **Burden of proving freedom from contributory negligence.**

Cited in *Hussey v. King*, 83 Me. 568, 22 Atl. 476, holding that party seeking to recover, under Rev. Stat. Chap. 30, § 1, for injuries inflicted by dog need not allege and prove his own freedom from negligence in the first instance; *Stuber v. Gannon*, 98 Iowa, 228, 67 N. W. 105 (dissenting opinion), majority holding that one must show himself free from contributory negligence when seeking to recover for personal injuries inflicted by dog under statute making owner liable unless "party injured is doing an unlawful act."

— **Negligence of parents as a defense.**

Cited in *Fye v. Chapin*, 121 Mich. 675, 80 N. W. 797, holding negligence of parent in admitting dog to house, when coming with owner's servants, not defense against liability to child bitten thereby.

Admissibility of evidence of viciousness of animal.

Cited in *Bresce v. Los Angeles Traction Co.* 149 Cal. 131, 5 L.R.A.(N.S.) 1059, 85 Pac. 152, holding vicious habits of animal provable to show negligence in permitting it to go at large.

Cited in note in 11 E. R. C. 243, on admissibility of facts collateral to the issue.

Contributory negligence as a defense generally.

Cited in *Linzey v. American Ice Co.* 131 App. Div. 333, 115 N. Y. Supp. 767, holding contributory negligence in its ordinary meaning not a defense in action for damages caused by nuisance; *Schile v. Brokhahus*, 80 N. Y. 614, holding contributory negligence not available as defense to action for tearing down party wall in disregard for neighbor's rights.

What constitutes contributory negligence.

Cited in *Rogers v. Rogers*, 4 N. Y. S. R. 373, holding party injured by vicious bull not negligent in trying to restrain same when anticipating injury to property or children; *Wolff v. Lamann*, 108 Ky. 343, 56 S. W. 408, holding question for jury whether girl eleven years old exercised care reasonably to be expected from one of her age in teasing or annoying dog while eating, when seeking to recover for injuries inflicted by it; *Lettis v. Horning*, 67 Hun, 627, 22 N. Y. Supp. 565, holding that question of negligence of party injured by vicious bull must be submitted to jury.

Assumption of risk by employer.

Cited in *Filbert v. Delaware & H. Canal Co.* 24 Jones & S. 170, 2 N. Y. Supp. 623, holding that employee did not assume risk of injury resulting from falling into hole between rails upon which he had to stand while uncoupling cars.

Cited in note in 92 A. D. 215, no risk assumed by servant.

Liability for injury due to negligence generally.

Cited in *Van Norden v. Robinson*, 45 Hun, 567, 10 N. Y. Supp. 638, holding

one navigating steamboat by use of uninspected boiler in violation of Federal statutes liable for injuries resulting from explosion thereof; *Murphy v. Leggett*, 29 App. Div. 309, 51 N. Y. Supp. 472, holding owner liable to one injured by slipping upon something while walking along platform erected in front of building, and entirely obstructing sidewalk.

What is an action for injuries resulting from negligence.

Cited in *Dickinson v. New York*, 92 N. Y. 584 (affirming 28 Hun, 254, 3 N. Y. Civ. Proc. Rep. 93), holding action to recover for injuries sustained by falling upon crosswalk on which city had suffered ice and snow to remain subject to three years limitation as one "to recover damages for personal injury resulting from negligence" rather than for one from positive wrong.

Waiver of matters upon trial.

Cited in *Roberts v. Lloyd*, 24 Jones & S. 333, 4 N. Y. Supp. 446, holding that refusal to charge as requested cannot be reviewed under general exception to direction of verdict, when no exception has been taken to such refusal nor request made that question of fact involved should be submitted to jury.

—Of right to have case submitted to jury.

Cited in *Rosenstein v. Traders' Ins. Co.* 102 App. Div. 147, 92 N. Y. Supp. 326; *Tilden v. Aitkin*, 37 App. Div. 28, 55 N. Y. Supp. 735, 29 N. Y. Civ. Proc. 28,—holding right of defendant to have case submitted to jury waived by motion to dismiss complaint on special grounds after parties have rested; *Stokes v. Mackay*, 46 N. Y. S. R. 940, 19 N. Y. Supp. 918; *Stirn v. Hoffman House Co.* 8 Misc. 246, 28 N. Y. Supp. 724,—holding that requests to go to jury must specify questions to be submitted when made after motion for dismissal of complaint or where both parties have asked for direction of verdict; *Second Nat. Bank v. Weston*, 31 App. Div. 403, 52 N. Y. Supp. 315, holding that request to go to jury must specify questions desired to be submitted, when made after both parties have asked for direction of verdict; *Ormes v. Dauchy*, 82 N. Y. 443, 37 A. R. 583, holding right to go to jury waived by failure to request submission of facts after denial of motion for dismissal of complaint; *Flandreau v. Elsworth*, 151 N. Y. 473, 45 N. E. 853, holding right to go to jury waived by failure to specify questions desired to be submitted after refusal to direct verdict; *Fisher v. Monroe*, 16 Daly, 461, 12 N. Y. Supp. 273, holding that error cannot be assigned for failure to submit certain question to jury when not specifically requested; *Cushman v. Family Fund Soc.* 36 N. Y. S. R. 856, 13 N. Y. Supp. 428, holding party deemed to have conceded that there were no facts in dispute by request for dismissal of complaint and direction of verdict in his favor.

29 AM. REP. 130, CALVO v. DAVIES, 73 N. Y. 211.

Discharge of surety.

Cited in *Firemen's Ins. Co. v. Wilkinson*, 35 N. J. Eq. 160, holding surety not released by giving of collateral bond; *Eagan v. Engeman*, 125 App. Div. 743, 110 N. Y. Supp. 366, holding obligation on bond not discharged by conveyance to mortgagee subject to mortgage; *Livingston v. Moore*, 15 App. Div. 15, 44 N. Y. Supp. 125, holding surety on bond of contractor to construct water works not discharged by new contract increasing capacity of works and changing time fixed for completion; *American Copper Co. v. Louthier*, 25 Misc. 441, 54 N. Y. Supp. 960, holding surety on bond guarantying repayment of specified sum not discharged because only part is advanced in cash and balance held subject to order; *Hancock Mut. L. Ins. Co. v. Lowenberg*, 4 N. Y. S. R. 699, holding surety on bond of insurance agent not discharged by company's knowledge that agent

was improperly retaining money as commissions; *Spies v. National City Bank*, 174 N. Y. 222, 61 L.R.A. 193, 66 N. E. 736 (affirming 68 App. Div. 70, 74 N. Y. Supp. 64), holding indorser on note discharged by act of holder in selling judgment against maker without reserving in transfer any rights against indorser.

Cited in note in 16 L.R.A. 85, on release of mortgagor as surety by mortgagor's dealing with vendee who has assumed the mortgage.

— By release of principal.

Cited in *Knobloch v. Zschwetzke*, 21 Jones & S. 391, holding mortgagor discharged as surety by discharge of grantee assuming debt; *Clinton v. Buffalo Land & Security Co.* 55 App. Div. 440, 66 N. Y. Supp. 862, holding mortgagor not fully discharged by mortgagee's release of part conveyed to grantee subject to mortgage upon latter's payment of his portion of debt; *Laird v. Wittkowski*, 67 App. Div. 476, 73 N. Y. Supp. 1115, holding mortgagor released by agreement of mortgagee with heirs of grantee subject to mortgage to release debt and accept payment from proceeds of partition; *Paine v. Jones*, 76 N. Y. 274 (affirming 14 Hun, 577), holding original mortgagor released by agreement between mortgagee and grantee assuming mortgage to abrogate clause relating to release of portion upon making certain payments.

Cited in note in 5 L.R.A. 286, on release of personal liability to pay debt secured by mortgage.

— By obligee's surrender of securities.

Cited in *Connecticut Mut. L. Ins. Co. v. Mayer*, 8 Mo. App. 18, holding mortgagor not released as to balance due by act of mortgagee in permitting grantee assuming debt to remove personalty; *Grow v. Garlock*, 97 N. Y. 81, 14 Abb. N. C. 487, holding surety released pro tanto by creditors surrender of security.

Cited in reference note in 59 A. D. 482, on duty of mortgagee to observe equitable rights of third parties in dealing with his security.

Cited in note in 5 L.R.A. 291, on right of creditor to have benefit of collateral securities.

— By change in contract.

Cited in *Higgins v. Deering Harvester Co.* 181 Mo. 800, 79 S. W. 959, holding surety released by another's signing without former's consent; *Reeves v. Pierson*, 23 Hun, 185, holding indorser discharged by material alteration of note; *Wright Steam Engine Works v. McAdam*, 113 App. Div. 872, 99 N. Y. Supp. 577 (dissenting opinion), on discharge of surety by alteration of contract.

— Release of retiring partner by accepting notes of remaining partners.

Cited in *Leithauser v. Baumeister*, 47 Minn. 151, 28 A. S. R. 336, 49 N. W. 660, holding retiring partner released by creditor's acceptance of note for firm debt from remaining partner; *McLoughlin v. Bieber*, 41 App. Div. 561, 58 N. Y. Supp. 790, holding retiring partners not discharged on theory of suretyship by creditor's acceptance of notes from remaining partners for goods purchased; *Palmer v. Purdy*, 83 N. Y. 144, holding retiring partners not discharged on theory of suretyship, by lessor's acceptance of note for rent from remaining partners.

— Delay in proceeding against principal generally.

Cited in *Newcomb v. Hale*, 90 N. Y. 326, 43 A. R. 173, holding vendor of bond and mortgage guaranteeing same and receiving full amount of security as consideration for transfer, not released from liability by neglect of assignee, after notice, to collect debt.

—By extension of time to principal.

Cited in *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437 (affirming 27 Fed. 588); *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683; *Iowa Loan & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255; *Johnston v. Paltzer*, 100 Ill. App. 171; *Union Stove & Mach. Works v. Caswell*, 48 Kan. 689, 16 L.R.A. 85, 29 Pac. 1072; *George v. Andrews*, 60 Md. 26, 45 A. R. 706; *Chilton v. Brooks*, 72 Md. 554, 20 Atl. 125; *Nelson v. Brown*, 140 Mo. 580, 62 A. S. R. 755, 41 S. W. 960; *Pratt v. Conway*, 148 Mo. 291, 71 A. S. R. 602, 49 S. W. 1028; *Wayman v. Jones*, 58 Mo. App. 313; *Fleischauer v. Doellner*, 58 How. Pr. 190; *Murray v. Fox*, 39 Hun, 108; *Mutual L. Ins. Co. v. Davies*, 12 Jones & S. 172; *Merrill v. Reinera*, 14 Misc. 583, 36 N. Y. Supp. 634; *Re Piza*, 5 App. Div. 181, 38 N. Y. Supp. 540; *Gottschalk v. Jungmann*, 78 App. Div. 171, 79 N. Y. Supp. 551; *New York L. Ins. Co. v. Casey*, 81 App. Div. 92, 81 N. Y. Supp. 1; *Douglass v. Ferris*, 63 Hun, 413, 18 N. Y. Supp. 685; *Poe v. Dixon*, 60 Ohio St. 124, 71 A. S. R. 713, 54 N. E. 86; *Bunnell v. Carter*, 14 Utah, 100, 46 Pac. 755; *Fanning v. Murphy*, 126 Wis. 538, 110 A. S. R. 946, 4 L.R.A.(N.S.) 666, 105 N. W. 1056, 5 A. & E. Ann. Cas. 435; *Spencer v. Spencer*, 95 N. Y. 353; *Marshall v. Davies*, 78 N. Y. 414, 58 How. Pr. 231,—holding mortgagor released by agreement of mortgagee with grantee assuming debt to extend time of payment; *Fish v. Hayward*, 28 Hun, 456; *Title Guarantee & T. Co. v. Weiher*, 30 Misc. 250, 63 N. Y. Supp. 224, holding mortgagor not discharged by void agreement of mortgagee to extend time of payment by grantee subject to debt; *Filippini v. Stead*, 4 Misc. 405, 23 N. Y. Supp. 1061, holding surety discharged by agreement enlarging time of payment; *Wyatt v. Dufrene*, 106 Ill. App. 214; *Commercial Bank v. Wood*, 56 Mo. App. 214; *Kuhlman v. Leavens*, 5 Okla. 562, 50 Pac. 171; *Hoffman v. Habighorst*, 49 Or. 379, 89 Pac. 952,—holding sureties on note discharged by extension of time to maker without former's consent; *National Bank v. Bigler*, 83 N. Y. 51, holding surety not discharged by agreement extending time of payment conditioned on consent of surety; *Rockville Nat. Bank v. Holt*, 58 Conn. 526, 18 A. S. R. 293, 20 Atl. 669, holding surety on note assenting to extension of time not discharged; *Big Rapids Nat. Bank v. Peters*, 120 Mich. 518, 79 N. W. 891, holding surety on note not released by extension of time to principal debtor where remedy is expressly reserved; *Hall v. Johnston*, 6 Tex. Civ. App. 110, 24 S. W. 861, holding retiring partners discharged as sureties by creditors' agreement to extend time of paying firm debts by remaining partners.

Cited in notes in 78 A. D. 75, on effect of extension of time on mortgage on liability of mortgagor and vendee; 21 E. R. C. 662, on discharge of surety by valid extension of time.

Discharge of principal by election to hold agent.

Cited in *Ranger v. Thalmann*, 65 App. Div. 5, 72 N. Y. Supp. 451, holding principal discharged by election to hold agent.

Retiring partner as surety.

Cited in *Re Dawson*, 59 Hun, 239, 12 N. Y. Supp. 781, holding retiring partner liable as surety for firm debt assumed by new firm.

Mortgagor as surety.

Cited in *Miller v. Kennedy*, 12 S. D. 478, 81 N. W. 906; *Durham v. Craig*, 79 Ind. 117; *Hyde v. Miller*, 45 App. Div. 396, 60 N. Y. Supp. 974,—holding mortgagor conveying premises to grantee assuming mortgage, surety.

Cited in notes in 78 A. D. 73, on liability of grantee assuming mortgage to mortgagee; 26 A. R. 663, on effect of conveyance of land subject to mortgage; 47 A. R. 473, on effect of grantee's acceptance of deed conditioned to be subject to mortgage; 5 L.R.A. 277, 278, on relation of vendor and vendee as principal and surety; 5 L.R.A. 289, on subrogation of mortgagor on payment of debt; 25 L.R.A. 276, on right of mortgagee, creditor, or lienor to sue one purchasing subject to mortgage, debt, or lien.

Liability of land for mortgage debt.

Cited in *Price v. Reed*, 38 Mo. App. 501; *Albree v. Kingsland*, 37 N. Y. S. R. 406, 13 N. Y. Supp. 794,—holding land primary fund for payment of mortgage debt.

Cited in reference note in 62 A. S. R. 763, on effect of purchaser's assumption of mortgage.

Construction of complaint.

Cited in *Knauss v. Lake Erie & W. R. Co.* 29 Ind. App. 216, 64 N. E. 95; *Kuehnemundt v. Haar*, 14 Jones & S. 188, 58 How. Pr. 464; *People v. Tillman*, 63 Misc. 461, 118 N. Y. Supp. 442; *Williams v. Hubbell*, 17 N. Y. S. R. 385,—holding complaint to be taken as whole in construing same; *Fleischmann v. Bennett*, 23 Hun, 200, holding whole complaint to be considered in determining whether cause of action alleged; *Wilson v. Louisville & N. R. Co.* 103 App. Div. 203, 92 N. Y. Supp. 1091, holding allegations tending to discharge as well as those tending to charge defendant, to be considered in determining whether cause of action stated.

Allegations of complaint.

Cited in *Bowlus v. Phenix Ins. Co.* 133 Ind. 106, 20 L.R.A. 400, 32 N. E. 319; *Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51,—holding that pleader is not bound to anticipate defense.

— Sufficiency.

Cited in *Behrley v. Behrley*, 93 Ind. 255, holding complaint stating facts constituting cause of action and facts showing defense, insufficient; *Delaware County Nat. Bank v. King*, 109 App. Div. 553, 95 N. Y. Supp. 956, holding allegation of maker's breach of promise in action on note against one of several guarantors, each to certain amount, insufficient as defendant's breach should be specially pleaded.

29 AM. REP. 134, MOORE v. NEW YORK, 73 N. Y. 238.

Liability of municipal corporation.

Cited in *Bieling v. Brooklyn*, 120 N. Y. 98, 24 N. E. 389, holding city, not commissioner of public works, liable for injuries caused by fall of wooden awning erected in violation of ordinance and permitted to remain; *Jardine v. New York*, 11 Daly, 116, denying liability of city for refusing to permit contractor to complete public contract for failure to publish notice of resolution therefor as required by statute; *Mathewson v. Grand Rapids*, 88 Mich. 558, 26 A. S. R. 299, 50 N. W. 651, denying right of contractor to recover damages from city for being delayed in performance of grading contract where work was held up by injunction; *Field v. Shawnee*, 7 Okla. 73, 54 Pac. 318, denying liability of city for services under contract to influence secretary of interior to require location of railroad at certain point.

— As affected by invalidity of, or irregularities in contract generally.

Cited in *Higgins v. San Diego*, 118 Cal. 524, 45 Pac. 824; *National Tube Works*
Am. Rep. Vol. XVII.—3.

Co. v. Chamberlain, 5 Dak. 54, 37 N. W. 761, holding city liable on water works contract where same is not made in direct violation of charter; Sawyer v. Manchester & K. R. Co. 62 N. H. 135, 13 A. S. R. 541, holding failure to take vote by ballot no defense to action for nonpayment of gratuity voted to railroad; Brown v. New York, 57 Misc. 433, 108 N. Y. Supp. 555, holding city not entitled to defeat specific performance of contract to lease, on ground of failure of commissioners to have land reappraised after amendment of resolution as to lease; Rodgers v. New York, 51 Misc. 119, 100 N. Y. Supp. 745, denying liability of city for refusal to permit carrying out of contract for street repairs which it had no power to make; Dady v. New York, 65 Misc. 332, 121 N. Y. Supp. 860, holding omission of competitive bidding omission of substantial requirement and not mere irregularity.

— Where city has received benefit of void or irregular contract.

Cited in Marion Water Co. v. Marion, 121 Iowa, 306, 96 N. W. 833, holding city receiving benefit of hydrants estopped to deny liability for rent on ground that ordinance relating thereto was void for containing two subjects in title; Columbus Waterworks Co. v. Columbus, 46 Kan. 666, 26 Pac. 1046, holding city receiving benefit of hydrants estopped in action for hydrant rent, to deny validity of ordinance as to payment of rent; Hutchinson & S. R. Co. v. Kingman County, 48 Kan. 70, 30 A. S. R. 273, 15 L.R.A. 401, 28 Pac. 1078, holding town retaining stock issued for railroad aid bonds estopped to deny liability on ground that petition for election as to bonds was not signed by required number; North River Electric Light & P. Co. v. New York, 48 App. Div. 14, 62 N. Y. Supp. 726, holding contractor performing work for reasonable price, of which city received benefit entitled to recover although city failed to advertise for bids; London & N. Y. Land Co. v. Jellico, 103 Tenn. 320, 52 S. W. 995, holding city impliedly liable for benefits actually received under void contract for street improvement; Wentink v. Passaic County, 66 N. J. L. 65, 48 Atl. 609, sustaining recovery on quantum meruit for work on bridge under contract with county set aside for irregularity; Milburn v. Glynn County, 109 Ga. 473, 34 S. E. 848, holding irregularity in proceedings no defense to action for compensation in supervising erection of court house; Bradley v. West Duluth, 45 Minn. 4, 47 N. W. 166, holding failure of village to obtain consent of abutting owners for purchase of sidewalk material no defense to action for price thereof; Bell v. Kirkland, 102 Minn. 213, 120 A. S. R. 621, 13 L.R.A.(N.S.) 793, 113 N. W. 271, holding failure of municipal corporation to secure proper consents for sewer no defense to action for materials furnished; Ludington Water-Supply Co. v. Ludington, 119 Mich. 480, 78 N. W. 558; Rogers v. Omaha, 76 Neb. 187, 107 N. W. 214; Rogers v. Omaha, 82 Neb. 118, 117 N. W. 119; State, Tappan, Prosecutor, v. Long Branch Police, 59 N. J. L. 371, 35 Atl. 1070,—holding irregularity of preliminary proceedings no defense to executed contract for public improvements; Moriarity v. New York City, 59 Misc. 204, 110 N. Y. Supp. 842, holding city estopped to set up its noncompliance with military code in action for cost of repairing armory; Calahan v. New York, 34 App. Div. 344, 54 N. Y. Supp. 279, holding recovery by contractor for electrical work for city not defeated by failure of commissioners to enter on minutes resolution employing him; Brundage v. Portchester, 31 Hun, 129, holding contractor's right to recover balance due for grading street not defeated because street was not legally opened; Schier v. Buffalo, 35 Hun, 564, holding city liable for sprinkling of streets under contract not made as required by charter; Clute v. Robison, 38 Hun, 283, holding mere

irregularity in employment of attorney by highway commissioners no defense to action for services rendered; *Mark v. West Troy*, 69 Hun, 422, 23 N. Y. Supp. 422, denying liability of village for fees of attorney employed by president alone in violation of provision of charter; *O'Brien v. Niagara Falls*, 65 Misc. 92, 119 N. Y. Supp. 497, to point that bona fide performance of contract, of which city has had benefit, gives strong equity in favor of contractor seeking his pay.

— Where municipality has received benefits, generally.

Cited in *Chicago Lumber & Coal Co. v. Sugar Loaf Twp.* 64 Kan. 163, 67 Pac. 630, holding fact that funds are unavailable no defense to action for material furnished for county bridge; *Van Dolsen v. Board of Education*, 162 N. Y. 446, 56 N. E. 990, holding recovery by one constructing retaining wall for public school building under contract with board not defeated by failure of board to make appropriation; *Sheehan v. New York*, 37 Misc. 432, 75 N. Y. Supp. 802, holding one furnishing materials to protect plants in park from frost entitled to recover from city therefor; *Board of Education v. Mapes*, 14 N. Y. S. R. 593, holding board of education liable on contract relating to school site of which board had benefit; *Abells v. Syracuse*, 7 App. Div. 501, 40 N. Y. Supp. 233, holding city receiving benefit of extra work of contractor in building retaining wall under verbal order, liable to latter therefor; *Quin v. Buffalo*, 26 Hun, 234, holding one performing work for city entitled to compel payment after failure of assessment levied for that purpose; *Reilly v. Albany*, 40 Hun, 405, sustaining right of contractor for paving street to sue city for its failure to take proceedings to collect cost by assessment; *Bellevue Water Co. v. Bellevue*, 3 Idaho, 739, 35 Pac. 693, denying right of city to escape liability on contract for water works after completion thereof by enactment of statute after work partly finished; *Becker v. New York*, 176 N. Y. 441, 68 N. E. 855 (dissenting opinion), on liability of city for work performed by contractor for street improvement not contemplated by contract.

Cited in note in 137 Am. St. R. 364, 371, on estoppel of county or municipal corporation to contest illegal claims or expenditures.

Ultra vires as defense to municipal corporation.

Cited in *Turner v. Cruzen*, 70 Iowa, 202, 30 N. W. 483, holding that county retaining possession of land bought for poor farm cannot deny liability for balance of purchase price on ground that purchase ultra vires; *Portland Lumbering & Mfg. Co. v. East Portland*, 18 Or. 21, 6 L.R.A. 290, 22 Pac. 536, holding that ultra vires is no defense to action under contract for street improvement.

Cited in note in 6 L.R.A. 292, on doctrine of ultra vires as applied to corporation contracts.

Municipal corporation as bound by act of officer.

Cited in *Ft. Edwards v. Fish*, 86 Hun, 548, 33 N. Y. Supp. 784, holding that village is not bound by officer's compromise of invalid claim; *People ex rel. Slosson v. Westchester County*, 116 App. Div. 844, 102 N. Y. Supp. 402; *People ex rel. Sweet v. Lawrence County*, 101 App. Div. 327, 91 N. Y. Supp. 948,—holding that county is not estopped by unauthorized act of board of supervisors.

Powers of public officers or municipal corporations.

Cited in *People ex rel. McLaughlin v. Yonkers Police Comrs.* 79 App. Div. 82, 79 N. Y. Supp. 710, holding that one illegally removed from office is not estopped to deny appointment of successor by acceptance of pension under removal order; *Queens County Water Co. v. Monroe*, 83 App. Div. 105, 82 N. Y. Supp. 610, deny-

ing power of commissioner of water supply to purchase land except that determined to be necessary for increasing water supply; *Re Mahan*, 20 Hun, 301, denying right of public officer to fix arbitrary price for certain kind of work in advertisement for bid under statute; *Gilmore v. Utica*, 55 Hun, 514, 9 N. Y. Supp. 912, denying power of city to impose tax for repaving portion of street required by charter to be paid by street railway company; *Portland v. Bituminous Paving & Improv. Co.* 33 Or. 307, 72 A. S. R. 713, 44 L.R.A. 527, 52 Pac. 28, denying power of city to take bond requiring paving contractor to keep street in repair for certain period; *New York v. Brown*, 27 Misc. 218, 57 N. Y. Supp. 742, sustaining plenary power of city over improving streets; *Weston v. Syracuse*, 82 Hun, 67, 31 N. Y. Supp. 186, sustaining power of common council to bind city by modification of sewer contract between city and another; *Legare v. Chicoutimi*, Rap. Jud. Quebec 5 B. R. 542, on powers of municipal corporations in regard to obstructions in streets.

Cited in note in 7 E. R. C. 368, on presumption that executed contract to which corporation is party is within its powers.

Validity of assessment.

Cited in *Dumars v. Denver*, 16 Colo. App. 375, 65 Pac. 580, holding sewer assessment void for failure to publish notice as required by statute; *Consolidated Ice Co. v. New York*, 53 App. Div. 260, 65 N. Y. Supp. 912, holding right to impose assessment for laying out street defeated by irregularities in proceedings; *Walden v. Relyea*, 89 App. Div. 241, 85 N. Y. Supp. 978, holding that failure to serve copy of improvement order as required by village charter relieves owner of liability for sidewalk assessment; *Kerker v. Bocher*, 20 Okla. 729, 95 Pac. 981, holding abutting owners who knowingly receive benefits of pavement estopped from setting up any irregularity.

Recovery of sum paid for void tax.

Cited in *Horn v. New Lots*, 83 N. Y. 100, 38 A. R. 402; *Day v. New Lots*, 36 Hun, 263,—holding action for money had and received maintainable against town for sum paid under invalid assessment.

29 AM. REP. 142, COMSTOCK v. HIER, 73 N. Y. 269.

Reimbursement of one compelled to pay bona fide transferee of negotiable instrument.

Cited in *Metropolitan Elev. R. Co. v. Kneeland*, 120 N. Y. 134, 17 A. S. R. 619, 8 L.R.A. 253, 24 N. E. 381, holding directors of corporation fraudulently issuing corporate notes liable to corporation compelled to pay them to bona fide holder; *Fahey v. Esterley Mach. Co.* 3 N. D. 220, 44 A. S. R. 554, 55 N. W. 580, holding maker of note rescinding same for breach of warranty of goods for which it was given entitled to recover face with accrued interest where note was transferred to bona fide holder; *Plainview v. Winona & St. P. R. Co.* 36 Minn. 505, 32 N. W. 745, holding railroad company liable to town for illegally procuring negotiable bonds from town which are transferred to innocent purchaser for value; *Myrick v. Purcell*, 95 Minn. 133, 103 N. W. 902, 5 A. & E. Ann. Cas. 148, holding maker entitled to recover face of note with accrued interest from payee transferring same to innocent purchaser in violation of contract; *Nashville Lumber Co. v. Fourth Nat. Bank*, 94 Tenn. 374, 45 A. S. R. 727, 27 L.R.A. 519, 29 S. W. 368, holding transferee of note taking same to enable holder who has knowledge of defects to collect from accommodation indorser, liable to latter.

Distinguished in *Mitchell v. Strough*, 35 Hun, 83, holding railroad commissioners of town wrongfully exchanging town bonds for railroad stock, liable to town.

Right of maker to return of notes.

Cited in *Farwell v. Importers' & T. Nat. Bank*, 90 N. Y. 483, holding maker entitled to notes held as collateral security upon payment of loan.

Liability of collecting bank.

Cited in *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561, 40 A. R. 261, holding bank negligent in making collection of draft thereby causing loss liable directly to owner of instrument.

Duty to account for money, etc., wrongfully received.

Cited in *Brown v. Brown*, 40 Hun, 418, holding one taking savings bank book without authority bound to account for money drawn as agent; *Muskingum County v. State*, 78 Ohio St. 287, 85 N. E. 562, holding one to whom bonds delivered without authority of law liable to money judgment where bonds subsequently transferred to bona fide holder; *Hartnelt v. Adler*, 15 Daly, 69, 2 N. Y. Supp. 713, on right of principal to claim note passed by agent for own benefit, except in hands of bona fide holder.

Who is a bona fide holder of bill or note.

Cited in *Re Hopper-Morgan Co.* 154 Fed. 249, holding indorsee taking accommodation note before maturity as collateral security for antecedent debt, holder for value; *Ames Iron Works v. Kalamazoo Pulley Co.* 63 Ark. 87, 37 S. W. 409, holding that one taking note for satisfaction of judgment for transfer of goods fraudulently obtained is not bona fide holder; *Petrie v. Williams*, 88 Hun, 292, 34 N. Y. Supp. 670 (prior appeal in 68 Hun, 589, 23 N. Y. Supp. 237), holding that one taking note from attorney with knowledge that same had been given latter in payment of collection for infant client is not bona fide purchaser; *Davis Sewing Mach. Co. v. Best*, 105 N. Y. 59, 11 N. E. 146, holding one taking corporate notes not signed by president is not bona fide holder; *Yale v. Dart*, 46 N. Y. S. R. 675, 19 N. Y. Supp. 389, holding that one taking draft as collateral for antecedent debt is not protected as bona fide holder; *Rock Springs Nat. Bank v. Luman*, 6 Wyo. 123, 42 Pac. 874 (dissenting opinion), on one taking note for pre-existing debt as bona fide holder.

Rights of transferee of negotiable instrument.

Cited in *Marine v. Peyser*, 6 Misc. 540, 27 N. Y. Supp. 226, denying right to recover on diverted note in absence of proof that plaintiff is bona fide holder.

— Bona fide transferee.

Cited in *Benjamin v. Rogers*, 32 N. Y. S. R. 626, 10 N. Y. Supp. 777, holding rights of bona fide holder of note not affected by knowledge of sureties' expectation as to delivery; *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784, holding town bonds fraudulently issued in aid of railroad valid in hands of bona fide holder; *Mundy v. Pritchard*, 22 Misc. 22, 47 N. Y. Supp. 1073, holding one acquiring title after maturity not entitled to enforce diverted note against maker; *Atlantic State Bank v. Savery*, 82 N. Y. 291, sustaining right of bona fide holder to recover on note given by partner for own pre-existing debt.

Cited in notes in 27 L.R.A. 520, on liability for transferring negotiable note to bona fide holder so as to cut off defense of indorser; 27 L.R.A. 521, on form of action against one transferring negotiable note to bona fide holder so as to

cut off defenses; 31 L.R.A.(N.S.) 297, on holder of bill or note as collateral as bona fide holder.

Burden of proof as to bona fides of transferee of negotiable instrument.

Cited in *Anderson v. Kissam*, 35 Fed. 699, holding one taking check from drawer's agent bound to show latter's power to give same; *Webster v. Howe Mach. Co.* 54 Conn. 394, 8 Atl. 482, holding burden of showing bona fides of ownership upon holder of draft indorsed by corporation without power; *Nash v. Second Nat. Bank*, 67 N. J. L. 265, 51 Atl. 727; *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Sutherland v. Mead*, 80 App. Div. 103, 80 N. Y. Supp. 504; *Mitchell v. Baldwin*, 88 App. Div. 265, 84 N. Y. Supp. 1043; *National Revere Bank v. Morse*, 163 Mass. 383, 40 N. E. 180,—holding burden of showing innocence of fraud upon holder of note fraudulently put into circulation; *Sixth Nat. Bank v. Lorillard Brick Works Co.* 29 Jones & S. 29, 18 N. Y. Supp. 861; *Ives v. Jacobs*, 21 Abb. N. C. 151, 1 N. Y. Supp. 330,—holding burden of showing bona fides upon holder of diverted note.

Defenses to action on note.

Cited in *Burgess v. Alcorn*, 75 Kan. 735, 90 Pac. 239, holding breach of warranty defense to action on purchase money note; *Brooks v. Hey*, 23 Hun, 372, holding that failure of payee to comply with prior agreement with reference to use of proceeds is no defense to accommodation maker signing without restrictions; *Franc v. Dickinson*, 52 Hun, 373, 5 N. Y. Supp. 303, holding that payee's breach of agreement not to negotiate note is no defense against bona fide holder.

Pre-existing debt as consideration.

Cited in *Harlem River Bank v. Meyer*, 42 N. Y. S. R. 465, 16 N. Y. Supp. 872, denying liability of married woman on her indorsement on husband's demand note given for antecedent debt.

Cited in reference note in 33 A. R. 46, on rights of one taking promissory note before maturity as payment or security for antecedent debt.

Cited in notes in 32 A. S. R. 713, on rights as bona fide holder of one taking collateral to secure pre-existing debt; 4 E. R. C. 331, on creditor accepting negotiable paper given for pre-existing debt as bona fide holder.

What constitutes conversion.

Cited in *Anderson v. Market Nat. Bank*, 16 N. Y. S. R. 98, 1 N. Y. Supp. 136; holding one diverting proceeds of check guilty of conversion; *Caswell v. Putnam*, 41 Hun, 521, 4 N. Y. S. R. 106, holding broker selling customer's stock without authority guilty of conversion; *Casey v. Pilkington*, 83 App. Div. 91, 82 N. Y. Supp. 525, holding transferee collecting warrants against city issued upon forged assignment of claim guilty of conversion; *Hynes v. Patterson*, 95 N. Y. 1 (affirming 28 Hun, 528) holding one diverting notes made for certain purpose liable for conversion.

Cited in reference note in 35 A. S. R. 878, on diversion of accommodation paper.

Cited in note in 31 A. S. R. 751, on fraudulent diversion of accommodation paper.

Distinguished in *Southwick v. First Nat. Bank*, 84 N. Y. 420, 61 How. Pr. 164 (reversing 20 Hun, 349), holding one diverting draft to purpose not intended guilty of conversion.

Measure of damages for conversion.

Cited in *Skeen v. Springfield Engine & T. Co.* 42 Mo. App. 158, holding face of note with interest measure of damages for conversion.

Limitations in action for conversion.

Cited in *McDonnell v. Buffalo Loan Trust & S. D. Co.* 193 N. Y. 92, 85 N. E. 801 (dissenting opinion), on running of Statute of Limitations against action for mortgagee's conversion.

Competency of witnesses.

Cited in *Johnson v. Townsend*, 117 N. C. 338, 23 S. E. 271, holding that party is not incapacitated from giving evidence of transactions with decedent where associates of latter in transaction are living and coparties; *Hixon v. Rodbourn*, 36 Miss. 19, holding that husband of plaintiff in action against executor of maker of note is not disqualified as interested party; *Re Shaw*, 18 Hun, 195, holding that death of one partner does not render party incompetent as witness to prove transaction so long as other partner who was present is alive; *Wilcox v. Corwin*, 117 N. Y. 500, 23 N. E. 165, holding one of two joint makers of note other of whom is dead, competent witness for payee that signature of deceased makes genuine.

Distinguished in *Auburn Sav. Bank v. Brinkerhoff*, 44 Hun, 142, holding surety incompetent to testify as to transactions relating to payment with principal before latter's death; *Raubitschek v. Blank*, 80 N. Y. 478, holding assignee of check incompetent to testify as to personal transactions with assignor had before latter's death.

Striking out evidence as error.

Cited in *Mullins v. Chickering*, 110 N. Y. 513, 1 L.R.A. 463, 18 N. E. 377 (dissenting opinion), on error in striking out immaterial evidence.

29 AM. REP. 149, MATSON v. FARM BUILDINGS INS. CO. 73 N. Y. 310.

Avoidance of policy by use of prohibited articles.

Cited in *Wheeler v. Traders' Ins. Co.* 62 N. H. 450, 13 A. S. R. 582, holding policy avoided by use of naphtha contrary to express prohibition; *Draper v. Oswego County Fire Relief Asso.* 190 N. Y. 12, 82 N. E. 755, holding policy avoided for breach of condition against building open fire within 50 feet of building; *Liverpool & L. & G. Ins. Co. v. Gunther*, 116 U. S. 113, 29 L. ed. 575, 6 Sup. Ct. Rep. 306; *McCurdy v. Orient Ins. Co.* 30 Pa. Super. Ct. 77,—holding policy avoided by tenant's use of gasoline without knowledge of insured.

Cited in reference notes in 37 A. R. 650, on use of materials prohibited in insurance; 13 A. S. R. 585, on conditions in insurance policies against combustibles and dangerous substances.

Cited in note in 66 A. S. R. 696, on increase of hazard avoiding fire insurance policy, in matters outside knowledge or control of insured.

Appellate court's examination of evidence.

Cited in *Clarkson v. Western Assur. Co.* 92 Hun, 527, 37 N. Y. Supp. 53, holding that appellate court will examine evidence to determine whether there are issues of fact upon direction of verdict to which exception taken; *Cowenhoven v. Ball*, 118 N. Y. 231, 23 N. E. 470, sustaining right of party taking exceptions during trial to waive same and base case submitted to appellate court.

29 AM. REP. 153, MADAN v. SHERARD, 73 N. Y. 329.

Liability of carrier.

Cited in *Park v. Preston*, 108 N. Y. 434, 15 N. E. 705, holding carrier liable for loss of goods in absence of proof of contract exempting from liability; *Lo-*

don & L. F. Ins. Co. v. Rome, W. & O. R. Co. 68 Hun, 598, 23 N. Y. Supp. 231, holding carrier presumed to be liable for loss of goods in transit.

Cited in notes in 61 A. S. R. 366, on limitation of liability of express companies; 42 L. ed. U. S. 689, on validity of contracts exempting carriers from liability for their own negligence or that of their servants.

Who bound by limitation of carrier's liability.

Cited in *Hutchins v. Pennsylvania R. Co.* 181 N. Y. 186, 106 A. S. R. 537, 73 N. E. 972, holding passenger not bound by contents of complex ticket of which he has no knowledge.

—In shipping receipt or bill of lading.

Cited in *Baum v. Long Island R. Co.* 58 Misc. 34, 108 N. Y. Supp. 1113; *Mills v. Weir*, 82 App. Div. 396, 81 N. Y. Supp. 801; *Addoms v. Weir*, 56 Misc. 487, 108 N. Y. Supp. 146,—holding shipper bound by contents of shipping receipt; *Springer v. Westcott*, 166 N. Y. 117, 59 N. E. 693; *Lewy v. Blumenthal*, 83 App. Div. 8, 82 N. Y. Supp. 344; *Zimmer v. New York C. & H. R. R. Co.* 137 N. Y. 460, 33 N. E. 642,—holding shipper bound by contents of bill of lading accepted by him.

Cited in notes in 29 A. R. 169, on effect of acceptance without objection of bill of lading releasing carrier from liability; 99 A. S. R. 367, on ticket as contract limiting carrier's liability for baggage; 11 E. R. C. 233, on admissibility of parol evidence to contradict or modify bill of lading.

—Baggage checks.

Cited in *Merrill v. Pacific Transfer Co.* 131 Cal. 582, 63 Pac. 915, holding one taking baggage transfer check legally chargeable with knowledge of limitation of liability; *Colvin v. Fargo*, 47 Misc. 642, 94 N. Y. Supp. 377, holding one delivering baggage checks to agent for transfer not guilty of negligence per se in failing to read receipts so as to discover limitation on liability.

Cited in notes in 32 A. D. 506, on insufficiency of notices printed or stamped on tickets or checks to limit liability of carriers; 34 L.R.A. 139, on limitation of liability of baggage transfer companies.

Knowledge of limitation of liability in receipt as question for jury.

Cited in *Morgan v. Woolverton*, 136 App. Div. 351, 120 N. Y. Supp. 1008; *Grossman v. Dodd*, 63 Hun, 324, 17 N. Y. Supp. 855; *Neuman v. National Shoe & L. Exch.* 26 Misc. 388, 56 N. Y. Supp. 193,—holding it question for jury whether one received receipt with knowledge of limitation of liability contained therein.

Evidence as to fairness of contract.

Cited in *O'Malley v. Great Northern R. Co.* 86 Minn. 380, 90 N. W. 974, holding extrinsic evidence admissible to show whether contract limiting carrier's liability was honestly entered into.

29 AM. REP. 157, WHITE'S BANK v. MYLES, 73 N. Y. 335.

Construction of written instruments.

Cited in *First Nat. Bank v. Waddell*, 74 Ark. 241, 85 S. W. 417, 4 A. & E. Ann. Cas. 818, holding agreement to pay all indebtedness to certain sum, continuing guaranty; *Sullivan v. Arcand*, 165 Mass. 364, 43 N. E. 198, holding promise to be responsible for all goods purchased by another, continuing guaranty; *Schwartz v. Hyman*, 107 N. Y. 562, 14 N. E. 447, holding that guaranty of payment of goods sold is not continuing; *Bank of Montreal v. Recknagel*, 109

N. Y. 482, 17 N. E. 217, holding that ambiguous instrument should be liberally interpreted; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 A. R. 434, holding precedents without much value in construing guaranties.

Cited in reference note in 30 A. R. 672, on effect of application of payments to discharge guarantor.

Cited in notes in 55 A. R. 703, as to how long guaranties continue; 4 L.R.A. 343, on rule of construction of guaranty.

Surety as bound by declarations of principal.

Cited in *Eichhold v. Tiffany*, 20 Misc. 680, 46 N. Y. Supp. 534, holding surety bound by declarations of principal made during transaction for which surety bound.

Admissibility of evidence as to written instrument.

Cited in *Bonney v. Robertson*, 6 Colo. App. 485, 41 Pac. 842, holding evidence of circumstances surrounding parties admissible to explain ambiguous guaranty; *American Ins. Co. v. Meyers*, 118 Ill. App. 484, holding parol evidence admissible to explain conflicting terms in policy; *Harvey v. First Nat. Bank*, 56 Neb. 320, 76 N. W. 870, holding extrinsic evidence admissible to show whether note was taken for debt or as renewal; *Drovers' Nat. Bank v. Albany County Bank*, 44 Fed. 183; *Johannessen v. Munroe*, 84 Hun, 594, 32 N. Y. Supp. 863; *Tilden v. Tilden*, 8 App. Div. 99, 40 N. Y. Supp. 403; *Murdock v. Gould*, 193 N. Y. 369, 86 N. E. 12,—holding parol evidence admissible to explain ambiguity in contract; *Henry McShane Co. v. Padian*, 142 N. Y. 207, 36 N. E. 880 (reversing 1 Misc. 332, 20 N. Y. Supp. 679, 48 N. Y. S. R. 705), holding extrinsic evidence inadmissible to explain instrument containing unambiguous language; *Brill v. Tuttle*, 81 N. Y. 454, 37 A. R. 515, holding extrinsic evidence admissible to explain order on fund where language ambiguous; *Lattimer v. Buxton*, 17 Misc. 202, 40 N. Y. Supp. 1033, holding extrinsic evidence admissible to explain term "indebtedness" used in agreement to pay; *Eichhold v. Tiffany*, 21 Misc. 627, 48 N. Y. Supp. 70, holding statements of vendee made to vendors not more than two weeks before guaranty was given that vendees were to constitute certain firm, competent as part of *res gestæ*; *Phelps v. Gamewell Fire Alarm Teleg. Co.* 72 Hun, 26, 25 N. Y. Supp. 654, holding parol evidence inadmissible to explain term "guaranty" used in contract; *Bull's Head Bank v. Koehler*, 1 N. Y. City Ct. Rep. 264, denying admissibility of oral evidence to vary legal effect of note.

Cited in note in 2 E. R. C. 717, on admissibility of parol evidence to explain ambiguity.

Right of court to take case from jury.

Cited in *Wait v. Borne*, 1 Silv. Sup. Ct. 129, 5 N. Y. Supp. 168; *Ruiz v. Renauld*, 100 N. Y. 256, 3 N. E. 182,—holding act of court in taking case from jury when no question of fact involved, no error.

29 AM. REP. 163, HILL v. SYRACUSE, B. & N. Y. R. CO. 73 N. Y. 351.

Acceptance of receipt, etc., as acquiescence in provisions.

Cited in *Louisville, E. & St. L. R. Co. v. Wilson*, 119 Ind. 352, 4 L.R.A. 244, 21 N. E. 341, holding shipper accepting bill of lading bound by stipulation as to cost of transportation; *Rogers v. Kennebec S. B. Co.* 86 Me. 261, 25 L.R.A. 491, 29 Atl. 1069, holding one accepting free pass presumed to agree to condition as to assumption of risk of injury; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553,

25 A. S. R. 660, 12 L.R.A. 340, 27 N. E. 665, holding passenger accepting ticket exempting carrier from liability for negligence presumed to be bound by terms; *Hoffman v. Metropolitan Exp. Co.* 111 App. Div. 407, 97 N. Y. Supp. 838; *Jennings v. Grand Trunk R. Co.* 127 N. Y. 438, 28 N. E. 394,—holding shipper accepting bill of lading bound by terms; *Guillane v. General Transp. Co.* 100 N. Y. 491, 3 N. E. 489; *Dobson v. Central R. Co.* 38 Misc. 582, 78 N. Y. Supp. 82,—holding holder of bill of lading presumed to know contents; *Isaacson v. New York C. & H. R. R. Co.* 25 Hun, 350, holding one accepting baggage checks bound by notice thereon as to route; *Smith v. American Exp. Co.* 108 Mich. 572, 66 N. W. 479; *Ballou v. Earle*, 17 R. I. 441, 33 A. S. R. 881, 14 L.R.A. 433, 22 Atl 1113,—holding shipper accepting receipt presumed to be bound by limitation on carrier's liability.

Cited in notes in 26 A. S. R. 121, on presumption that shipper knows and assents to conditions in contract of shipment; 88 A. S. R. 82, 83, on evidence of shipper's assent to limitation of carrier's liability.

One signing instrument as bound by terms.

Cited in *Chicago, St. P. M. & O. R. Co. v. Belliwith*, 28 C. C. A. 358, 55 U. S. App. 113, 83 Fed. 437, holding one unable to read signing contract without procuring another to explain instrument, bound by its terms; *Rozen v. Dry Dock, E. B. & B. R. Co.* 7 Misc. 130, 27 N. Y. Supp. 337; *West v. First Nat. Bank*, 20 Hun, 408; *Sanger v. Dun*, 47 Wis. 615, 32 A. R. 789, 3 N. W. 388; *Root v. Zaller*, 19 N. Y. S. R. 679, 2 N. Y. Supp. 742,—holding that one is not relieved from contract for failure to read same; *Johnstone v. Richmond & D. R. Co.* 39 S. C. 55, 17 S. E. 512; *Nashville, C. & St. L. R. Co. v. Heikens*, 112 Tenn. 348, 105 A. S. R. 955, 79 S. W. 1031,—holding shipper bound by contract he signed without reading.

Principal as bound by receipt signed by employee.

Cited in *Bernstein v. Weir*, 40 Misc. 635, 83 N. Y. Supp. 48, holding express company bound by freight receipt signed by employee.

Signing contract without reading as negligence.

Cited in *Wood v. Gordon*, 44 N. Y. S. R. 640, 18 N. Y. Supp. 109, holding one signing contract upon representation of agent as to contents guilty of negligence when means at hand of ascertaining contents.

Right of carrier to limit liability.

Cited in *McKinney v. Jewett*, 24 Hun, 19, sustaining right of common carrier to limit liability for negligent loss of goods.

Cited in reference notes in 33 A. S. R. 889, on rights and liabilities on carrier's contract of shipment; 31 A. S. R. 59, 865; 37 A. S. R. 776,—on liability of connecting carriers.

Cited in notes in 32 A. D. 497, on power of common carrier to limit his liability; 88 A. S. R. 104, on exemption from liability for losses caused by negligence of carrier or his servant.

Release of carrier from liability.

Cited in *Potter v. Sharp*, 24 Hun, 179, holding carrier not released from liability for negligence by condition in bill of lading that live stock taken at owner's risk of injury during loading.

Admissibility of oral proof to contradict instrument.

Cited in *Reynolds v. Robinson*, 37 Hun, 561, denying admissibility of oral testimony tending to contradict terms of written contract.

Cited in note in 6 L.R.A. 39, on admissibility of parol evidence to vary terms of written contract.

29 AM. REP. 169, KENNEDY v. NEW YORK, 73 N. Y. 365.

Liability of municipal corporations or commissioners.

Cited in *Workman v. New York*, 63 Fed. 298, holding city liable for injury to boat by fire boat hastening to fire; *Eddy v. Ellicottville*, 35 App. Div. 256, 54 N. Y. Supp. 800, denying liability of village for death of one caused by exposure in delapidated lockup.

— **For dangerous condition of highways generally.**

Cited in *Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621; *Crawfordsville v. Smith*, 79 Ind. 308, 41 A. R. 612; *Wood v. Gilboa*, 76 Hun, 175, 27 N. Y. Supp. 586; *Fay v. Lindley*, 33 N. Y. S. R. 539, 11 N. Y. Supp. 355,—holding town liable for injuries caused by defect in highway.

Cited in reference note in 106 A. S. R. 374, on municipal liability for injuries to horses by defects in streets.

Cited in notes in 98 A. D. 611, on liability of cities and towns for injuries to or by horses frightened by defects in highway; 18 L.R.A. 103, on when liability of municipalities to provide for safety of runaway horse exists; 8 L.R.A. (N.S.) 79, on municipal liability for injury to person or property of one driving over defective highway whose horse is frightened without fault of either party; 20 L.R.A. (N.S.) 684, on liability of municipality for defects or obstructions in streets.

— **For lack of railings or guards generally.**

Cited in *Malloy v. Walker*, 77 Mich. 448, 6 L.R.A. 695, 43 N. W. 1012; *Akers v. New York*, 14 Misc. 524, 35 N. Y. Supp. 1099,—holding city liable for failure to guard excavation in street leaving passageway for only one vehicle; *Holcomb v. Champion*, 36 N. Y. S. R. 761, 12 N. Y. Supp. 8, holding town liable for failure to guard embankment near highway; *Mass v. Burlington*, 60 Iowa, 438, 46 A. R. 82, 15 N. W. 267, denying liability of city for death of runaway horse caused by plunging down unguarded ravine near highway; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 A. R. 522, 10 N. E. 858 (reversing 35 Hun, 349), denying liability of city for injuries caused by horse backing off embankment outside of street.

— **For defects in bridges generally.**

Cited in *Lane v. Wheeler*, 35 Hun, 606, denying liability of highway commissioners for injury to runaway horse on bridge out of repair.

— **For lack of railings or guards for bridges and approaches.**

Cited in *Chicago v. McDonald*, 57 Ill. App. 250, holding city operating swing bridge liable for failure to guard opening; *Maxim v. Champion*, 50 Hun, 88, 4 N. Y. Supp. 515, holding town liable for failure to place railing along bridge; *Willis v. Providence Real Estate Co.* 20 R. I. 285, 38 Atl. 947; *Thomas v. Springville*, 9 Utah, 426, 35 Pac. 503,—holding city liable for failure to provide safe railing to bridge approach.

— **For defective condition of docks.**

Cited in *Ruddiman v. A Scow Platform*, 38 Fed. 158, holding city liable for failure to keep docks in repair.

Cited in note in 61 L.R.A. 954, on liability of public corporation for safety of wharf or dock.

Proximate cause of injury.

Cited in *Spaulding v. Winslow*, 74 Me. 528, holding defect in highway frightening horse, proximate cause of injury; *San Antonio v. Porter*, 24 Tex. Civ. App. 444, 59 S. W. 922, holding failure of city to provide railing proximate cause of injury caused by horse backing off street into river.

Cited in notes in 50 A. R. 574, on negligence as proximate cause of injury; 52 A. R. 165; 2 L.R.A. 696,—on necessity to recovery, of negligence being proximate cause of injury; 5 L.R.A.(N.S.) 375, on what is deemed to be proximate cause of injuries following a runaway; 18 L.R.A.(N.S.) 1144, on horses not under control as proximate result of absence of guard rail in highway.

Proof as to viciousness of horse.

Cited in *Finney v. Curtis*, 78 Cal. 498, 21 Pac. 120, holding horse is not shown to be vicious because it became unmanageable when frightened.

Burden of showing negligence.

Distinguished in *Yerkes v. Sabin*, 97 Ind. 141, 49 A. R. 434, holding burden of showing negligence upon one alleging same.

29 AM. REP. 171, CONNECTICUT F. INS. CO. v. ERIE R. CO. 73 N. Y. 399.**Right of recovery over by insurer paying loss.**

Cited in *Lett v. Guardian F. Ins. Co.* 52 Hun, 570, 5 N. Y. Supp. 526; *Thomas v. Montauk F. Ins. Co.* 43 Hun, 218,—holding insurer paying loss to mortgagor entitled to right of subrogation pro tanto with right to enforce bond and to that extent; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; *First Presby. Soc. v. Goodrich Transp. Co.* 7 Fed. 257; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. 643; *Southern R. Co. v. Stonewall Ins. Co.* 163 Ala. 161, 50 So. 940; *Lamar Ins. Co. v. Pennell*, 19 Ill. App. 212; *Phenix Ins. Co. v. Pennsylvania R. Co.* 134 Ind. 215, 20 L.R.A. 405, 33 N. E. 970; *Chicago, B. & Q. R. Co. v. German Ins. Co.* 2 Kan. App. 395, 42 Pac. 594; *Hartford F. Ins. Co. v. Wabash R. Co.* 74 Mo. App. 106; *Omaha & R. Valley R. Co. v. Granite State F. Ins. Co.* 53 Neb. 514, 73 N. W. 950; *Platt v. Richmond, Y. R. & C. R. Co.* 108 N. Y. 358, 15 N. E. 393; *Fayerweather v. Phenix Ins. Co.* 118 N. Y. 324, 6 L.R.A. 805, 23 N. E. 192; *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.* 68 Hun, 598, 23 N. Y. Supp. 231; *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569, 23 A. S. R. 151, 26 Pac. 857; *Fireman's Fund Ins. Co. v. Oregon R. & Nav. Co.* 45 Or. 53, 67 L.R.A. 161, 76 Pac. 1075, 2 A. & E. Ann. Cas. 360; *Brighthope R. Co. v. Rogers*, 76 Va. 443; *Cushman & R. Co. v. Boston & M. R. Co.* 82 Vt. 390, 73 Atl. 1073, 18 A. & E. Ann. Cas. 708; *Swarthout v. Chicago & N. W. R. Co.* 49 Wis. 625, 6 N. W. 314,—holding insurance company compelled to pay owner for property negligently burned by railroad entitled to sue latter without assignment of claim; *Hanna v. People's Nat. Bank*, 76 App. Div. 224, 78 N. Y. Supp. 516 (dissenting opinion), on right of insurance company paying loss to recover from one causing loss.

Cited in reference note in 10 A. S. R. 545, on right of subrogation when loss of insured building is caused by wrongdoer.

Cited in notes in 44 A. S. R. 732, on right of insurer to subrogation; 44 A. S. R. 736-738, on payment to creditor as prerequisite to subrogation of insurer; 2 L.R.A.(N.S.) 922, on subrogation of insurer.

— **Marine insurers.**

Cited in *The St. Johns*, 101 Fed. 469, holding right of marine insurance company to subrogation upon payment of loss from collision not affected by abandonment of boat.

Discharge of insurer.

Cited in *Pollock v. Webster*, 16 Daly, 104, holding right to enforce policy lost by insured's release to party causing injury to building; *Simms v. Mutual F. Ins. Co.* 101 Wis. 586, 77 N. W. 908, holding liability of insurance company released by insured's settlement with railroad company for property negligently destroyed.

Cited in note in 29 L.R.A. (N.S.) 699, as to effect of discharge of person primarily liable for loss, or of contractual provision giving him benefit of insurance, upon insured's right of action against insurer.

Insurer paying loss as necessary party plaintiff in action against wrongdoer.

Cited in *Munson v. New York C. & H. R. R. Co.* 32 Misc. 282, 65 N. Y. Supp. 848, holding insurance companies paying loss caused by negligence of railroad company necessary parties plaintiff in action against railroad.

Cited in notes in 44 A. S. R. 738, 739, on proper parties plaintiff for destruction of insured property; 64 L.R.A. 615, on who is a real party in interest in case of insurance within meaning of statutes defining parties by whom action must be brought.

29 AM. REP. 175, WELSH v. GERMAN AMERICAN BANK, 73 N. Y. 424.

Depositor's examination of vouchers.

Cited in *Leather Mfrs.' Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, holding depositor under duty to bank to examine pass book and returned vouchers within reasonable time; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969 (modifying 60 App. Div. 241, 70 N. Y. Supp. 246), holding depositor under duty to bank to examine returned vouchers; *United States v. Onondaga County Sav. Bank*, 39 Fed. 259; *United Secur. L. Ins. & T. Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. 97, 42 W. N. C. 145, —holding that depositor on return of paid checks is not bound to examine them to see that indorsements correct.

Liability of bank paying on forged indorsement.

Cited in *Morris v. St. Louis Nat. Bank*, 17 Colo. App. 231, 29 Pac. 802; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 A. S. R. 399, 70 N. W. 769; *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74, 43 A. R. 655; *Adler v. Broadway Bank*, 30 Misc. 382, 62 N. Y. Supp. 402; *Clark v. National Shoe & Leather Bank*, 32 App. Div. 316, 52 N. Y. Supp. 1064; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 A. S. R. 595, 77 N. E. 693, —holding bank paying check on forged indorsement of depositor liable to latter; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72, holding right of depositor to recourse against bank paying on forged indorsement lost by failure to exercise reasonable care in examining vouchers; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125, 70 S. W. 173, holding that right of depositor to restitution for forgery of name is not lost by negligence in examining vouchers; *Wachsmann v. Columbia Bank*, 8 Misc. 280, 28 N. Y. Supp. 711 (affirming 6 Misc. 62, 26 N. Y. Supp. 885), holding that depositor giving pass book and canceled checks to his bookkeeper

for examination thereby enabling latter to conceal forgery is not estopped by delay in recovering from bank amount of forged checks; *First Nat. Bank v. Allen*, 100 Ala. 476, 46 A. S. R. 80, 27 L.R.A. 426, 14 So. 335, denying liability of bank for money paid on forged checks which depositor was negligent in discovering after return of vouchers.

Cited in reference notes in 34 A. R. 325, on payment by bank of check forged by drawer's agent; 11 A. S. R. 616, on rights of one paying forged check or draft.

Cited in notes in 61 A. D. 739, on forged signatures; 12 L.R.A. 792, on liability of bank in paying out money on its deposits; 7 L.R.A. (N.S.) 745, on depositor's right to recover amount of forged or raised checks paid by bank as affected by his having intrusted examination of vouchers to employee guilty of original fraud; 3 E. R. C. 745, on liability of bank for paying bill upon forged indorsement of payee.

Forged indorsement as affecting rights of drawer.

Cited in *Anderson v. Dundee State Bank*, 47 N. Y. S. R. 447, 20 N. Y. Supp. 611, holding that drawer of draft is not bound by payment on forged indorsement.

Cited in reference note in 15 A. S. R. 661, on liability of banks for paying checks having forged indorsements.

Bank's knowledge of depositor's signature.

Cited in *National Marine Underwriters v. National Bank*, 9 Misc. 362, 29 N. Y. Supp. 698; *Bank of British N. A. v. Merchants' Nat. Bank*, 91 N. Y. 106; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281,—holding bank bound to know signature of depositor to checks.

Cited in note in 39 A. D. 525, on discovery of forgery and notice thereof.

Rights of indorsee of check indorsed without authority.

Cited in *Hamilton Nat. Bank v. Nye*, 37 Ind. App. 464, 117 A. S. R. 333, 77 N. E. 295, denying title of indorsee to check indorsed without authority.

Principal as bound by act or knowledge of agent.

Cited in *Merchants' Nat. Bank v. Nichols & S. Co.* 123 Ill. App. 430, holding that principal is not liable for unauthorized overdrafts by agent unless negligent in examination of pass book; *Jordan March Co. v. National Shawmut Bank*, 201 Mass. 397, 22 L.R.A. (N.S.) 250, 87 N. E. 740, to the point that negligence of maker is immaterial unless it is of kind that directly and proximately affects conduct of banker in performance of his duties; *Henry v. Allen*, 151 N. Y. 1, 36 L.R.A. 658, 45 N. E. 355, holding that principal is not bound by fraudulent agreement by agent to deposit former's money made with reference to checks issued in own name; *Butler v. Michigan Mut. L. Ins. Co.* 184 N. Y. 337, 77 N. E. 398, holding that life insurance company is not bound by true statements as to health made to soliciting agent; *Shipman v. Bank of State*, 126 N. Y. 318, 22 A. S. R. 821, 12 L.R.A. 791, 27 N. E. 371 (affirming 36 N. Y. S. R. 966, 13 N. Y. Supp. 475), holding that principal is not bound by knowledge of agent acquired in scheme to defraud former; *Slaterry v. Schwannecke*, 44 Hun, 75, holding that client is not chargeable with knowledge of attorney of existence of deed acquired while acting for another; *Constant v. University of Rochester*, 111 N. Y. 604, 7 A. S. R. 769, 2 L.R.A. 734, 19 N. E. 631, holding that principal is not chargeable with agent's knowledge of mortgage acquired when acting for another principal.

Cited in note in 27 L.R.A. 430, on effect of depositor intrusting examination of returned checks to agent who happens to have forged them.

Impeachment of settled account.

Cited in *Comer v. Mackey*, 73 Hun, 236, 25 N. Y. Supp. 1023; *Ballard v. Beveridge*, 171 N. Y. 194, 63 N. E. 960,—denying right to impeach settled account in absence of fraud; *Ract v. Duviard-Dime*, 21 N. Y. S. R. 736, 4 N. Y. Supp. 156, sustaining right to impeach account stated for misconduct of employee of one party in erroneously including certain items; *Boyce v. Walker*, 130 App. Div. 305, 114 N. Y. Supp. 166; *Gonville v. Shook*, 144 N. Y. 686, 39 N. E. 405,—sustaining right to open settled account for mistake materially affecting result.

Cited in notes in 27 L.R.A. 427, on duty of depositor as to forged checks charged to him by bank; 27 L.R.A. 820, on what constitutes an account stated between banker and depositor; 29 L.R.A. (N.S.) 339, on effect of retaining statement of account to render it an account stated.

29 AM. REP. 180, SHERWOOD v. AGRICULTURAL INS. CO. 73 N. Y. 447.

Avoidance of fire policy, generally.

Cited in note in 14 E. R. C. 30, on rules of construction of contracts of insurance.

—By change in ownership.

Cited in *Trabue v. Dwelling-House Ins. Co.* 121 Mo. 75, 42 A. S. R. 523, 23 L.R.A. 719, 25 S. W. 848 (affirming 49 Mo. App. 331) holding policy forfeited by partition as change of title; *Dacey v. Agricultural Ins. Co.* 21 Hun, 83, holding policy on cows avoided by chattel mortgage subsequently executed in violation of policy; *Benninghoff v. Agricultural Ins. Co.* 93 N. Y. 495, holding policy not avoided ipso facto by transfer of property in violation of terms.

Cited in reference note in 2 A. S. R. 696, on effect of alienation or change in title on insurance policy.

—By death of insured.

Cited in *Miller v. German Ins. Co.* 54 Ill. App. 53; *Pinckneyville Mut. F. Ins. Co. v. Kimmell*, 59 Ill. App. 532,—holding policy personal contract avoided by death of insured; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 74 A. S. R. 161, 55 N. E. 139; *Hardesty v. Forest City Ins. Co.* 77 Ill. App. 413,—holding policy payable to insured or executors not avoided by insured's death.

Cited in note in 28 A. D. 158, on death of person insured as alienation defeating claim for insurance.

Distinguished in *Richardson v. German Ins. Co.* 89 Ky. 571, 8 L.R.A. 800, 13 S. W. 1, holding policy on buildings not avoided by death of insured.

—By failure to furnish proof of loss.

Cited in *Matthews v. American Cent. Ins. Co.* 9 App. Div. 339, 41 N. Y. Supp. 304, holding right to recover on policy forfeited by failure to furnish proofs of loss within required time.

Parties entitled to benefit of policy.

Cited in *Hine v. Woolworth*, 93 N. Y. 75, 45 A. R. 176 (affirming 29 Hun, 84), holding mortgagor, not heirs, insured by policy issued to him payable to mortgagee as interest may appear; *Quarles v. Clayton*, 87 Tenn. 308, 3 L.R.A. 170, 10 S. W. 505, holding that widow having estate in house by virtue of

marriage contract with insured is not entitled to proceeds of policy payable to his heirs, etc.

29 AM. REP. 184, MERRILL v. AGRICULTURAL INS. CO. 73 N. Y. 452.

Representation as to title of insured property.

Cited in *St. Paul F. & M. Ins. Co. v. Neidecker*, 6 Dak. 494, 43 N. W. 696, holding that answer "homestead" made in reply to question as to title does not constitute representation as to absolute ownership within meaning of policy.

Cited in notes in 15 L.R.A. 68, on distinction between "title" and "interest" of applicant for insurance; 13 E. R. C. 334, on necessity to specify interest of insured in property covered.

Encumbrance within meaning of policy.

Cited in *Continental Ins. Co. v. Vanlue*, 126 Ind. 410, 10 L.R.A. 843, 26 N. E. 119, holding that paid but unsatisfied judgment is not encumbrance avoiding policy; *Ampersand Hotel Co. v. Home Ins. Co.* 62 Misc. 116, 115 N. Y. Supp. 1108, holding lien of mortgagee upon real and personal property not an interest within meaning of policy; *Nassauer v. Susquehanna Mut. F. Ins. Co.* 109 Pa. 507, 42 Phila. Leg. Int. 384, holding that mechanics' liens are not encumbrances avoiding policy; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 54 A. S. R. 297, 35 S. W. 428; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 6 A. S. R. 144, 1 L.R.A. 216, 15 Atl. 353,—holding that undischarged mortgage which has been paid is not encumbrance within meaning of policy.

Cited in reference note in 110 A. S. R. 938, on discharge of mortgage by payment of debt secured, without entry of record of satisfaction.

Cited in note in 11 L.R.A. 293, on effect of fire insurance of transfer of property by mortgage.

Severability of contract.

Cited in *Hardin v. Dolge*, 46 App. Div. 416, 61 N. Y. Supp. 753, holding that mortgage covering real and personal property is not invalidated as to former by failure to file; *Uvalde Asphalt Pav. Co. v. New York City*, 128 App. Div. 210, 112 N. Y. Supp. 535, holding municipal contract divisible where plans, specifications and advertisement for bids are for construction of sewer and sewage disposal plant in connection therewith; *Pierson v. Crooks*, 42 Hun, 571, holding vendee of goods entitled to reject inferior part delivered and retain balance; *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255, sustaining right to rescind part of divisible contract for fraud and retain balance.

— Policies.

Cited in *American S. S. Co. v. Indemnity Mut. M. Ins. Co.* 108 Fed. 421, holding policy covering hull and machinery under separate valuations, severable; *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 78 A. S. R. 216, 52 L.R.A. 70, 36 S. E. 821; *McQueeny v. Phenix Ins. Co.* 52 Ark. 257, 20 A. S. R. 178, 5 L.R.A. 744, 12 S. W. 498,—holding policy on two houses entire when gross sum is paid as premium; *Goorberg v. Western Assur. Co.* 150 Cal. 510, 119 A. S. R. 246, 10 L.R.A.(N.S.) 876, 89 Pac. 130, 11 A. & E. Ann. Cas. 841, holding entire policy on building and contents avoided by breach of warranty of title as to building where premium entire; *Thurber v. Royal Ins. Co.* 1 Marv. (Del.) 251, 40 Atl. 1111, holding that policy covering real and personal property is not avoided in toto by breach of condition as to real estate; *Taylor v. Anchor Mut. F. Ins. Co.* 116 Iowa, 625, 93 A. S. R. 261, 57 L.R.A. 328, 88 N. W. 807, holding that policy

covering house, furniture, cattle, etc., is not avoided in toto by chattel mortgage on cattle; *Manchester F. Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759; *Dwelling-House Ins. Co. v. Butterly*, 33 Ill. App. 626; *Havens v. Home Ins. Co.* 111 Ind. 90, 60 A. R. 689, 12 N. E. 137; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 12 A. S. R. 393, 21 N. E. 546; *Nappanee Furniture Co. v. Vernon Ins. Co.* 10 Ind. App. 319, 37 N. E. 1064; *Pratt v. Dwelling-House Mut. F. Ins. Co.* 130 N. Y. 206, 29 N. E. 117; *Donley v. Glens Falls Ins. Co.* 184 N. Y. 107, 76 N. E. 914, 6 A. & E. Ann. Cas. 81 (reversing 100 App. Div. 69, 91 N. Y. Supp. 302); *Merchants' S. S. Co. v. Commercial Mut. Ins. Co.* 19 Jones & S. 444; *Sunderlin v. Aetna Ins. Co.* 18 Hun, 522; *Mott v. Citizens' Ins. Co.* 69 Hun, 501, 23 N. Y. Supp. 400; *King v. Tioga County Patrons Fire Relief Asso.* 35 App. Div. 58, 54 N. Y. Supp. 1057; *Miller v. Delaware Ins. Co.* 14 Okla. 81, 65 L.R.A. 173, 75 Pac. 1121, 2 A. & E. Ann. Cas. 17; *Republic County Mut. F. Ins. Co. v. Johnson*, 69 Kan. 146, 105 A. S. R. 157, 76 Pac. 419, 2 A. & E. Ann. Cas. 20,—holding ing policy severable when separate valuations placed on various subjects of insurance; *Crossam v. Pennsylvania F. Ins. Co.* 133 Mo. App. 537, 113 S. W. 704, holding contract separable where policy insures several amounts upon several and distinct items; *Trabue v. Dwelling-House Ins. Co.* 121 Mo. 75, 42 A. S. R. 523, 23 L.R.A. 719, 25 S. W. 848; *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 A. S. R. 696, 6 L.R.A. 524, 43 N. E. 340,—holding that policy on buildings and personal property severable so that giving of mortgage on land does not avoid policy as to personal property; *Baldwin v. Hartford F. Ins. Co.* 60 N. H. 422, 49 A. R. 324, holding policy on all parcels avoided by alienation of same contrary to terms; *Smith v. Home Ins. Co.* 47 Hun, 30, holding that policy is not avoided in toto for breach of warranty as to one class of property covered; *Dacey v. Agricultural Ins. Co.* 21 Hun, 83; *Woodward v. Republic F. Ins. Co.* 32 Hun, 365,—holding that policy covering numerous articles is not avoided by chattel mortgage on one class; *Kiernan v. Agricultural Ins. Co.* 81 Hun, 373, 30 N. Y. Supp. 892 (reversing on rehearing 72 Hun, 519, 25 N. Y. Supp. 438), holding policy on dwelling and furniture, severable so that docketing of judgment does not avoid same as to furniture; *Schuster v. Dutchess County Ins. Co.* 102 N. Y. 260, 6 N. E. 406, holding policy on dwelling, furniture and other personal property, severable so same is not avoided in toto for breach as to real estate; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.* 1 Misc. 114, 20 N. Y. Supp. 646, 48 N. Y. S. R. 655, holding policy on stock and fixtures, severable so that same not avoided as to stock by chattel mortgage on fixtures; *Knowles v. American Ins. Co.* 66 Hun, 220, 21 N. Y. Supp. 50, holding policy covering crops of hops for various years stored separately, severable; *Tompkins v. Hartford F. Ins. Co.* 22 App. Div. 380, 49 N. Y. Supp. 184, holding policy covering various classes of animals giving valuation of those of each class, severable; *Herrman v. Adriatic F. Ins. Co.* 85 N. Y. 162, 39 A. R. 644, holding policy containing provision that same shall be forfeited if "above mentioned premises" become vacant, severable; *Smith v. Agricultural Ins. Co.* 118 N. Y. 518, 23 N. E. 883, holding that policy on barn and contents for gross sum, is not severable; *Adler v. Germanis F. Ins. Co.* 17 Misc. 347, 39 N. Y. Supp. 1070; *Coleman v. New Orleans Ins. Co.* 49 Ohio St. 310, 34 A. S. R. 565, 16 L.R.A. 174, 31 N. E. 279,—holding policy covering store and goods, severable so that breach of condition as to sole ownership of store does not avoid policy as to goods; *Kelly v. Humboldt F. Ins. Co.* 4 Sadler (Pa.) 99, 6 Atl. 740, 17 Pittsb. L. J. N. S. 234, 45 Phila. Leg. Int. 17, holding policy on two houses entire when consideration paid entire; *Am. Rep. Vol. XVII.—4.*

Roberts, W. & T. Co. v. Lancashire Ins. Co. 13 Tex. Civ. App. 64, 35 S. W. 955; *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. 606,—holding policy covering store and merchandise, divisible so that violation of iron safe clause does not avoid policy on building; *Loomis v. Rockford Ins. Co.* 77 Wis. 87, 20 A. S. R. 96, 8 L.R.A. 834, 45 N. W. 813, holding policy covering three buildings and personal property on three different farms, divisible so that sale of one will not avoid contract; *Connecticut F. Ins. Co. v. Tilley*, 88 Va. 1024, 29 A. S. R. 770, 14 S. E. 851, denying right to recover for loss of houses vacant in violation of policy covering 16 separate houses.

Cited in reference note in 28 A. S. R. 677, on divisibility of insurance contract.

Cited in notes in 74 A. D. 500, on whether insurance policy void as to part of property is void in toto; 38 A. R. 230, on severability of insurance contract where part is void for misrepresentation; 8 L.R.A. 834, on entire and severable contracts of fire insurance; 19 L.R.A. 215, as to severability of insurance in same policy.

What will avoid policy.

Cited in *German Ins. Co. v. York*, 48 Kan. 488, 30 A. S. R. 313, 29 Pac. 586, holding policy not avoided by giving of void deed on property insured.

29 AM. REP. 197, BOYD v. DE LA MONTAGNIE, 73 N. Y. 496.

What communications are privileged.

Cited in *Church of Jesus Christ L. D. S. v. Watson*, 25 Utah, 45, 69 Pac. 531, holding disclosures to spiritual adviser, privileged.

Right to set aside transfer, or compel reconveyance as between the parties.

Cited in *Sistare v. Heckscher*, 15 N. Y. Supp. 737, holding wife's deed to husband's creditor procured by latter by false statement that same was necessary to save husband from financial ruin, properly set aside; *Hayes v. Kerr*, 19 App. Div. 91, 45 N. Y. Supp. 1050, 79 N. Y. S. R. 1050, holding voluntary deed from grantor 84 years old and very ill, properly set aside in equity; *Busch v. Busch*, 12 Daly, 476, holding contract properly set aside for mutual mistake; *Berry v. American Cent. Ins. Co.* 132 N. Y. 49, 28 A. S. R. 548, 30 N. E. 254 (affirming 30 N. Y. S. R. 53, 8 N. Y. Supp. 762, 5 Silv. Sup. Ct. 242), holding insurer's settlement of loss properly set aside where same was induced by fraudulent representation that policy was void; *Grabush v. Goodman*, 16 N. Y. S. R. 910, 1 N. Y. Supp. 864, denying right to set aside assignment of judgment in absence of clear proof of fraud; *Gunderman v. Gunnison*, 39 Mich. 313, sustaining right to compel reassignment of land certificate given as security in absence of proof that assignment was made to defraud; *Girty v. Standard Oil Co.* 1 App. Div. 224, 37 N. Y. Supp. 369 (dissenting opinion), on husband's threat of suicide as duress entitling wife to set aside conveyance to him.

Cited in reference note in 30 A. R. 577, on validity of conveyance by minor to a person in loco parentis on day of majority.

Cited in notes in 7 A. S. R. 588, on relief of grantor from conveyance made to evade law or accomplish unlawful purpose; 1 L.R.A.(N.S.) 1013, on recovery of nonexempt property conveyed to avoid nonexistent or unfounded demand induced by false representations of grantee upon confidential relation to grantor.

—Conveyance made to defraud creditors.

Cited in *Kleeman v. Peltzer*, 17 Neb. 381, 22 N. W. 793, holding transfer by mother to daughter induced by false representation that she would lose in

litigation, properly set aside in equity; *Ingersoll v. Weld*, 103 App. Div. 554, 93 N. Y. Supp. 291, holding woman conveying property to another upon whose judgment she relied confidently in order to prevent law suit, entitled to compel reconveyance; *Phillips v. Bradford*, 147 Ala. 346, 41 So. 657, denying right to cancelation of mortgage given to defraud creditors; *Sloan v. McCartney*, 58 Misc. 75, 108 N. Y. Supp. 840, denying right of heirs of grantor to set aside deed given to defeat creditors; *Harper v. Harper*, 85 Ky. 160, 7 A. S. R. 583, 3 S. W. 5; *O'Conner v. Ward*, 60 Miss. 1025; *Pride v. Andrew*, 51 Ohio St. 405, 38 N. E. 84,—denying right of grantor to compel reconveyance of land deeded away to defeat satisfaction of judgment.

Cited in notes in 34 A. D. 767, on rights of parties to illegal or fraudulent transaction; 3 A. S. R. 745, on sufficiency of bad motive to warrant setting aside conveyance in fraud of creditors.

Burden of showing nature of transaction.

Cited in *Lamb v. Lamb*, 18 App. Div. 250, 46 N. Y. Supp. 219; *Parrett v. Palmer*, 8 Ind. App. 356, 52 A. S. R. 479, 35 N. E. 713,—holding husband taking voluntary transfer from wife bound to show that gift was intended; *Greene v. Greene*, 42 Neb. 634, 47 A. S. R. 724, 60 N. W. 937, holding husband attempting to compel wife to perform contract to convey to him bound to show that contract was based on consideration.

Cited in notes in 33 A. R. 739, on burden of proof as to undue influence in gift from patient to physician; 56 L.R.A. 820, on burden of proof of husband's debt to wife on account of property received from her under married women's acts.

—Fairness.

Cited in *Case v. Case*, 49 Hun, 83, 1 N. Y. Supp. 714; *Hovorka v. Havlik*, 68 Neb. 14, 110 A. S. R. 387, 93 N. W. 990,—holding husband taking gratuitous transfer from wife bound to show that same was fair; *Miskey's Appeal*, 107 Pa. 611, 40 Phila. Leg. Int. 414, 3 Pennyp. 408, holding son taking voluntary deed from intemperate father bound to show want of unfair advantage.

Cited in notes in 11 A. S. R. 759, on presumptions and proof as to fraud between persons in fiduciary relations; 6 E. R. C. 877, on degree of proof necessary on part of one who occupies position of trust or sustains position of legal or natural authority over another, to establish validity of gift or benefit from latter to former of any financial settlement between them.

Presumption as to validity of conveyance.

Cited in *Bell v. Smith*, 83 Hun, 438, 32 N. Y. Supp. 54, holding that deed from grantor who is old and feeble is not presumed to have been given as result or undue influence.

—By wife to husband.

Cited in *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806; *Gibson v. Kueffer*, 69 Kan. 524, 77 Pac. 282; *Livingston v. Hall*, 73 Md. 386, 21 Atl. 49; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907; *Norfleet v. Hawkins*, 93 N. C. 392,—holding gratuitous conveyance by wife to husband presumed to be fraudulent.

Cited in reference note in 110 A. S. R. 392, on requisites for gratuitous transfer of land to husband.

Validity of agreement between husband and wife generally.

Cited in *Daniels v. Benedict*, 38 C. C. A. 592, 97 Fed. 367, holding separation agreement made by husband and wife presumptively valid; *Tallinger v. Mandeville*,

113 N. Y. 427, 21 N. E. 125, holding agreements between husband and wife based on good consideration, valid.

Cited in reference note in 2 A. S. R. 361, on effect of undue influence in conveyances between husband and wife.

Husband as trustee for wife.

Cited in *Re Neiman*, 3 N. B. N. Rep. 872, 109 Fed. 113, holding husband receiving wife's property deemed to hold as trustee for her; *Haack v. Weicken*, 118 N. Y. 67, 23 N. E. 133, holding that husband procuring conveyance of wife's property to himself holds as trustee for her.

Husband's receipt of wife's money as loan.

Cited in *McNally v. Weld*, 30 Minn. 209, 14 N. W. 895, holding husband's receipt of wife's money presumed to be loan, not gift.

Validity of conveyance by married woman.

Cited in *Leach v. Rains*, 149 Ind. 152, 48 N. E. 858, sustaining right of married woman to make conveyance based upon consideration.

29 AM. REP. 200, MEYER v. KNICKERBOCKER L. INS. CO. 73 N. Y. 516.

Duty of insured as to tender of premiums.

Cited in *Beatty v. Mutual Reserve Fund Life Asso.* 21 C. C. A. 227, 44 U. S. App. 527, 75 Fed. 65; *Primeau v. National Life Asso.* 77 Hun. 418, 28 N. Y. Supp. 794; *Supreme Lodge K. H. v. Davis*, 26 Colo. 252, 58 Pac. 595, holding subsequent tenders of premiums unnecessary after wrongful refusal to accept one and claiming policy forfeited; *Grand Lodge A. O. U. W. v. Scott*, 3 Neb. (Unof.) 851, 93 N. W. 190; *Lavin v. Grand Lodge A. O. U. W.* 112 Mo. App. 1, 86 S. W. 600,—holding member of mutual benefit association wrongfully suspended bound to tender payment of premiums and performance of duties; *Doney v. Prudential Ins. Co.* 99 App. Div. 23, 90 N. Y. Supp. 757; *Carey v. John Hancock Mut. L. Ins. Co.* 114 App. Div. 789, 100 N. Y. Supp. 289; *Kenyon v. National Life Asso.* 39 App. Div. 276, 57 N. Y. Supp. 60,—holding that insured is not bound to tender subsequent premiums after illegal forfeiture by insurer; *Reed v. Provident Sav. L. Assur. Soc.* 190 N. Y. 111, 82 N. E. 734, holding assured excused from further tender of premiums by assurance society's refusal to accept.

Cited in reference note in 32 A. S. R. 328, on acknowledgment in policy of premium as estopping insurer to show it unpaid.

Cited in note in 35 A. R. 126, on forfeiture of policy for nonpayment of premium.

Creation of contract by conduct.

Cited in *DeFrece v. National L. Ins. Co.* 136 N. Y. 144, 32 N. E. 556, 48 N. Y. S. R. 909, holding agreement as to payment of premiums inferable from dealing between parties.

Cited in reference note in 31 A. R. 555, on duty of insurance company to notify insured of discontinuance of custom of giving him notice of time when premiums fall due.

Equitable action to preserve or reinstate policy.

Cited in *Wineland v. Knights of the Maccabees*, 148 Mich. 608, 112 N. W. 696; *Bradbury v. Mutual Reserve Fund L. Asso.* 53 N. J. Eq. 306, 31 Atl. 775; *Gray v. Chapter General K. St. J. & M.* 70 App. Div. 155, 75 N. Y. Supp. 267,—sustaining power of equity to prevent wrongful forfeiture of benefit certificate by

association; *Langan v. Supreme Council A. L. H.* 174 N. Y. 266, 66 N. E. 932, sustaining right of holder of benefit certificate to maintain action in equity to preserve contract from effect of by-law reducing amount; *National L. Ins. Co. v. Tullidge*, 39 Ohio St. 246; *Kelly v. Security Mut. L. Ins. Co.* 106 App. Div. 352, 94 N. Y. Supp. 601,—sustaining right of insured to have policy adjudged in force after act of insurer in wrongfully declaring same lapsed.

Cited in note in 68 A. S. R. 61, on relief in equity from forfeiture of insurance policy.

Right to declare forfeiture of policy or mortgage.

Cited in *Kenyon v. Knights Templar & M. Mut. Aid Asso.* 122 N. Y. 247 (affirming 48 Hun, 278), holding insurer estopped to claim forfeiture by conduct leading insured to believe that forfeiture waived; *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 A. R. 787, 6 N. E. 267, holding that policy is not forfeited by surrender by agent without authority, no notice as to nonpayment of premiums being served; *Greenwald v. United L. Ins. Asso.* 18 Misc. 91, 42 N. Y. Supp. 973, denying right of insurer to declare forfeiture for failure to give notice thereof as required by policy; *Atty. Gen. v. Continental L. Ins. Co.* 33 Hun, 138, denying right of insurer to declare policy forfeited for nonpayment of premiums where custom has arisen on part of insurer to give notice of nonpayment and such notice was not served; *French v. Row*, 77 Hun, 380, 28 N. Y. Supp. 849, denying right of mortgagee to declare whole debt for failure to pay interest, where he has been accustomed to receive interest from one to six months after it fell due.

Cited in note in 2 L.R.A. 118, on forfeitures of life insurance.

Waiver of provisions of policy.

Cited in *Appleton v. Phenix Mut. L. Ins. Co.* 59 N. H. 541, 47 A. R. 220; *Hartford Life & Annuity Ins. Co. v. Eastman*, 54 Neb. 90, 74 N. W. 394,—holding provision of policy requiring payment of cash for premiums waived by habitually accepting checks; *Graham v. Security Mut. L. Ins. Co.* 72 N. J. L. 298, 62 Atl. 681, holding that forfeitures are not favored in law; *Hicks v. British America Assur. Co.* 162 N. Y. 284, 48 L.R.A. 424, 56 N. E. 743 (dissenting opinion), on right of insurer repudiating contract to issue policy to demand that insured comply with conditions.

Cited in notes in 11 A. S. R. 724; 39 A. S. R. 320; 59 A. S. R. 669,—on waiver of forfeiture for nonpayment of premium; 40 A. S. R. 105, on waiver of insurance premium; 26 L. ed. U. S. 766, on forfeiture of life insurance policy for nonpayment of premium and waiver thereof; 137 Am. St. Rep. 727, on time within which proof must be furnished.

29 AM. REP. 208, BAYLOR v. DELAWARE, L. & W. R. CO. 40 N. J. L. 23.

Assumption of risk of injury by employee.

Cited in *Foley v. Jersey City Electric Light Co.* 54 N. J. L. 411, 24 Atl. 487, holding risk of injury from absence of step on pole assumed by employee caring for electric lamps.

Cited in notes in 92 A. D. 218, 219, on duty of employer to furnish safe premises and conditions in and under which to work; 17 E. R. C. 239, on liability of master for injuries to servant.

— On railroad.

Cited in *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 13 A. S. R. 84, 4 L.R.A. 710, 6 So. 277, holding risk of injury from overhead bridge not assumed by

brakeman making first trip; *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627, holding railroad liable for injury to brakeman struck by bridge of insufficient height; *Clark v. St. Paul & S. C. R. Co.* 28 Minn. 128, 9 N. W. 581, holding risk of injury from awning near track not assumed by brakeman on freight train; *Gusman v. Caffrey Cent. Refinery & R. Co.* 49 La. Ann. 1264, 22 So. 219; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 A. R. 291; *New York, S. & W. R. Co. v. Marion*, 57 N. J. L. 94, 30 Atl. 316; *Clark v. Richmond & D. R. Co.* 78 Va. 709, 49 A. R. 394; *Williamson v. Newport News & M. Valley Co.* 34 W. Va. 657, 26 A. S. R. 927, 12 L.R.A. 297, 12 S. E. 824,—holding risk of injury from low bridges assumed by brakeman on freight train; *Woodell v. West Virginia Improv. Co.* 38 W. Va. 23, 17 S. E. 386, holding risk of injury assumed by employee working on construction train with notice of danger.

Cited in reference notes in 7 A. S. R. 450, on liability of railroad company for injuries caused by bridge; 13 A. S. R. 93, on railroad company's duty to employee regarding low bridges.

29 AM. REP. 210, VAN RIPER v. PARSONS, 40 N. J. L. 123.

Validity of statutes.

Cited in *State ex rel. Covington v. Thompson*, 142 Ala. 98, 38 So. 679, holding act providing for time of holding general elections, valid; *Crovatt v. Mason*, 101 Ga. 246, 28 S. E. 891, holding act making councilmen of cities ineligible to hold other offices, valid; *Home Bldg. & L. Asso. v. Nolan*, 21 Mont. 205, 53 Pac. 738, holding act containing more than one subject in title, void; *Hutchinson v. State*, 39 N. J. Eq. 569, holding act empowering boards of health to abate nuisances, valid; *Colwell v. Chamberlin*, 43 N. J. L. 387, holding act giving courts jurisdictions of causes to amount of \$200, valid; *State ex rel. Hines v. Essex County*, 45 N. J. L. 504, holding act reducing poll tax valid; *State, Fitzgerald, Prosecutor, v. New Brunswick*, 47 N. J. L. 479, 54 A. R. 182, 1 Atl. 496, holding act prohibiting removal of members of police department for political reasons, valid; *Haring v. State*, 51 N. J. L. 386, 17 Atl. 1079, holding statute making it lawful to keep betting resort, unconstitutional; *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 82, holding act declaring usurious, every loan contract not reduced to writing, valid; *Northern P. R. Co. v. Barns*, 2 N. D. 310, 51 N. W. 386, holding law taxing gross earnings of corporations, valid.

—As local or special legislation.

Cited in *Gray v. McLendon*, 134 Ga. 224, 67 S. E. 859, upholding act relating to suspension and removal of railroad commissioners as not being special law; *People ex rel. Henderson v. Onahan*, 170 Ill. 449, 48 N. E. 1003, holding law relating to selection of jurors is not void because applicable to only one city; *Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915, holding act relating to criminal appeals in cities of certain population, valid; *State, Bingham, Prosecutor, v. Camden*, 40 N. J. L. 156, holding act regulating internal affairs of city, void; *State, Zeigler Prosecutor, v. Gaddis*, 44 N. J. L. 363, holding act giving courts power to license hotels, void where restricted to cities; *State Assessors v. Central B. Co.* 48 N. J. L. 146, 4 Atl. 578, holding act taxing railroad and canal property, valid; *State ex rel. Randolph v. Wood*, 49 N. J. L. 85, 7 Atl. 286, holding act relating to election of councilmen in cities, void as local law; *State ex rel. Rutgers v. New Brunswick*, 42 N. J. L. 51, holding act reapportioning districts for city courts thereby abolishing one court, valid; *State, Trenton Iron Co., Prosecutor, v. Yard*, 42 N. J. L. 357, holding act taxing certain corpora-

tions, valid; *State ex rel. Skinner v. Bogert*, 42 N. J. L. 407, holding act providing that judges mentioned therein shall not draw per diem compensation, valid; *State ex rel. Quin v. Wiedenmayer*, 42 N. J. L. 435, holding act revising taxes in cities, void as special law; *Hudson County v. Buck*, 51 N. J. L. 155, 16 Atl. 698, holding act authorizing certain counties to issue certificates of indebtedness for improvement of highways, void as special statute; *Lodi Twp. v. State*, 51 N. J. L. 402, 6 L.R.A. 56, 18 Atl. 749, holding act relating to maintenance of bridges in certain counties, void; *State, Alexander, Prosecutor, v. Elizabeth*, 56 N. J. L. 71, 23 L.R.A. 525, 28 Atl. 51, holding act licensing race courses, void as special law; *Re Cleveland* 52 N. J. L. 188, 7 L.R.A. 431, 19 Atl. 17, holding act authorizing mayors to appoint certain officials, valid; *State ex rel. Boorum v. Connelly*, 66 N. J. L. 197, 88 A. S. R. 469, 48 Atl. 955, holding act regulating time of election and appointment of officers in cities, valid; *Cincinnati Street R. Co. v. Hortsman*, 72 Ohio St. 93, 73 N. E. 1075, holding that statute relating to operation of street railways in city is not void as local act; *Guthrie Daily Leader v. Cameron*, 3 Okla. 677, 41 Pac. 635, holding act conferring rights upon state printing company, void as special legislation; *Ladd v. Holmes*, 40 Or. 167, 91 A. S. R. 457, 66 Pac. 714, holding that primary election law is not void as local legislation; *Groves v. County Ct.* 42 W. Va. 587, 26 S. E. 460, holding act providing for relocation of county seat, void as special law; *Standard Cattle Co. v. Baird*, 8 Wyo. 144, 56 Pac. 598, holding that act assessing cattle on open range is not void as local statute; *Van Cleve v. Passaic Valley Sewerage Comrs.* 71 N. J. L. 183, 58 Atl. 571, sustaining validity of act creating sewerage district; *Anderson v. Ritterbusch*, 22 Okla. 761, 98 Pac. 1002, holding act of general nature passed for whole state and not applied by legislature to any particular locality, "act having uniformity of operation;" *Bronson v. Oberlin*, 41 Ohio St. 476, 52 A. R. 90, sustaining validity of act authorizing college towns to prohibit sales of intoxicating liquors; *State ex rel. Brumsted v. Govern*, 47 N. J. L. 368, 1 Atl. 835 (dissenting opinion), on validity of local act; *McGill v. State*, 34 Ohio St. 228 (dissenting opinion), on validity of act relating to selection of jurors in certain county.

Cited in notes in 12 A. S. R. 716, on general or local application of statute; 21 A. S. R. 782, 785, on what is a general law.

Repeal of part or whole of act.

Cited in *Wallace v. Bradshaw*, 54 N. J. L. 175, 23 Atl. 759, holding original act revived by repeal of repealing statute; *Fielder v. State*, 40 Tex. Crim. Rep. 184, 49 S. W. 376, sustaining power of legislature to repeal definite portion of act without re-enactment of balance.

Amendment of statute.

Cited in *Montclair Twp. v. New York & G. L. R. Co.* 45 N. J. Eq. 436, 18 Atl. 242; *State v. American Forcite Powder Mfg. Co.* 50 N. J. L. 75, 11 Atl. 127,—holding that amendatory statute is not required to set out statute amended.

29 AM. REP. 214, STEFFENS v. EARL, 40 N. J. L. 128.

Duration of term of lease.

Cited in *State, Shaw, Prosecutor, v. Schietinger*, 51 N. J. L. 152, 16 Atl. 186; *Decker v. Hartshorne*, 65 N. J. L. 87, 46 Atl. 755,—holding monthly tenancy presumed to be created by payment of rent monthly; *Wilson v. Taylor*, 8 Daly, 253; *Spies v. Voss*, 16 Daly, 171, 9 N. Y. Supp. 532; *Albey v. Weingart*, 71 N. J. L. 92, 58 Atl. 87,—holding character of tenure under lease determined by

interval of payments when no time mentioned; *Douglass v. Seiferd*, 18 Misc. 188, 41 N. Y. Supp. 289, holding term indefinite under hiring "at rate of" specified sum per month.

Cited in note in 15 E. R. C. 615, on when rent payable quarterly is due.

Length of notice to quit.

Cited in *Stewart v. Murrell*, 65 Ark. 471, 47 S. W. 130, holding month's notice to end monthly tenancy required by common law; *Drey v. Doyle*, 28 Mo. App. 249, holding tenant of building in city holding over entitled to month's notice to quit; *Condon v. Barr*, 47 N. J. L. 113, 54 A. R. 121; *Baker v. Kenny*, 69 N. J. L. 180, 54 Atl. 526,—holding month's notice necessary to terminate tenancy from month to month; *Hanks v. Workmaster*, 75 N. J. L. 73, 66 Atl. 1097, holding that neither landlord nor tenant can terminate such tenancy except upon proper notice.

Cited in notes in 42 A. D. 126, on right of tenants from year to year to notice to quit; 42 A. D. 129, on necessity of notice to quit to tenancies from month to month or shorter intervals; 42 A. D. 130, on necessity of notice to quit where demise is for a fixed term; 15 E. R. C. 625, on when notice to quit is necessary to terminate tenancy.

Service of notice to quit.

Cited in *Searle v. Powell*, 89 Minn. 278, 94 N. W. 868, holding notice served on monthly tenant to quit day following date of end of monthly term, insufficient; *Leahy v. Lubman*, 67 Mo. App. 191, holding notice to quit monthly tenancy on June 30th, served May 31st, sufficient; *Finkelstein v. Herson*, 55 N. J. L. 217, 26 Atl. 688; *State, Waters, Prosecutor, v. Williamson*, 59 N. J. L. 337, 36 Atl. 665,—holding notice to quit on certain date ineffective in absence of proof that monthly tenancy expired on that day; *McClung v. McPherson*, 47 Or. 73, 82 Pac. 13, holding grantee of demised premises entitled to give notice to quit; *Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549, holding that notice to quit is not rendered ineffectual by giving monthly tenant all of first day of succeeding month to vacate; *Feater v. King*, 35 Wash. 138, 76 Pac. 688, holding notice to terminate monthly tenancy on Dec. 23d, served Dec. 2nd, in time.

Liability of tenant holding over.

Cited in *Byxbee v. Blake*, 74 Conn. 607, 57 L.R.A. 222, 51 Atl. 535, holding monthly tenant liable for rent of ensuing month by holding over any month.

Cited in note in 120 A. S. R. 44, on holding after expiration of tenancy from month to month as unlawful detainer.

Validity of contract made on Sunday.

Cited in *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. 252; *Newbury v. Luke*, 68 N. J. L. 189, 52 Atl. 625,—holding contract made on Sunday, void.

29 AM. REP. 219, SCHOMP v. SCHENCK, 40 N. J. L. 195.

Validity of contract as to attorney's fees.

Cited in *Cubberly v. Cubberly*, 33 N. J. Eq. 82; *Hassell v. Van Houten*, 39 N. J. Eq. 105,—holding contract giving attorney paying expenses half of recovery, valid; *Colgan v. Jones*, 44 N. J. Eq. 274, 18 Atl. 55, holding client's assignment to attorney of part of recovery in negligence action, void as to excess above reasonable fee; *Lynde v. Lynde*, 64 N. J. Eq. 736, 97 A. S. R. 692, 58 L.R.A. 471, 52 Atl. 694, holding contract between woman and attorney giving latter portion of alimony recovered in divorce action, void; *Terney v. Wilson*, 45 N. J. L. 282, holding agreement to give attorney lien on judgment to be recovered, valid;

Voorhees v. Barr, 59 N. J. L. 123, 35 Atl. 651, holding contract to pay attorney certain fees, valid; *Shreve v. Freeman*, 44 N. J. L. 78; *Waldron v. Angleman*, 71 N. J. L. 166, 58 Atl. 568,—holding agreement between attorney and client to prosecute action for part of recovery, valid; *Porter v. Bergen*, 54 N. J. Eq. 405, 34 Atl. 1067, holding security taken by lawyer from client, valid only to extent of fees justly due.

Cited in notes in 27 A. R. 320, on champerty; 13 A. S. R. 299, as to what contracts of attorneys are void as against public policy; 83 A. S. R. 169, on champerty, barratry, and maintenance; 4 L.R.A. 113, on champerty and maintenance; 6 E. R. C. 390, on validity of agreements of champerty and maintenance.

Right of attorney to fees.

Cited in *Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611, sustaining right of solicitor to charge client reasonable fee without express contract relating thereto; *Bentley v. Fidelity & D. Co.* 75 N. J. L. 828, 127 A. S. R. 837, 69 Atl. 202, 15 A. & E. Ann. Cas. 1178; *McCrea v. Stierman*, 76 N. J. L. 394, 69 Atl. 1008; *Hopper v. Ludlum*, 41 N. J. L. 182,—denying right to maintain action for attorney's fees in absence of contract fixing same.

Cited in note in 127 Am. St. Rep. 850, 854, on attorney's right to recover compensation.

Adoption of law of champerty and maintenance.

Cited in *Bigelow v. Old Dominion Copper Min. & Smelting Co.* 74 N. J. Eq. 457, 71 Atl. 153; *Bouvier v. Baltimore & N. Y. R. Co.* 67 N. J. L. 281, 60 L.R.A. 750, 51 Atl. 781; *Weller v. Jersey City, H. & P. Street R. Co.* 66 N. J. Eq. 11, 57 Atl. 730,—holding that law of maintenance and champerty forms no part of law of New Jersey.

29 AM. REP. 224, RAHWAY v. CROWELL, 40 N. J. L. 207.

Liability of surety on bond of officer holding over.

Cited in *Brewer v. King*, 63 Ala. 511, holding sureties on tax collector's bond not liable for defalcations during period of extension of term of office by statute; *People use of Logan County v. Toomey*, 122 Ill. 308, 13 N. E. 521, holding sureties on bond of county clerk whose term is fixed not liable for default while holding over; *Hewes v. People*, 48 Ill. App. 439, holding sureties on bond of officer holding over, liable for reasonable time for selection of successor; *State v. Powell*, 40 La. Ann. 241, 4 So. 447, holding liability of surety not extended by provisions of law that officer continues in office until his successor qualifies; *Scott County v. Ring*, 29 Minn. 398, 13 N. W. 181, holding sureties on treasurer's bond for one term not liable for defalcations after re-election; *People's Bldg. & L. Asso. v. Wroth*, 43 N. J. L. 70; *Camden v. Greenwald*, 65 N. J. L. 458, 47 Atl. 458,—holding surety on bond containing words so long as principal shall continue in office, liable for default after expiration of term; *Baker City v. Murphy*, 30 Or. 405, 35 L.R.A. 88, 42 Pac. 133, holding surety liable for defalcation of officer while holding over pending election of successor.

Cited in reference note in 10 A. S. R. 857, on liability of sureties on successive bonds.

Cited in notes in 103 A. S. R. 936, on liability of sureties on official bond where statute provides for liability "until successor appointed;" 35 L.R.A. 91, on extension of liability on official bond while officer is holding over after expiration of term under provision for liability until successor is appointed.

Discharge of surety on official bond.

Cited in *White v. East Saginaw*, 43 Mich. 567, 6 N. W. 86, holding surety on official bond discharged by enactment of statute increasing duties of principal.

Cited in reference note in 34 A. S. R. 898, as to when liability of sureties on official bonds ceases.

29 AM. REP. 230, CITIZENS' LOAN ASSO. v. NUGENT, 40 N. J. L. 215.**Liability of sureties on official or fidelity bond.**

Cited in *Ida County Sav. Bank v. Seidensticker*, 128 Iowa, 54, 111 A. S. R. 189, 102 N. W. 821, 5 A. & E. Ann. Cas. 945; *Wapello State Sav. Bank v. Colton*, 133 Iowa, 147, 11 L.R.A.(N.S.) 793, 110 N. W. 450,—holding surety on bond of cashier employed for definite term discharged by appointment to serve at pleasure of bank trustees; *White v. East Saginaw*, 43 Mich. 567, 6 N. W. 86, holding surety on official bond discharged by enactment of statute increasing duties of principal.

—After expiration of term.

Cited in *Brewer v. King*, 63 Ala. 511, holding sureties on tax collector's bond not liable for defalcations during period of extension of term of office by statute; *Bonnéy v. Robertson*, 6 Colo. App. 485, 41 Pac. 842; *Thomssen v. Hall County*, 63 Neb. 777, 57 L.R.A. 303, 89 N. W. 389,—holding sureties on treasurer's bond not liable for default after re-election; *People's Bldg. & L. Asso. v. Wroth*, 43 N. J. L. 70, holding surety on bond containing words so long as principal shall continue in office, liable for default after expiration of term.

Cited in reference notes in 37 A. R. 449, on continuance of suretyship by re-election of principal.

Cited in notes in 1 L.R.A. 118, on liability of sureties for second term for delinquencies of first term; 34 A. S. R. 898, as to when liability of sureties on official bonds ceases; 24 A. S. R. 526, on cashier's bond as covering continuing liability.

29 AM. REP. 233, BITZ v. MEYER, 40 N. J. L. 252.**Basis of action for malicious prosecution.**

Cited in *Brand v. Hinchman*, 68 Mich. 590, 13 A. S. R. 362, 36 N. W. 664, holding arrest unnecessary to give right of action for malicious prosecution.

Cited in reference note in 67 A. S. R. 247, on arrest or interference with property as essential element of malicious prosecution.

Cited in notes in 93 A. S. R. 468, on seizure of person or property as essential to liability for malicious prosecution of civil action; 2 L.R.A.(N.S.) 1101, on effect of lack of jurisdiction of court in which malicious prosecution is begun upon right to maintain action therefor.

—Civil action.

Cited in *Paul v. Fargo*, 84 App. Div. 9, 82 N. Y. Supp. 369, holding that civil action brought maliciously is no basis for action for malicious prosecution; *Abbott v. Thorne*, 34 Wash. 692, 101 A. S. R. 1021, 65 L.R.A. 826, 76 Pac. 302; *Wetmore v. Mellinger*, 64 Iowa, 741, 52 A. R. 465, 18 N. W. 870; *Luby v. Bennett*, 111 Wis. 613, 87 A. S. R. 897, 56 L.R.A. 261, 87 N. W. 804,—holding that civil action not inflicting special injury will not sustain action for malicious prosecution; *Tamblyn v. Johnston*, 62 C. C. A. 601, 126 Fed. 267, sustain-

ing right to base action for malicious prosecution on attachment based on lawful debt but brought for sole purpose of injury; *Wade v. National Bank*, 114 Fed. 377, sustaining right to maintain action for malicious prosecution for injuries to reputation and business caused by false allegations in complaint in civil action maliciously; *Pope v. Pollock*, 46 Ohio St. 367, 15 A. S. R. 608, 4 L.R.A. 255, 21 N. E. 356, sustaining right to maintain action for malicious prosecution based on action of forcible entry and detainer maliciously instituted; *Lipscomb v. Shofner*, 96 Tenn. 112, 33 S. W. 818, sustaining right to base action for malicious prosecution on civil suit brought maliciously resulting in actual injury; *Smith v. Michigan Buggy Co.* 175 Ill. 619, 67 A. S. R. 242, 51 N. E. 569, denying right to base action for malicious prosecution on issuance of summons without arrest; *Supreme Lodge A. P. L. v. Unverzagt*, 76 Md. 104, 24 Atl. 323, denying right of corporation to maintain action for damages for malicious prosecution of action for dissolution.

Cited in note in 93 A. S. R. 455, on liability for malicious prosecution of civil action.

Right to damages for action brought in good faith.

Cited in *McFadden v. Whitney*, 51 N. J. L. 391, 18 Atl. 62, denying right to maintain action for damages for attachment brought by creditor in good faith.

Right to damages on dismissal of proceedings.

Cited in *Andrus v. Bay Creek R. Co.* 60 N. J. L. 10, 36 Atl. 826, denying right of landowner to recover attorney's fees from railroad company abandoning condemnation proceedings.

Cited in note in 93 A. S. R. 462, on effect of dismissal of civil action on liability for malicious prosecution.

29 AM. REP. 237, KNAUS v. JENKINS, 40 N. J. L. 288.

Submission to arbitration as bar to action.

Cited in *Alford v. Tiblier*, *McGloin* (La.) 151, holding that party agreeing to arbitrate differences is not entitled to appeal to court before submission; *Savage v. Glenn*, 10 Or. 440, holding that unexecuted agreement to arbitrate is no defense to action; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366, holding submission to arbitration under court order, bar to action.

Cited in note in 56 A. D. 383, on agreement to submit to arbitration as defense.

Revocation of submission to arbitration.

Cited in *Harrison v. Hartford F. Ins. Co.* 112 Iowa, 77, 83 N. W. 820, holding independent agreement to arbitrate revoked by commencing action on policy; *Jones v. Harris*, 58 Miss. 293, holding that submission to arbitration is not revoked by bringing action.

Cited in notes in 31 L.R.A.(N.S.) 680, on bringing suit before award as revocation of submission to arbitration; 3 E. R. C. 371, on right to revoke arbitration.

29 AM. REP. 242, MAXWELL v. GOETSCHUIS, 40 N. J. L. 383.

Powers of legislature.

Cited in *State, Aldridge, Prosecutor, v. Essex Public Road Board*, 51 N. J. L. 166, 16 Atl. 695, denying power of legislature to authorize levy of further assessment against other lands of same owners paying one assessment for improvement; *Rutgers College v. Morgan*, 70 N. J. L. 460, 57 Atl. 250, sustaining power of legislature to establish free public educational institution; *Moore v.*

State, 43 N. J. L. 203, 39 A. R. 558, holding statute authorizing punishment of one for act barred by existing statutes, void.

—To validate void decree or assessment.

Cited in *Ross v. Lettice*, 134 Ga. 866, 68 S. E. 734, holding act which creates new obligation and imposes new duty in respect to transactions or considerations already past retroactive; *Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227, holding act validating void levy of tax, unconstitutional; *Re Christiansen*, 17 Utah, 412, 70 A. S. R. 794, 41 L.R.A. 504, 53 Pac. 1003, holding act validating void divorce decree, void; *Wells, F. & Co. v. Clarkson*, 5 Mont. 336, 5 Pac. 894, denying power of legislature to validate void decree; *State, Peckham, Prosecutor, v. Newark*, 43 N. J. L. 576, denying power of legislature to validate void assessment; *Johnson v. State*, 59 N. J. L. 535, 38 L.R.A. 373, 39 Atl. 646 (dissenting opinion), on validity of statute validating void proceedings.

Cited in note in 37 A. R. 398, on acts which may be ratified by state.

Remainderman as party to partition.

Cited in *Gayle v. Johnston*, 80 Ala. 395, holding remaindermen necessary, parties to partition by life tenant.

Cited in note in 113 A. S. R. 56, on partition of estates held in reversion or remainder without partition of life estate.

29 AM. REP. 251, *GRISCOM v. EVENS*, 40 N. J. L. 402.

Extrinsic evidence to explain instrument.

Cited in *Wills v. McKinney*, 41 N. J. L. 120, denying admissibility of parol evidence to explain sheriff's return as to extent of property levied on.

—Will.

Cited in *Gilmore v. Jenkins*, 129 Iowa, 686, 106 N. W. 193, 6 A. & E. Ann. Cas. 1008, holding parol evidence admissible to explain will; *Burnet v. Burnet*, 30 N. J. Eq. 595; *Barnard v. Barlow*, 50 N. J. Eq. 131, 24 Atl. 912,—holding parol evidence of circumstances surrounding testator at time of death, admissible to explain will; *Zabriskie v. Huyler*, 62 N. J. Eq. 697, 51 Atl. 197, holding evidence of testator's directions to attorney drawing will, inadmissible to explain provisions; *Crosson v. Carr*, 70 N. J. L. 393, 57 Atl. 158, holding extrinsic evidence admissible to explain devise of house where one intended uncertain.

Cited in reference note in 78 A. D. 93, on contradicting or varying wills by parol evidence; 6 L.R.A. 324; 46 A. R. 72, 75,—on admissibility of parol evidence to identify land described in devise; 30 A. R. 717; 3 L.R.A. 849,—on admissibility of extrinsic evidence to explain ambiguities in will; 50 A. S. R. 280, 284, 285, on extrinsic evidence to explain wills; 50 A. S. R. 281, on admissibility of extrinsic evidence to show intention of testator; 50 A. S. R. 287, on extrinsic evidence to identify beneficiary under will; 6 L.R.A.(N.S.) 965, on declarations as showing testator's intention in describing land in will; 6 L.R.A.(N.S.) 966, on testator's relations, environment, and estate as affecting misdescription of land in will; 6 L.R.A.(N.S.) 959, on boundaries and area of land devised in will misdescribing the land; 14 E. R. C. 815, as to what lands will pass by deed or will under general description with addition of words particularly denoting certain subject comprised in general description.

Error in part as affecting whole.

Cited in *American Surety Co. v. Great White Spirit Co.* 58 N. J. Eq. 526, 43 Atl. 579, holding that act is not invalidated by superfluous matter which is

erroneous; *Kanouse v. Slockbower*, 48 N. J. Eq. 42, 21 Atl. 197, holding words of description of land devised which are only partially true, properly rejected.

29 AM. REP. 262, FIRST NAT. BANK v. CHRISTOPHER, 40 N. J. L. 435.

Notice or knowledge of agent, as imputable to principal.

Cited in *Willard v. Denise*, 50 N. J. Eq. 482, 35 A. S. R. 788, 26 Atl. 29, holding principal not chargeable with notice casually obtained by agent.

Cited in notes in 10 L.R.A. 706, on exception to rule as to imputation of agent's knowledge to principal; 10 L.R.A. 705, on notice to agent as notice to principal.

—Corporation generally.

Cited in *Lindsey v. Lambert Bldg. & L. Asso.*, 4 Fed. 48; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773; *Whittle v. Vanderbilt Min. & Mill. Co.* 28 C. C. A. 276, 55 U. S. App. 242, 83 Fed. 48,—holding corporation not bound by knowledge of agent dealing adversely to it; *Clark v. Marshall*, 62 N. H. 498, holding grantee corporation not chargeable with agent's knowledge of grantor's intention to defraud creditors; *Lindsey v. Lambert Bldg. & L. Asso.* 11 Pittsb. L. J. N. S. 75, 37 Phila. Leg. Int. 426, holding corporation not bound by knowledge of acts of officer in matter in which he acts for himself.

Cited in reference note in 32 A. R. 480, on notice to president of transfer of stock as notice to corporation.

Cited in notes in 36 A. D. 192, on knowledge possessed by officer dealing with corporation; 36 A. D. 196, 198, on notice to directors as a body as notice to corporation; 2 L.R.A.(N.S.) 994, on how far corporation is charged with knowledge of managing officers engaged in illegal act.

—Bank.

Cited in *Hohn v. Atlas Nat. Bank*, 28 C. C. A. 297, 55 U. S. App. 570, 84 Fed. 119, holding bank not chargeable with notice of infirmity in note because its vice-president was secretary of corporation discounting same; *School Dist. v. DeWeese*, 100 Fed. 705, holding bank not chargeable with notice of cashier's misappropriation of funds while acting as agent for third party in individual capacity; *Curtice v. Crawford County Bank*, 110 Fed. 830, holding bank not chargeable with knowledge of cashier pledging own stock to bank as security for personal debt; *McCalmont v. Lanning*, 84 C. C. A. 138, 154 Fed. 353, holding bank not chargeable with president's knowledge of fraud in inception of note discounted; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 A. R. 710, 1 N. E. 282, holding bank not bound by director's knowledge of fraud acquired when acting in individual capacity; *Koehler v. Dodge*, 31 Neb. 328, 23 A. S. R. 518, 47 N. W. 913; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, 58 N. W. 734, holding bank not chargeable with knowledge of agent acquired while acting in individual capacity; *Lanning v. Johnson*, 75 N. J. L. 259, 69 Atl. 490, holding knowledge of illegality or want of consideration of note by president of bank who discounts it not imputable to bank; *Shand v. Rowan*, 33 S. C. 451, 10 L.R.A. 705, 12 S. E. 165, holding knowledge of depositor's insolvency acquired by officer of bank when acting as attorney for former not imputable to bank; *First Nat. Bank v. Briggs*, 70 Vt. 594, 67 A. S. R. 691, 41 Atl. 580, holding bank not chargeable with notice of conditions attaching to notes of its officers; *National Bank v. Young*, 41 N. J. Eq. 531, 7 Atl. 488, on bank as bound by knowledge of officer.

Cited in note in 29 L.R.A. (N.S.) 561, on imputation of knowledge of personally interested officers to bank.

— **Loan association.**

Cited in *Sudbury v. Merchantville Bldg. & L. Asso.* 57 N. J. Eq. 342, 38 Atl. 420, holding loan association not chargeable with notice of mortgage because borrower who knew of same was director therein.

Principal as bound by agent's acts.

Cited in *National Bank v. Munger*, 36 C. C. A. 659, 95 Fed. 87, holding bank permitting agent of depositor to have latter's money transferred to concern in which agent interested, chargeable with agent's want of authority; *First Nat. Bank v. Drake*, 35 Kan. 564, 57 A. R. 193, 11 Pac. 445, holding that national bank is not bound by act of directors acting as individuals.

— **Fraud.**

Cited in *State Sav. Bank v. Montgomery*, 126 Mich. 327, 85 N. W. 879, holding that bank is not bound by cashier's fraud when representing maker of notes; *Fisher v. National Bank*, 48 N. J. L. 390, 57 A. R. 561, 4 Atl. 444, holding that bank of which trustee of bonds is cashier is not bound by his fraud in pledging bonds as security for own debt; *Vulcan Detinning Co. v. American Can Co.* 70 N. J. Eq. 588, 62 Atl. 881, holding corporation liable for fraud of agent employed to procure secret process from another; *Commercial Bank v. Burgwyn*, 110 N. C. 267, 17 L.R.A. 326, 14 S. E. 623; *Gunster v. Scranton Illuminating Heating & P. Co.* 181 Pa. 327, 59 A. S. R. 650, 37 Atl. 550,—holding that bank is not chargeable with fraud committed by its officer as treasurer of drawer of check.

Corporate directors as agents.

Cited in *Peirce v. Morse-Oliver Bldg. Co.* 94 Me. 406, 47 Atl. 914; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261,—holding that director of corporation is not agent except when acting as member of board.

29 AM. REP. 266, PELL v. NEWARK, 40 N. J. L. 550.

Validity of statutes as special or local legislation.

Cited in *Carpenter v. People*, 8 Colo. 116, 5 Pac. 828, holding that act amending city charter is not void as special legislation; *Burnet v. Dean*, 60 N. J. Eq. 9, 46 Atl. 532, holding act making unpaid taxes in certain districts lien on real estate, void as special law; *State ex rel. Rutgers v. New Brunswick*, 42 N. J. L. 51, holding that act establishing courts according to population is not void because one court thereby abolished; *State, Anderson, Prosecutor, v. Trenton*, 42 N. J. L. 486, holding act empowering certain cities to issue bonds, void; *State, Zeigler, Prosecutor, v. Gaddis*, 44 N. J. L. 363, holding act giving certain courts power to license hotels in certain towns, void; *State, Long Branch Police, Prosecutor, v. Sloane*, 49 N. J. L. 356, 8 Atl. 101, holding act providing for formation of borough government, void as special legislation; *State, Alexander, Prosecutor, v. Elizabeth*, 56 N. J. L. 71, 23 L.R.A. 525, 28 Atl. 51, holding statute regulating race courses, void as special act; *State, Lawthorpe, Prosecutor v. Trenton*, 61 N. J. L. 484, 40 Atl. 442, holding act regulating internal affairs of town, void; *Hermann v. Guttenberg*, 63 N. J. L. 616, 44 Atl. 758, holding statute providing for funding of town debts for local improvements, valid as general law; *Van Cleve v. Passaic Valley Sewerage Comrs.* 71 N. J. L. 183, 58 Atl. 571, holding act establishing sewer district, valid; *Howe v. Board of Education*, 72 N. J. L. 158, 60 Atl. 518, holding

act creating certain school districts, valid; *Terry v. King County*, 43 Wash. 61, 86 Pac. 210, 9 A. & E. Ann. Cas. 1170, holding act empowering certain cities to borrow money for erection of armories, void as special legislation.

Cited in reference note in 64 A. S. R. 615, on special and general statutes relating to municipal corporations.

Construction of words in statutes.

Cited in *Stout v. Glen Ridge*, 59 N. J. L. 201, 35 Atl. 913, holding towns not included in statute relating to incorporation of cities.

— Word "town."

Cited in *Broome, Prosecutor, v. New York & N. J. Teleph. Co.* 49 N. J. L. 624, 9 Atl. 754, holding townships included in term "towns" used in statute regulating telegraph companies; *State, Henderson, Prosecutor, v. Court of Common Pleas*, 41 N. J. L. 495; *State, Brown, Prosecutor, v. Union*, 62 N. J. L. 142, 40 Atl. 632, holding municipal bodies less than counties included in term "town;" *Bliss v. Woolley*, 68 N. J. L. 51, 52 Atl. 835, holding sanitary district "town" within election law; *State, Banta, Prosecutor, v. Richards*, 42 N. J. L. 497, holding act authorizing towns to levy taxes is inapplicable to townships; *Millville Improv. Co. v. Pitman, G. & C. Gas Co.* 75 N. J. L. 410, 67 Atl. 1005, holding that word "town" includes townships.

29 AM. REP. 271, FRANKLIN F. INS. CO. v. MARTIN, 40 N. J. L. 568.

Who has insurable interest in property.

Cited in *Lowenthal v. Home Ins. Co.* 112 Ala. 108, 57 A. S. R. 17, 33 L.R.A. 258, 20 So. 419, holding that contract vendee of land in default as to part of purchase price has insurable interest; *Carson v. Jersey City Ins. Co.* 43 N. J. L. 300, 39 A. R. 584, holding that owner of legal title has insurable interest; *Trade Ins. Co. v. Barracliff*, 45 N. J. L. 543, 46 A. R. 792, holding that husband living with wife on latter's property has insurable interest therein; *Barnard v. National F. Ins. Co.* 27 Mo. App. 26; *Grunauer v. Westchester F. Ins. Co.* 72 N. J. L. 289, 3 L.R.A.(N.S.) 107, 62 Atl. 418; *Johannes v. Standard Fire Office*, 70 Wis. 196, 5 A. S. R. 159, 35 N. W. 298,—holding that contract vendee of land has insurable interest in buildings

Cited in reference notes in 32 A. S. R. 506, on what constitutes insurable interest; 67 A. S. R. 813, on what constitutes insurable interest in property.

Cited in notes in 20 A. D. 513, on insurable interest of vendor and vendee; 20 L.R.A.(N.S.) 777, on vendee under land contract as owner within meaning of insurance policy.

Insurer as bound by act of or notice to agent.

Cited in *Marston v. Kennebec Mut. L. Ins. Co.* 89 Me. 266, 56 A. S. R. 412, 36 Atl. 389, holding insurer bound by mistakes in preparation of policy by agent who is made by statute to stand in place of company; *Spalding v. New Hampshire F. Ins. Co.* 71 N. H. 441, 52 Atl. 858, holding insurer estopped to avoid policy for other insurance by agent's issuance of policy with knowledge of such insurance; *Martin v. Jersey City Ins. Co.* 44 N. J. L. 273, holding insurer estopped to avoid policy for increase of risk where policy renewed by officer knowing that additions were being made to buildings; *Medley v. German Alliance Ins. Co.* 55 W. Va. 342, 47 S. E. 101, 2 A. & E. Ann. Cas. 99, holding company bound by waiver of conditions by agent intrusted with blank policies with authority to fill out; *Northern Assur. Co. v. Grand View*

Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; *Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co.* 11 Okla. 585, 69 Pac. 938,—denying right of insurer to take advantage of waiver of condition in absence of proof of authority of agent to waive same.

Cited in notes in 26 A. R. 372, 373, on insurer's waiver of conditions in policy by reason of agent's knowledge of facts; 16 L.R.A. 33, on effect of knowledge by insurer's agent of falsity of statements in application; 67 L.R.A. 706, on retention of insurance policy as waiver of mistake or fraud of the insurer or its agent.

Distinguished in *Flynn v. Equitable L. Ins. Co.* 78 N. Y. 568, 34 A. R. 561, holding insurance company bound by act of agent in changing answers in application so as to be untrue.

What will avoid policy.

Cited in *Vivar v. Supreme Lodge, K. of P.* 52 N. J. L. 455, 20 Atl. 36, holding life policy avoided by false reply made in answer to question by insurer; *Dimick v. Metropolitan L. Ins. Co.* 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291 (reversing 67 N. J. L. 367, 51 Atl. 692), holding life policy avoided by untrue answers entered by solicitor and signed by applicant; *Shotliff v. Modern Woodmen*, 100 Mo. App. 138, 73 S. W. 326, denying right to declare forfeiture of policy for erroneous answer made upon advice of medical examiner who was officer in company; *Martin v. State Ins. Co.* 44 N. J. L. 485, 43 A. R. 397, holding policy describing property as boarding house not avoided by proof that portion is occupied as bar and billiard room.

—Vacancy.

Cited in *Connecticut F. Ins. Co. v. Buchanan*, 4 L.R.A.(N.S.) 758, 73 C. C. A. 111, 141 Fed. 877; *Riple v. Boston Ins. Co.* 92 Minn. 337, 100 N. W. 8, holding terms "occupied as dwelling," warranty avoiding policy if building vacant when policy issued.

Parol evidence to vary written instrument.

Cited in *Ellison v. Gray*, 55 N. J. Eq. 581, 37 Atl. 1018, holding parol proof inadmissible in absence of fraud to vary terms of written contract; *Atlas Reduction Co. v. New Zealand Ins. Co.* 9 L.R.A.(N.S.) 433, 71 C. C. A. 21, 138 Fed. 497 (dissenting opinion), on admissibility of parol proof to vary terms of policy.

Cited in notes in 16 L.R.A.(N.S.) 1195, on grounds for relaxation of parol evidence rule as to varying or contradicting written contract for purpose of avoiding forfeiture in insurance policy; 16 L.R.A.(N.S.) 1179, on parol evidence rule as to varying or contradicting written contracts, as applied to policies of insurance; 16 L.R.A.(N.S.) 1171, on distinction between action at law and action in equity in respect to parol evidence rule as to varying or contradicting written contracts, as applied to policies of insurance.

39 AM. REP. 282, HURFF v. HIRES, 40 N. J. L. 581.

Sale of part of mass.

Cited in *Kingman v. Holmquist*, 36 Kan. 735, 59 A. R. 604, 14 Pac. 168, holding separation not essential to transfer title of certain number of articles sold from ascertained lot which are identical in kind and value; *Nash v. Brewster*, 39 Minn. 530, 2 L.R.A. 409, 41 N. W. 105, holding that measuring of quantity of grain sold and separation from mass is not necessary to pass title where purchaser entitled to remove amount purchased; *Hostetter v.*

Brooks Elevator Co. 14 N. D. 357, 61 N. W. 49, holding that want of separation from mass, of seed sold, will not prevent passing of title where property identified.

Cited in reference notes in 29 A. R. 418, on necessity for separation to pass title to part of mass; 52 A. S. R. 521, on separation of articles of same quality sufficient to pass property.

Cited in notes in 26 L.R.A.(N.S.) 4, 9, 16, 56, 61, 64, 68, on sufficiency of selection or designation of goods sold out of larger lot; 23 E. R. C. 256, on passing of title by sale of unascertained chattels.

Replevin for portion of mass.

Cited in *Adams v. Thornton*, 5 Cal. App. 455, 90 Pac. 713, sustaining right of cropper to maintain replevin for share of produce readily devisable by measurement from mass.

Necessity of delivery of chattels sold.

Cited in *Rail v. Little Falls Lumber Co.* 47 Minn. 422, 50 N. W. 471, holding that delivery is not necessary to pass title to logs clearly designated by contract.

Passing of title to goods sold.

Cited in *Kerr v. Henderson*, 62 N. J. L. 724, 42 Atl. 1073, holding that title to goods in store does not pass by vendee's acceptance of vendor's offer to sell at future date.

Cited in notes in 30 A. R. 537; 1 L.R.A. 767,—as to when title passes in sale of goods

29 AM. REP. 293, WATERS v. STEVENSON, 13 NEV. 157.

Measure of damages for trespass.

Cited in *Beebe v. Lamprey*, 64 N. H. 510, 10 A. S. R. 426, 15 Atl. 133, holding value of trees after severance, measure of damages for careless but not wilful cutting; *Ross v. Scott*, 15 Lea, 479, holding difference in value of property before and after trespass, measure of damages for trespass from ignorance in cutting timber and removing coal.

Cited in reference notes in 36 A. R. 770, on measure of damages for trover for property taken by mistake; 1 A. S. R. 498, on measure of damages in trespass or trover for timber cut on another's land; 28 A. S. R. 567, on measure of damages for mining coal on another's land.

Cited in notes in 24 A. D. 79, on measure of damages where property is taken or converted by mistake under bona fide belief of right; 54 A. R. 422, on measure of damages for trespass by mistake; 33 A. R. 69, on measure of damages for unintentionally taking minerals from land of another; 17 E. R. C. 878, 880, on measure of damages where trespasser mines beyond limits of his property.

— Allowance for labor.

Cited in *St. Clair v. Cash Gold Min. & Mill. Co.* 9 Colo. App. 235, 47 Pac. 466, holding value of ore without deduction of labor, measure of damages for wilful trespass in mining; *Parker v. Waycross & F. R. Co.* 81 Ga. 387, 8 S. E. 871, holding that wilful trespasser is not entitled to allowance for labor in cutting cross ties, in action for cutting trees; *Austin v. Huntsville Coal & Min. Co.* 72 Mo. 535, 37 A. R. 446, holding value of coal at mouth of shaft, less cost of mining, measure of damages for negligent but not wilful

Am. Rep. Vol. XVII.—5.

trespass; *Hall v. Abraham*, 44 Or. 477, 75 Pac. 882, holding unintentional trespasser entitled to allowance for labor in removal of coal.

Cited in reference note in 30 A. R. 628, on damages where timber wrongfully cut enhanced in value.

Cited in note in 24 A. D. 71, on value at time of conversion and interest as measure of damages where value is enhanced by wrongdoer; 17 E. R. C. 883, on right of innocent trespasser to allowance for his labor and expense.

Lease reserving royalty as rent.

Cited in *Higgins v. California Petroleum & Asphalt Co.* 109 Cal. 304, 41 Pac. 1087, holding lease of land reserving royalty as rent, valid.

29 AM. REP. 308, JONES v. PACIFIC WOOD, LUMBER & FLUME CO. 13 NEV. 359.

Check as equitable assignment.

Cited in *Donohoe-Kelly Bkg. Co. v. Southern P. Co.* 138 Cal. 183, 94 A. S. R. 28, 71 Pac. 93; *Moore v. Davis*, 57 Mich. 251, 23 N. W. 800,—holding that bank discounting draft becomes assignee thereof; *Harrison v. Wright*, 100 Ind. 512, 50 A. R. 805; *Covert v. Rhodes*, 48 Ohio St. 66, 27 N. E. 94,—holding that check is not equitable assignment before acceptance by drawee.

Cited in reference notes in 30 A. R. 764, on validity of instrument as bill of exchange; 38 A. R. 310, on bill of exchange as creating equitable assignment of funds in drawee's hands.

Cited in notes in 19 A. S. R. 612; 7 L.R.A. 596,—on checks as equitable assignments; 10 E. R. C. 424, on order payable out of particular fund as equitable assignment.

29 AM. REP. 316, BURKE v. WALL, 29 LA. ANN. 38.

Sale of lots with reference to street.

Cited in *Sheen v. Shothart*, 29 La. Ann. 630, holding one selling lots with reference to street estopped to deny existence of street.

Cited in notes in 122 A. S. R. 218, on easement in street or way where grant refers to plat or map; 28 L.R.A.(N.S.) 1025, on right of purchaser according to plat to easements in ways indicated thereon, other than on which his property abuts.

Rights of lot owner in cemetery.

Cited in *Mt. Greenwood Cemetery Asso. v. Hildebrand*, 126 Ill. App. 399, holding owner of lot in cemetery entitled to right of way thereto; *Hertle v. Riddell*, 127 Ky. 623, 128 A. S. R. 364, 15 L.R.A.(N.S.) 796, 106 S. W. 282, holding that lot owner has property right which he may protect from invasion; *Choppin v. Dauphin*, 48 La. Ann. 1217, 55 A. S. R. 313, 33 L.R.A. 133, 20 So. 681, denying right of tomb owner to cause removal of remains of dead.

Cited in notes in 68 A. S. R. 866, on control of and rights in church property; 67 L.R.A. 124, on trespass on possession of owner of burial lot; 3 L.R.A. (N.S.) 485, on injunction by lot owners in aid of control of lots, erections, or surroundings.

Disposition of property upon dissolution of corporation.

Cited in *Church of Ascension v. Texas & P. R. Co.* 41 Fed. 564, holding members of religious corporation entitled to property upon dissolution of corporation.

Property exempt from seizure.

Cited in *Police Jury v. Foulhouze*, 30 La. Ann. 64, holding that property dedicated to public use is not subject to seizure; *Kline v. Ascension*, 33 La. Ann. 562, holding rents from parish property exempt from seizure.

Right of minor to emancipation.

Cited in *Pochelu's Emancipation*, 41 La. Ann. 331, 6 So. 541, denying right of minor to emancipation in absence of proof of ability to manage own affairs.

29 AM. REP. 328, NEW ORLEANS v. KAUFMAN, 29 LA. ANN. 283.**Validity of statute or ordinance relating to tax or license.**

Cited in *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242, holding statute taxing gross earnings of railroad companies valid; *Phoenix Carpet Co. v. State*, 118 Ala. 143, 72 A. S. R. 143, 22 So. 627, holding act imposing privilege tax on corporations valid; *Mefford v. Sheffield*, 148 Ala. 539, 41 So. 970, holding ordinance taxing dealers in kerosene oil valid; *New Orleans v. People's Bank*, 32 La. Ann. 82, holding act taxing banks void; *New Orleans v. Dubarry*, 33 La. Ann. 481, 30 A. R. 273, holding ordinance taxing keepers of private markets valid; *Plaquemines v. Bowman*, 30 La. Ann. 1403, holding license tax on boats trading within parish valid; *Weise v. Thibaut*, 34 La. Ann. 556, holding rice flume tax law valid; *Pleuler v. State*, 11 Neb. 547, 10 N. W. 481, holding liquor tax law valid; *State v. United States & C. Exp. Co.* 60 N. H. 219, holding tax on express companies valid; *Crawford v. Linn County*, 11 Or. 482, 5 Pac. 738, holding mortgage tax law valid; *Stull v. De Mattos*, 23 Wash. 71, 51 L.R.A. 892, 62 Pac. 451, holding ordinance licensing auctioneers valid; *Chicago & N. W. R. Co. v. State*, 128 Wis. 553, 108 N. W. 557; *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833,—sustaining power of legislature to prescribe what property shall be taxed, providing that rule is uniform; *State Assessors v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578 (dissenting opinion), on validity of act taxing railroad and canal property; *State v. Becker*, 30 La. Ann. 682, holding act imposing heavier license tax on saloon keepers giving entertainments, than on others, valid; *State v. Rolle*, 30 La. Ann. 991, 31 A. R. 234, holding act imposing smaller license tax on bars on boats than those on land, valid; *New Orleans v. Davidson*, 30 La. Ann. 554, holding act exempting from taxation incomes not exceeding certain amount per year, valid; *Louisiana Cotton Mfg. Co. v. New Orleans*, 31 La. Ann. 440, holding act exempting from taxation property not used for education or religious purposes void.

Cited in reference note in 58 A. S. R. 662, on uniformity and equality of taxes.

Cited in notes in 4 L.R.A. 809, on rule of uniformity as to taxation; 4 L.R.A. 810, as to whether license fees are taxes; 30 L.R.A. 419, on constitutional provisions requiring equality and uniformity in license fees; 32 L.R.A. 121, on police power of municipality to regulate business of junk dealers; 60 L.R.A. 338, on constitutional equality in corporate taxation as applied to exercises upon franchises, privileges, and occupations.

29 AM. REP. 330, BARTHE v. LACROIX, 29 LA. ANN. 326.**Sufficiency of note.**

Cited in *Rabasse's Succession*, 49 La. Ann. 1405, 22 So. 767, holding undorsed note payable to order of maker incomplete.

Cited in note in 26 L.R.A.(N.S.) 522, on moral obligation as consideration for express promise.

29 AM. REP. 332, COOLEY v. BROAD, 29 LA. ANN. 345.

Liability of partner.

Cited in *Woods v. Pickett*, 30 La. Ann. 1095, holding that part owner of boat not interested in operation is not liable as commercial partner for running expenses.

Cited in notes in 18 L.R.A.(N.S.) 977, 982, on force and effect of partnership contracts; 18 L.R.A.(N.S.) 1096, on liability as partners under trusts, pooling, and traffic agreements.

What constitutes partnership.

Cited in *Chaffraix v. Lafitte*, 30 La. Ann. 631 (dissenting opinion), on what constitutes partnership.

Cited in reference note in 18 A. S. R. 291, on presumption that all sharing in profits are partners.

Cited in notes in 90 A. S. R. 364, on partnership in employment of vessel; 115 A. S. R. 414, on necessity for intent on part of alleged partners to form partnership to the formation of the partnership; 18 L.R.A.(N.S.) 987, on distinction between partnerships *inter sese* and partnerships in respect to third persons; 18 L.R.A.(N.S.) 973, on characteristics of partnerships.

Transfer of title.

Cited in *W. T. Adams Mach. Co. v. Newman*, 107 La. 702, 32 So. 38, holding title to machine transferred to vendee by absolute sale; *Kessler v. Manhein*, 114 La. 619, 38 So. 473, holding sale of property by transfer of warehouse receipt, complete under statute; *Barber Asphalt Paving Co. v. St. Louis Cypress Co.* 121 La. 151, 40 So. 193, holding that so called conditional sale is not possible under laws of this state.

29 AM. REP. 335, NEW ORLEANS NAT. BANK v. RAYMOND, 29 LA. ANN. 355.

Mortgage by national bank.

Cited in *Ball v. New Orleans*, 52 La. Ann. 1550, 28 So. 109, holding mortgage taken by national bank, valid.

Cited in note in 26 L. ed. U. S. 443, on power of national banks to take mortgage security.

Building as part of land.

Cited in *Lange v. Baranco*, 32 La. Ann. 697, sustaining right to enjoin interference with market house located on land of another owner.

Right to proceed by rule.

Cited in *Morris v. Cain*, 34 La. Ann. 657, holding creditors having judgments against estate of deceased person entitled to proceed by rule; *Gary's Succession*, 120 La. 1028, 46 So. 12, denying right in absence of statute to maintain rule to show cause why writ of possession should not issue against one in possession of plaintiff's property.

29 AM. REP. 339, CARONDELET CANAL & NAV. CO. v. PARKER, 29 LA. ANN. 430.

Validity of statutes as to charges for use of navigable waters.

Cited in *Harmon v. Chicago*, 140 Ill. 374, 29 N. E. 732, holding statute charg-

ing for use of harbor improved by city, valid; *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001, holding act authorizing boom companies to use rivers improved by them, constitutional.

Cited in reference note in 38 A. R. 222, on state's right to authorize private persons to charge tolls for improvements to navigable waters.

Cited in notes in 27 A. S. R. 555, on state regulation of improvements of and toll for use of rivers; 67 L.R.A. 825, on right as between state and Federal governments to improve navigability of stream.

Injury to riparian rights.

Cited in *Singer v. Carondelet Canal & Nav. Co.* 39 La. Ann. 478, 2 So. 102, denying right of one to establish ferry to injury of company entitled to use banks of stream.

Cited in note in 41 L. ed. U. S. 999, on navigable waters and right therein.

Right of navigation improvement company to exemption from taxation.

Cited in *Carondelet Canal Nav. Co. v. New Orleans*, 44 La. Ann. 394, 10 So. 871, holding company improving navigation properly exempted from taxation.

Issues raised by answer.

Cited in *Interstate Bank & T. Co. v. Welsh*, 118 La. 676, 43 So. 274, holding issue as to modification of agreement sued on properly raised by answer.

29 AM. REP. 343, COLE v. SMITH, 29 LA. ANN. 551.

Parol evidence as to written instruments.

Cited in *Cain v. Pullen*, 34 La. Ann. 511, sustaining right to show parol modification of written instrument.

Cited in note in 6 L.R.A. 40, on admissibility of parol evidence to explain writing.

—As to consideration.

Cited in *Dickson v. Ford*, 38 La. Ann. 736, holding parol evidence admissible to explain consideration of mortgage; *Perry v. Burton*, 31 La. Ann. 262, holding parol evidence admissible to explain receipt; *Vial v. Moll*, 37 La. Ann. 203, (dissenting opinion), on admissibility of parol evidence to explain consideration of contract.

Cited in note in 13 L.R.A. 53, on parol evidence to show want of consideration for indorsement.

—As to liability of indorsers.

Cited in *Redden v. Lambert*, 112 La. 740, 36 So. 668, holding parol evidence admissible to show order in which indorsements were made on note; *Sloan v. Gibbes*, 56 S. C. 480, 76 A. S. R. 559, 35 S. E. 408, holding parol evidence admissible to show that indorsers in blank agreed to be liable as cosureties.

Cited in reference note in 31 A. R. 609, on admissibility of parol evidence to explain the character of indorsement as between original parties.

Cited in note in 13 L.R.A. 649, on admissibility of parol evidence as between immediate parties to promissory note.

29 AM. REP. 345, MONROE v. HOFFMAN, 29 LA. ANN. 651.

Validity of ordinances relating to fire protection.

Cited in *Clark v. South Bend*, 85 Ind. 276, 44 A. R. 13, holding ordinance prohibiting keeping more than five tons of straw in city at one time, valid; *Ford*

v. Thralkill, 84 Ga. 169, 10 S. E. 600; Baumgartner v. Hasty, 100 Ind. 575, 50 A. R. 830; First Nat. Bank v. Sarlls, 129 Ind. 201, 28 A. S. R. 185, 13 L.R.A. 481, 28 N. E. 434; Hubbard v. Medford, 20 Or. 315, 25 Pac. 640; Olympia v. Mann, 1 Wash. 389, 12 L.R.A. 150, 25 Pac. 337; Charleston v. Reed, 27 W. Va. 681, 55 A. R. 336,—sustaining power of city to forbid erection of wooden buildings within fire limits.

Cited in reference notes in 52 A. S. R. 752, on validity of ordinances for fire protection; 62 A. S. R. 910, on regulations concerning fire limits within municipality.

Cited in notes in 93 A. S. R. 405, on power of municipality to require fire escapes on certain kinds of buildings; 25 A. S. R. 889, on application of 14th Amendment to regulations and restrictions to promote and secure public health and safety; 93 A. S. R. 410, on constitutionality of building regulations intended to promote health, safety, and morals; 6 L.R.A. 763, on abatement of public nuisances; 13 L.R.A. 481, on municipal control over erection of wooden buildings; 38 L.R.A. 161, on extent of municipal power over buildings as nuisances; 38 L.R.A. 171, on municipal power over wooden and frame buildings as nuisances; 38 A. R. 89; 28 A. S. R. 198; 46 A. S. R. 375; 12 L.R.A. 150; 16 E. R. C. 529,—on power to establish fire limits.

29 AM. REP. 349, RILEY v. STATE LINE S. S. CO. 29 LA. ANN. 791.

Liability of master for injury to servant.

Cited in *The Dago*, 31 Fed. 574, denying liability of shipowner to employee of stevedore injured by breaking of tackle having no apparent defect, furnished by former; *McCall v. Pacific Mail S. S. Co.* 123 Cal. 42, 55 Pac. 706, holding that stevedore employed to unload boat is not liable for injury to servant by defect in apparatus furnished by shipowner not discoverable on inspection; *Sweeney v. Murphy*, 32 La. Ann. 628, holding master of ship not liable for injury to servant by employee of stevedore employed to unload; *Davie v. Levy*, 39 La. Ann. 551, 4 A. S. R. 225, 2 So. 395, holding master liable for injury to servant by permitting nuisance to exist; *Robideaux v. Hebert*, 118 La. 1089, 12 L.R.A.(N.S.) 632, 43 So. 887, holding master liable for death of servant killed through negligence of former while assisting in operating machine.

Cited in reference notes in 31 A. S. R. 123, on liability of property owner for acts of independent contractor; 32 A. S. R. 462, on whether employee is servant or contractor and who are fellow-servants as questions for jury.

Cited in notes in 36 A. D. 289, on who are fellow servants; 1 A. S. R. 813, on duties of shipowners to seamen as to seaworthiness of vessel; 76 A. S. R. 385, on nonliability for negligence and other torts of independent contractors; 76 A. S. R. 426, on liability for negligence of stevedore; 92 A. S. R. 558, on liability of bailor, lessor, etc., of defective hoisting apparatus, ship's tackle, etc.; 26 L.R.A. 526, on liability to employees of contractor for unsafe appliances; 46 L.R.A. 46, on knowledge as element of liability to servant of another person engaged in performance of duties; 65 L.R.A. 655, on nonliability of employer for negligence of independent contractor in loading or unloading of ships; 65 L.R.A. 470, on inference of independence of contracts by stevedores; 25 L. ed. U. S. 613, on who are coservants within rule that the master is not responsible for injuries to servant occasioned by negligence of coservant.

29 AM. REP. 353, FREY v. DRAHOS, 6 NEB. 1.**What passes as appurtenance.**

Cited in *California Title Ins. & T. Co. v. Pauly*, 111 Cal. 122, 43 Pac. 586, holding pleasure resort at terminus of railroad included in mortgage of road, as appurtenance; *Barrett v. Bell*, 82 Mo. 110, 52 A. R. 361, holding that kettle on adjoining lot of lessor does not pass by lease of hotel.

Cited in reference note in 30 A. S. R. 305, on what are appurtenances.

Cited in note in 15 L.R.A. 654, on corporeal appurtenances to realty.

Construction of term "with appurtenances."

Cited in *Lincoln v. Lincoln Street R. Co.* 67 Neb. 469, 93 N. W. 766, holding words "with appurtenances" ineffectual to enlarge rights of parties or scope of deed.

Written instrument as best evidence.

Cited in *Sylvester v. Carpenter Paper Co.* 55 Neb. 621, 75 N. W. 1092, holding written contract best evidence of agreement between parties.

Cited in reference notes in 4 A. S. R. 87, on sufficiency of description in chattel mortgage as against third person; 58 A. S. R. 311, on parol evidence to aid description in mortgage.

29 AM. REP. 356, ATCHISON & N. R. CO. v. BATY, 6 NEB. 37.**Validity of class legislation.**

Cited in *McGill v. State*, 34 Ohio St. 228 (dissenting opinion), on distinction between California and Ohio constitutions as to unequal legislation; *State v. Austin*, 114 N. C. 55, 41 A. S. R. 817, 25 L.R.A. 283, 19 S. E. 919 (dissenting opinion), majority holding constitutional, ordinance prohibiting unmarried minor from entering saloon except as agent of parent or guardian.

Overruled in *Graham v. Kibble*, 9 Neb. 182, 2 N. W. 455, denying unconstitutionality of statute giving injured party a right to fifty dollars against officer taking illegal fees, though constitution provides that penalties shall go to school funds.

—As to wages.

Cited in *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 78 A. S. R. 17, 47 L.R.A. 338, 59 Pac. 304, holding unconstitutional, as class legislation, statute making corporations peculiarly liable for wages of employees; *Low v. Rees Printing Co.* 41 Neb. 127, 43 A. S. R. 670, 24 L.R.A. 702, 59 N. W. 362, holding statute regulating rates of wages except as to those engaged in farm or domestic labor, unconstitutional as class legislation.

—As to taxation of express companies.

Cited in *State v. United States & C. Exp. Co.* 60 N. H. 219, holding statute creating annual tax on express companies unconstitutional.

—Allowance of attorney's fees, generally.

Distinguished in *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 42 A. S. R. 613, 23 L.R.A. 210, 58 N. W. 226, holding statute allowing recovery, in certain actions, of costs, expenses and attorneys' fees not unconstitutional as imposing attorneys' fees.

—Allowance of attorney's fees in actions for wages.

Cited in *Chicago, R. I. & P. R. Co. v. Mashore*, 21 Okla. 275, 96 Pac. 630, 17 A. & E. Ann. Cas. 277; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 53 A. S. R. 622, 29 L.R.A. 386, 41 N. E. 263,—denying constitutionality of statute

allowing recovery of attorneys' fees in cases for recovery of wages; *Vogel v. Pekoc*, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386 (dissenting opinion), majority holding statute allowing recovery of attorney's fees in suits for wages, constitutional.

— **Allowance of attorney's fees against railroad companies.**

Cited in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, denying constitutionality of statute making railroad companies liable for attorneys' fees in certain cases; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609 (dissenting opinion), majority holding statute making railroads liable for attorney's fee on recovery against them for loss by fire constitutional.

— **Allowance of double damages against railroad company for killing of live stock.**

Cited in *Grand Island & W. C. R. Co. v. Swinbank*, 51 Neb. 521, 71 N. W. 48, holding unconstitutional, provision of statute giving double damages for injuries to cattle on railroad track.

Cited in notes in 52 A. R. 375, on constitutionality of law making railroad companies liable for double damages for injuries to stock caused by failure to erect fence; 62 A. S. R. 170, on duty of railroad company to fence tracks and maintain cattle guards; 31 L.R.A.(N.S.) 864, on constitutionality of statutes requiring railroad to fence tracks and build cattle guards.

Distinguished in *Cram v. Chicago, B. & Q. R. Co.* 84 Neb. 607, 26 L.R.A.(N.S.) 1022, 122 N. W. 31, holding that legislature may provide that shipper of live stock may recover liquidated damages from carrier for failure to transport live stock delivered to it.

Criticised in *St. Louis, I. M. & S. R. Co. v. Wynne*, 90 Ark. 538, 119 S. W. 1127, 17 A. & E. Ann. Cas. 631; *Cairo & St. L. R. Co. v. Peoples*, 92 Ill. 97; *Cairo & S. L. R. R. Co. v. Warrington*, 92 Ill. 157,—denying unconstitutionality of statute allowing owner of cattle to recover double damages for injuries thereto.

— **Making railroad company absolutely liable for stock killed.**

Cited in *Schenck v. Union P. R. Co.* 5 Wyo. 430, 40 Pac. 840, holding unconstitutional provisions of statute making railroad company liable for stock killed on tracks, without reference to negligence.

Distinguished in *Burlington & M. River Co. v. Webb*, 18 Neb. 215, 53 A. R. 809, 24 N. W. 706, holding railroad companies absolutely liable, under statute, for damage to cattle through neglect to maintain cattle-guard.

— **Subjecting railroad company to special damages, generally.**

Cited in *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. (Willson) 565, 19 S. W. 910, holding act making railroad company liable to twenty per cent additional damages for fifteen days delay in paying indebtedness to employee, void as special legislation.

29 AM. REP. 363, MARSHALL v. STATE, 6 NEB. 120.

What constitutes former jeopardy.

Cited in *Strobhar v. State*, 55 Fla. 167, 47 So. 4, holding that acquittal in one state for crime against sovereignty of another cannot constitute a second putting in jeopardy.

Cited in reference note in 77 A. D. 697, on conclusiveness of plea of *autrefois* convict in another state.

Cited in notes in 92 A. S. R. 98, on conviction or acquittal in different state as former jeopardy; 92 A. S. R. 148, on forging and uttering of forged instrument within rule of former jeopardy; 21 L. ed. U. S. 875, on what constitutes former jeopardy; 31 L.R.A.(N.S.) 695, 709, 710, on right to convict for several offenses growing out of same facts.

Plea in bar by accused.

Cited in *Davis v. State*, 51 Neb. 301, 70 N. W. 984, holding that accused's plea in bar will not lie while plea of not guilty in record; *State v. Priebnow*, 16 Neb. 131, 19 N. W. 628, holding insufficient plea in bar to prosecution properly overruled on demurrer without impaneling jury.

Waiver of defect in indictment.

Cited in *Goddard v. State*, 73 Neb. 739, 103 N. W. 443, holding irregularities in indictment waived by accused's plea of not guilty.

29 AM. REP. 365, EATON v. HASTY, 6 NEB. 419.

Impeachment of foreign judgment.

Cited in *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306, denying right to attack judgment rendered by another state on ground that statute of limitations had run against action; *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969; *Keeler v. Elston*, 22 Neb. 310, 34 N. W. 891,—sustaining right to attack foreign judgment obtained by fraud; *Reed v. Reed*, 52 Mich. 117, 50 A. R. 247, 19 N. W. 720; *Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197,—sustaining right to impeach foreign judgment on ground of want of jurisdiction; *Jaster v. Currie*, 69 Neb. 4, 94 N. W. 995, holding foreign judgment impeachable for fraud in bringing defendant within jurisdiction.

Cited in reference notes in 1 A. S. R. 663, on defenses available in action on foreign judgment; 4 A. S. R. 173, on impeachment of judgment of other state for want of jurisdiction.

Cited in note in 103 A. S. R. 314, on distinction between domestic judgments and those of courts of sister states as to avoiding for fraud.

Revivor of dormant judgment.

Cited in *Boyd v. Furnas*, 37 Neb. 387, 55 N. W. 865, sustaining power of court to revive dormant judgment; *Leman v. Cunningham*, 12 Idaho, 135, 85 Pac. 212, holding action on judgment of foreign state barred six years after revivor; *Rice v. Moore*, 48 Kan. 590, 30 A. S. R. 318, 16 L.R.A. 198, 30 Pac. 10, holding action to revive dormant judgment of another state barred after lapse of five years; *St. Paul Harvester Co. v. Maha*, 82 Neb. 336, 117 N. W. 702, holding revivor proceeding not commencement of new action but continuation of action previously commenced; *Bankers L. Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484, holding statute of limitations inapplicable to proceedings to revive dormant judgment; *Gillette v. Morrison*, 7 Neb. 263, denying power to examine into merits of case upon revivor of dormant judgment.

—Lien of judgment after revivor.

Cited in *Horbach v. Smiley*, 54 Neb. 217, 74 N. W. 623, holding dormant judgment lien from date of order of revivor.

Right of subrogation.

Cited in *Culbertson v. Salinger*, 131 Iowa, 307, 108 N. W. 454, holding that surety compensated for assuming debt of another will not be subrogated to rights of creditor.

29 AM. REP. 369, BROWN v. STRAW, 6 NEB. 536.**Material alteration of instruments.**

Cited in *Foxworthy v. Colby*, 64 Neb. 216, 62 L.R.A. 393, 89 N. W. 800, holding insertion of word "gold" before word "dollars" in mortgage, material.

Cited in reference note in 4 A. S. R. 25, on what constitutes and effect of material alteration of written instrument.

Cited in notes in 86 A. S. R. 117, on alteration of instrument to correct mistake or conform it to intent of parties; 11 E. R. C. 231, on admissibility of parol evidence to vary terms of negotiable instruments.

— Notes.

Cited in *Townsend v. Star Wagon Co.* 10 Neb. 615, 35 A. R. 493, 7 N. W. 274, holding alteration of place of payment of note, material; *Mt. Morris Bank v. Lawson*, 10 Misc. 359, 31 N. Y. Supp. 18; *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538,—holding addition of interest clause to note, material; *Fisherdict v. Hutton*, 44 Neb. 122, 162 N. W. 488, holding erasure of guaranty of payment of note, material; *Walton Plow Co. v. Campbell*, 35 Neb. 173, 16 L.R.A. 468, 52 N. W. 883, holding fraudulent erasure of words "or order" from note and insertion of word "bearer," material; *Erickson v. First Nat. Bank*, 44 Neb. 622, 48 A. S. R. 753, 28 L.R.A. 577, 62 N. W. 1078, holding erasure of name of original payee of note and insertion of another after execution, material.

Cited in notes in 3 L.R.A. 726, on effect of consent to alteration of note; 35 L.R.A. 466, on change in date of note as affecting bona fide holders.

Alteration as avoiding instrument.

Cited in *Phœnix Ins. Co. v. McKernan*, 100 Ky. 97, 37 S. W. 490, holding policy vitiated by insured's addition of property covered after loss; *State Sav. Bank v. Shaffer*, 9 Neb. 1, 31 A. R. 394, 1 N. W. 980, holding note amount of which has been changed, void in hands of bona fide holder; *Newman v. King*, 54 Ohio St. 273, 56 A. S. R. 705, 35 L.R.A. 471, 43 N. E. 683, holding note date of which is altered, void in hands of bona fide holder.

Cited in note in 10 A. D. 267, 268, on effect of alteration in notes.

29 AM. REP. 371, OUTLER v. ROBERTS, 7 NEB. 4.**Right to enforce bond or note.**

Cited in *Benton County Sav. Bank v. Boddicker*, 105 Iowa, 548, 67 A. S. R. 310, 45 L.R.A. 321, 75 N. W. 632, holding obligee taking bond in ignorance of breach of condition by obligor entitled to enforce same; *United States v. O'Neill*, 19 Fed. 567; *Butte v. Cook*, 29 Mont. 88, 74 Pac. 67; *Henry & C. Co. v. Fisherdict*, 37 Neb. 207, 55 N. W. 643; *Mullen v. Morris*, 43 Neb. 596, 62 N. W. 74,—holding bond delivered to obligee without execution by all parties named therein, unenforceable; *Hart v. Mead Invest. Co.* 53 Neb. 153, 73 N. W. 458, holding that conditional execution is no defense to action by obligee on bond complete on face; *Gyger v. Courtney*, 59 Neb. 555, 81 N. W. 437, holding that bond ordered to be signed by "sureties" is not void although executed by only one; *American Radiator Co. v. American Bonding & G. Co.* 72 Neb. 100, 100 N. W. 138, holding bond not executed as required by recitals therein void in hands of obligee; *Gray v. School Dist.* 35 Neb. 438, 53 N. W. 377, holding surety signing bond alone when statute requires two, liable thereon by waiving additional surety; *State v. Welbes*, 12 S. D. 339, 81 N. W. 629, holding that obligee taking bond with notice that surety is not to be bound until another signs is not entitled to enforce same before such execution; *Smith v. Gale*, 13 S. D. 162, 82 N. W. 385, holding appeal bond with

one surety where statute requires two, unenforceable; *Jordan v. Jordan*, 10 Lea, 124, 43 A. R. 294, holding that failure of maker of note to procure additional surety as agreed is no defense to surety signing; *Clarke v. Williams*, 61 Minn. 12, 62 N. W. 1125; *Sullivan v. Williams*, 43 S. C. 489, 21 S. E. 642; *Newman v. Ruby*, 54 W. Va. 381, 46 S. E. 172,—sustaining right of obligee to enforce bond complete on face which obligor delivered before procuring additional surety as agreed; *Hall v. Smith*, 14 Bush, 604, denying right of obligee to enforce bond delivered to his knowledge without compliance with condition by obligor.

Cited in reference notes in 32 A. R. 73, on surety's liability on bond delivered to principal on condition not complied with; 34 A. R. 780, on liability of surety on instrument delivered in violation of condition; 56 A. S. R. 436, on liability of sureties on official bonds signing on condition that others sign; 67 A. S. R. 275, on execution of bond, delivery of which is conditioned upon signing by other sureties.

Cited in notes in 28 A. D. 681, on validity of bond not signed by all who are expected to sign, of which fact obligee does not have notice; 45 L.R.A. 324, on validity of bond depending on knowledge or notice of condition that it should not take effect until signed by others; 45 L.R.A. 327-329, on effect of obligee's knowledge or notice of condition that bond was not to take effect until signed by others.

Discharge of surety by alteration of bond.

Cited in *Hagler v. State*, 31 Neb. 144, 28 A. S. R. 514, 47 N. W. 692, holding sureties discharged by alteration of bond which is clearly noticeable; *Standard Underground Cable Co. v. Stone*, 35 App. Div. 62, 54 N. Y. Supp. 383, holding that bond is not materially altered discharging sureties by signature by one not named in instrument as surety; *Baker County v. Huntington*, 46 Or. 275, 79 Pac. 187; *King County v. Ferry*, 5 Wash. 536, 34 A. S. R. 880, 19 L.R.A. 500, 32 Pac. 538,—holding that sureties on official bond complete on face are not released by erasure of one surety and insertion of another before delivery.

Strict compliance with statute.

Cited in *Gregory v. Cameron*, 7 Neb. 414, holding strict compliance with statute necessary to obtain stay of execution; *Hillman v. Mayher*, 38 Tex. Civ. App. 377, 85 S. W. 818, holding statutory bond required to be executed by two sureties not binding on one surety when executed by him alone.

Cited in note in 28 A. D. 681, on conclusiveness of bond when signed by only one instead of two sureties as required by statute.

Statute as part of instrument.

Cited in *Mulhall v. McVay*, 2 Okla. 534, 37 Pac. 604, holding that provisions of statute constitute portion of replevin bond given pursuant thereto.

Waiver of errors on appeal.

Cited in *Swansen v. Swansen*, 12 Neb. 210, 10 N. W. 713; *Danforth v. Fowler*, 68 Neb. 452, 94 N. W. 637,—holding errors of trial court not brought up on appeal, waived.

Cited in note in 137 Am. St. R. 190, on waiver.

29 AM. REP. 377, MCLEERY v. ALLEN, 7 NEB. 21.

Validity of assignment or chattel mortgage.

Cited in *Schofield v. Johnson*, 11 Fed. 297, holding assignment for creditors permitting sales in way not authorized by statute, void; *Rosenstein v. Coleman*, 18 Mont. 459, 45 Pac. 1081, holding assignment for creditors permitting sales on credit, void; *Brahmstadt v. McWhirter*, 9 Neb. 6, 31 A. R. 396, 2 N. W.

232, holding assignment for creditors authorizing sales upon such terms as appear just to all, valid; *Gregory v. Whedon*, 8 Neb. 373, 1 N. W. 309, holding chattel mortgage permitting sales by mortgagor in ordinary course of trade, void.

Cited in note in 58 A. S. R. 76, 77, as to invalidity, on their face, of assignments for creditors.

29 AM. REP. 380, WISE v. FREY, 7 NEB. 134.

Property subject to exemption laws.

Cited in *Porch v. Arkansas Mill. Co.* 65 Ark. 40, 67 A. S. R. 895, 45 S. W. 51; *Rosenbaum v. Hayden*, 22 Neb. 744, 36 N. W. 147,—holding that partnership property is not subject to exemption laws.

Cited in reference notes in 31 A. R. 238, 630, as to whether partnership property is within meaning of exemption laws; 1 A. S. R. 593, on partners' right to claim benefit of exemption law as to partnership property.

Cited in notes in 1 A. S. R. 594, on exemption from execution of property of partners and co-tenants, including both personal and homestead exemptions; 11 A. S. R. 297, on exemptions of partnership property.

Validity of assignment excluding exempt property.

Cited in *Lininger v. Raymond*, 9 Neb. 40, 2 N. W. 359, holding assignment for creditors not including exempt property, valid.

29 AM. REP. 382, RICH v. STATE NAT. BANK, 7 NEB. 201.

Principal as bound by act of agent.

Cited in *Robertson v. Buffalo County Nat. Bank*, 40 Neb. 235, 58 N. W. 715, holding that bank is not bound by president's gift to new industry; *Thomas v. City Nat. Bank*, 40 Neb. 501, 24 L.R.A. 263, 58 N. W. 943, holding bank bound by president's act in guarantying notes in return for maker's payment of debt to bank; *German Nat. Bank v. First Nat. Bank*, 59 Neb. 7, 80 N. W. 48, holding corporation accepting proceeds of unauthorized sales by agent, bound thereby; *Alexander v. Culbertson Irrig. & Water Power Co.* 61 Neb. 333, 85 N. W. 283, holding corporation accepting unauthorized lease by agent, bound thereby; *State Bank v. Green*, 8 Neb. 297, 1 N. W. 210, holding that principal is not bound by act of attorney in waiving supersedeas bond; *Sturdevant Bros. v. Farmers' & M. Bank*, 62 Neb. 472, 87 N. W. 156, denying power of bank cashier to obligate bank on replevin bond in case in which bank has no interest; *First Nat. Bank v. Bakken*, 17 N. D. 224, 116 N. W. 192, holding bank liable for funds collected by cashier having authority to make collections.

Ratification of unauthorized act.

Cited in *First Nat. Bank v. Drake*, 29 Kan. 311, 44 A. R. 646, holding act of cashier in selling bank property to himself is not ratified by bank ignorant of transactions.

Cited in reference note in 35 A. R. 137, on trover for grain mixed with other grain against national bank holding it as security.

Estoppel to plead ultra vires.

Cited in *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 19 A. S. R. 134, 23 Pac. 569, holding corporation enjoying benefit of unauthorized contract estopped to plead ultra vires; *Hunt v. Hauser Malting Co.* 90 Minn. 282, 96 N. W. 85, holding corporation receiving dividends on stock in another corporation, estopped from claiming purchase of stock ultra vires.

Validity of agreements made out of court.

Cited in *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692, holding agreement between attorneys out of court to submit matters to arbitration, void; *Lincoln v. Lincoln Street R. Co.* 67 Neb. 469, 93 N. W. 766, holding party to action stipulating as to material facts, bound thereby.

29 AM. REP. 388, RAY v. SWEENEY, 14 BUSH, 1.**Rights at common law or under bill of rights.**

Cited in *Ætna Ins. Co. v. Com.* 106 Ky. 864, 45 L.R.A. 355, 51 S. W. 624, holding combinations to maintain insurance rates are not indictable at common law; *Com. v. Jones*, 118 Ky. 889, 82 S. W. 643, 4 A. & E. Ann. Cas. 1192, holding that Bill of Rights guarantying trial by jury of vicinage is not violated by permitting trial in either county, where wound inflicted in one and death ensues in another.

Doctrine of ancient lights.

Cited in reference note in 33 A. R. 196, on doctrine of ancient lights.

Cited in notes in 46 A. D. 582, on repudiation of doctrine of ancient lights by American cases; 7 A. D. 52, 58; 37 A. S. R. 184,—on easement of light and air; 37 A. S. R. 184, on prescriptive easement of light and air; 11 L.R.A. 636; 22 L.R.A. 536,—on American law as to easements of light, air, and prospect; 136 Am. St. Rep. 681, on creation and conveyance of easements appurtenant; 2 E. R. C. 567, on prescriptive right to light and air, not based on grant.

Liability for furnishing burglar access to house.

Cited in *Jenkins v. Home Teleph. Co.* — Ky. —, 22 L.R.A.(N.S.) 1167, 120 S. W. 276, holding one erecting pole on own property in close proximity to neighbor's window not liable because it furnishes burglar means of access to house.

29 AM. REP. 402, SMITH v. COM. 14 BUSH, 31.**What pass as appurtenances.**

Cited in *Fratt v. Whittier*, 58 Cal. 126, 41 A. R. 251, holding that gas fixtures, range and boiler pass by deed of hotel with appurtenances and improvements.

Cited in reference notes in 42 A. R. 447; 52 A. S. R. 585,—on what are fixtures.

Cited in notes in 34 A. R. 355, on gas fittings as fixtures; 1 L.R.A. 351, on fixtures as between mortgagor and mortgagee.

Property subject of larceny.

Cited in notes in 57 A. D. 273, on caption and asportation as elements of larceny; 88 A. S. R. 590, 591, on larceny of property annexed to freehold or savoring of realty.

Intent as element of larceny.

Cited in note in 57 A. D. 277, on intent as element of larceny.

29 AM. REP. 404, WITHERSPOON v. MUSSELMAN, 14 BUSH, 214.**Contracts against public policy, generally.**

Cited in *Logan v. Postal Teleg. & Cable Co.* 157 Fed. 570, holding lottery contract, void; *Union Cent. L. Ins. Co. v. Spinks*, 119 Ky. 261, 69 L.R.A. 264, 83 S. W. 615, 7 A. & E. Ann. Cas. 913, holding provision in policy that suit

shall be brought thereon within period less than that fixed by statute of limitations, void as against public policy.

Validity of stipulation in note for payment of attorney's fee.

Cited in *Boozar v. Anderson*, 42 Ark. 167; *Dow v. Updike*, 11 Neb. 95, 7 N. W. 857; *Tinsley v. Hopkins*, 111 N. C. 340, 32 A. S. R. 801, 16 S. E. 325; *Exchange Bank v. Apalachian Land & Lumber Co.* 128 N. C. 193, 38 S. E. 813,—holding provision in promissory note for payment of attorney's fees, invalid; *Merchants' Nat. Bank v. Sevier*, 14 Fed. 662, holding provision in promissory note for payment of attorney's fees, stipulation for penalty a forfeiture and void.

Annotation cited with special approval in *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 A. S. R. 461, 14 L.R.A. 588, 28 Pac. 291, holding stipulation in notes for attorney's fees, valid, and not distinctive of negotiability.

Cited in note in 55 A. S. R. 444, 445, on validity of stipulation for attorneys' fees.

Disapproved in *Peyser v. Cole*, 11 Or. 39, 50 A. R. 451, 4 Pac. 520, holding stipulation in note for reasonable attorneys' fees, enforceable against maker.

—As usury.

Cited in *Fidelity Trust & Safety Vault Co. v. Ryan*, 109 Ky. 240, 58 S. W. 610, holding attorneys' fees paid creditor additional to interest for forbearance to collect judgment, recoverable as usury; *Chaffe v. Landers*, 46 Ark. 364, holding as penalty and not usury difference between sum due at maturity and larger sum fixed by contract, if not paid then.

Disapproved in *Farmers' & M. Nat. Bank v. Barton*, 21 Ill. App. 403, holding note containing stipulation for payment of attorneys' fees not usurious on its face.

—In foreign notes.

Cited in *Clark v. Tanner*, 100 Ky. 275, 38 S. W. 11, holding valid provision for attorneys' fees in Tennessee notes, agreements for penalties, not enforceable in Kentucky.

Validity of stipulation in mortgage for attorney's fees.

Cited in *Kentucky Trust Co. v. Third Nat. Bank*, 106 Ky. 232, 50 S. W. 43, holding stipulation in mortgage to trustee for reasonable attorneys' fees in case of foreclosure, void.

—In foreign state.

Cited in *Rogers v. Rains*, 100 Ky. 295, 38 S. W. 483, holding valid provision for attorneys' fees in Tennessee mortgage securing note, agreement for penalty, not enforceable in Kentucky.

Validity of stipulation in mortgage as to expenses of foreclosure, generally.

Cited in *Northwestern Mut. L. Ins. Co. v. Butler*, 57 Neb. 198, 77 N. W. 667, holding stipulations in bond and mortgage for mortgagors payment for title abstracts for foreclosure, unenforceable.

Effect on negotiability of note of provision for attorney's fees.

Cited in *Trader v. Chidester*, 41 Ark. 242, 48 A. R. 38, holding negotiability of note not destroyed by provision herein for payment of attorneys' fees.

Cited in reference notes in 32 A. S. R. 803; 57 A. S. R. 253,—on effect of stipulation as to costs of collection on negotiability of note; 42 A. S. R. 121, on effect of provision for attorneys' fees in bill of exchange.

Cited in notes in 33 A. R. 356; 28 A. S. R. 474; 39 A. S. R. 89; 62 A. S. R. 938; 1 L.R.A. 547,—on effect of stipulation for attorneys' fees on negotiability of note.

Criticized in *Maryland Fertilizing & Mfg. Co. v. Newman*, 60 Md. 584, 45 A. R. 750, holding negotiability of promissory note destroyed by stipulation therein for payment of attorneys' fees; *Oppenheimer v. Farmers' & M. Bank*, 97 Tenn. 19, 56 A. S. R. 778, 33 L.R.A. 767, 36 S. W. 705, holding negotiability of note not destroyed by stipulation therein for payment of reasonable attorneys' fees; *First Nat. Bank v. Larsen*, 60 Misc. 213, holding negotiability of note destroyed by stipulation herein for collection of attorneys' fees; *Bowie v. Hall*, 69 Md. 433, 9 A. S. R. 433, 1 L.R.A. 546, 16 Atl. 64, holding that stipulation in note as to recovery of attorneys' fees destroys negotiability but does not destroy contract.

When attorney's fees stipulated for may be recovered.

Cited in *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755, holding reasonable attorneys' fees stipulated in demand note not recoverable until demand and refusal.

29 AM. REP. 407, COM. v. WELLER, 14 BUSH, 218.

Taking effect of statute.

Cited in *Gayle v. Owen County Ct.* 83 Ky. 61; *Burnside v. Lincoln County Ct.* 86 Ky. 423, 6 S. W. 276,—holding liquor law relating to county making operation dependent upon acceptance by people, valid; *Owen v. Baer*, 154 Mo. 434, 55 S. W. 644, holding act making validity depend upon adoption by people at large, void as delegation of legislative power; *Fouts v. Hood River*, 46 Or. 492, 1 L.R.A. (N.S.) 483, 81 Pac. 370, 7 A. & E. Ann. Cas. 1160, holding that taking effect of statute cannot be made dependent upon vote of people, where constitution provides that taking effect of laws shall not be made dependent upon any authority.

Cited in note in 1 L.R.A. (N.S.) 484, as to time when local-option law takes effect.

Validity of statute.

Cited in *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 Pac. 177, holding empowering executive council to appoint metropolitan police board not void as special legislation.

Cited in reference notes in 25 A. S. R. 605, on legislature's right to delegate authority; 53 A. S. R. 331, on constitutionality of act which depends upon subsequent vote of people.

—Regulating liquor traffic.

Cited in *Territory ex rel. McMahon v. O'Connor*, 5 Dak. 397, 3 L.R.A. 355, 41 N. W. 746; *Stickrod v. Com.* 86 Ky. 285, 5 S. W. 580,—holding act regulating retail sales of intoxicating liquors, valid; *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469, holding local option act, valid; *Gordon v. State*, 46 Ohio St. 607, 6 L.R.A. 749, 23 N. E. 63, holding act regulating liquor traffic in townships of state, valid.

Cited in reference note in 31 A. R. 344, on constitutionality of statute allowing electors of municipality to forbid or allow sale of intoxicating liquors.

Cited in notes in 35 A. D. 337; 1 L.R.A. 87,—on local option laws; 114 A. S. R. 324, on constitutionality of local-option liquor laws; 15 L.R.A. (N.S.) 943, on validity of local-option laws and submissions to popular vote.

Repeal of statute.

Cited in *Com. v. Cain*, 14 Bush, 525; *Bamberger v. Louisville*, 82 Ky. 337,—holding that special law applicable to particular locality is not repealed by general law conflicting therewith; *Louisville v. Louisville Water Co.* 105 Ky. 754, 49 S. W. 766, holding that provisions of charter of water company are not repealed by enactment of statute on subject.

Change of statute as affecting violations.

Cited in *Com. v. Overby*, 107 Ky. 169, 53 S. W. 36, holding that fact that district has voted favoring sales of liquors since commission of offense is no defense to indictment.

29 AM. REP. 412, GRAHAM v. MT. STERLING COALROAD CO. 14 BUSH, 425.**Property subject to mechanics' liens.**

Cited in *Badger Lumber Co. v. Marion Water Supply Electric Light & P. Co.* 48 Kan. 187, 30 A. S. R. 306, 30 Pac. 117, holding property of electric light company in street subject to mechanics' lien; *Eufaula Water Co. v. Addyston Pipe & Steel Co.* 89 Ala. 552, 8 So. 25, as to whether property of water company furnishing city is subject to mechanics' liens.

Cited in reference notes in 1 A. S. R. 635, 697, on estates and interests affected by mechanics' liens; 9 A. S. R. 538, as to what estate mechanics' lien attaches to.

— Railroad property.

Cited in *Tod v. Kentucky Union R. Co.* 18 L.R.A. 305, 3 C. C. A. 60, 6 U. S. App. 186, 52 Fed. 241; *Pennsylvania Steel Co. v. J. E. Potts Salt & Lumber Co.* 11 C. C. A. 11, 22 U. S. App. 537, 63 Fed. 11,—holding railroad not subject to mechanics' lien; *Huntley Mfg. Co. v. Michigan C. R. Co.* 76 Ill. App. 387, holding railroad elevator subject to mechanics' lien.

Cited in note in 8 L.R.A. 702, on mechanics' lien law as applicable to railroads.

Taxation of property of railroad, etc.

Cited in *Frankfort, L. & V. Turnp. Co. v. Com.* 82 Ky. 386, holding statute taxing turnpike roads for county purposes, valid; *Ludlow v. Cincinnati Southern R. Co.* 78 Ky. 357, holding lot owned by railroad company abutting street taxable for local improvements; *Com. use of Marion County v. Louisville & N. R. Co.* 89 Ky. 134, 9 S. W. 805, holding railroad property not taxable by counties; *Cumberland Teleph. & Teleg. Co. v. Hopkins*, 121 Ky. 850, 90 S. W. 594, holding property of telegraph company taxable only as entirety.

29 AM. REP. 413, RUSK v. FENTON, 14 BUSH, 490.**Validity of contract of incompetent person.**

Cited in *Coburn v. Raymond*, 76 Conn. 484, 100 A. S. R. 1000, 57 Atl. 116, holding deed by person not of average mental capacity, valid; *Reid v. Singer Mfg. Co.* 128 Ky. 50, 107 S. W. 310, holding deed of lunatic not void, but voidable merely; *Cundall v. Haswell*, 23 R. I. 508, 51 Atl. 426, holding executory contract with insane person, voidable; *Elder v. Schumacher*, 18 Colo. 433, 33 Pac. 175 (dissenting opinion), on validity of lunatic's deed.

Cited in notes in 19 L.R.A. 491, on necessity of restoration of consideration in order to disaffirm deed because of grantor's insanity; 6 E. R. C. 76, on validity of contract between lunatic and one without knowledge of his insanity; 16 E. R. C. 740, on avoidance of contract of alleged insane person.

Liability of married woman.

Cited in *McDanell v. Landrum*, 87 Ky. 404, 12 A. S. R. 500, 9 S. W. 223, holding married woman conveying land while under disability bound to return purchase money upon avoidance of conveyance; *Segal v. Reisert*, 128 Ky. 117, 107 S. W. 747, holding wives of tenants in common who joined their husbands in action for sale of land for division, estopped to assert dower interest; *Smith v. Weeks*, 65 Vt. 566, 27 Atl. 197, holding married woman liable on debt contracted on representation that property is in her own name.

Cited in reference note in 31 A. R. 571, on wife's concealment of husband's insanity as estoppel to deny validity of conveyance by husband.

29 AM. REP. 416, BROWN v. THOMPSON, 14 BUSH, 538.

Recovery of money lost in gaming.

Cited in *McGinley v. Cleary*, 2 Alaska, 269; *Elias v. Gill*, 92 Ky. 569, 18 S. W. 454; *Stapp v. Mason*, 114 Ky. 900, 72 S. W. 11,—denying right to recover money lost in gambling.

Cited in reference note in 38 A. R. 282, on right to recover money lost in betting against faro bank.

Interpretation of statutes.

Cited in *Campbellsville v. Odewalt*, 24 Ky. L. Rep. 1717, 60 L.R.A. 723, 72 S. W. 316 (dissenting opinion), on interpretation of statutes; *Mechanics' & F. Sav. Bank v. Com.* 128 Ky. 190, 108 S. W. 263, holding that intention of legislature must be considered in construing statute.

29 AM. REP. 418, FERGUSON v. NORTHERN BANK, 14 BUSH, 555.

Validity and effect of warehouse receipt.

Cited in *Conrad v. Fisher*, 37 Mo. App. 352, 8 L.R.A. 147; *Bank of Newport v. Hirsch*, 59 Ark. 225, 27 S. W. 74,—holding that title to goods in warehouse transferred by indorsement and delivery of warehouse receipt; *Mercer Nat. Bank v. Hawkins*, 104 Ky. 171, 46 S. W. 717, holding that no title passes by warehouse receipt for grain stored in common mass issued to one failing to comply with statute; *Fifth Nat. Bank v. Providence Warehouse Co.* 17 R. I. 112, 9 L.R.A. 260, 20 Atl. 203, holding warehouse receipt for crates of eggs containing no distinguishing marks, valid; *Bank of Rome v. Haselton*, 15 Lea, 216, holding warehouse receipt of definite parties of mass, valid.

Cited in note in 16 L.R.A.(N.S.) 228, on issuance and delivery by warehouseman of receipt for his own property as a constructive transfer of possession essential to a valid pledge.

Power to issue warehouse receipts.

Cited in *Franklin Nat. Bank v. Whithead*, 149 Ind. 560, 63 A. S. R. 302, 39 L.R.A. 725, 49 N. E. 592, denying power of private warehouseman to issue receipts on own property to secure debts.

Sale of part of mass.

Cited in *Davis v. Meyer*, 47 Ark. 210, 1 S. W. 95, holding sale of part of mass ineffectual for want of delivery; *Commercial Bank v. Gillette*, 90 Ind.

Am. Rep. Vol. XVII.—6.

268, 46 A. R. 222, holding that no title passes by sale of part of bulk until separation; *New England Dressed Meat & Wool Co. v. Standard Worsted Co.* 165 Mass. 328, 52 A. S. R. 516, 43 N. E. 112, holding that no title passes by sale of part of mass, all of which remains in vendor's possession with power to separate.

Cited in reference note in 30 A. R. 537, on when title passes in sales.

Cited in note in 26 L.R.A.(N.S.) 21, 37, 50, 56, 66, 67, 68, on sufficiency of selection or designation of goods sold out of larger lot.

29 AM. REP. 429, COM. v. AVERY, 14 BUSH, 625.

Mode of prosecuting criminal proceeding.

Cited in *Ford v. Moss*, 124 Ky. 288, 98 S. W. 1015, holding misdemeanor punishable without indictment; *Louisville v. Wehmhoff*, 116 Ky. 812, 76 S. W. 876, holding prosecution for violation of ordinance against pool rooms properly brought in name of city; *Louisville & N. R. Co. v. Com.* 112 Ky. 625, 66 S. W. 505, holding that offense punishable only by fine is properly prosecuted as penal action; *James v. Helm*, 129 Ky. 323, 111 S. W. 335, holding penal action for recovery of fine, where no imprisonment can be imposed, classed as civil action; *State v. McConnell*, 70 N. H. 158, 46 Atl. 458, holding action for penalty for keeping dog without license recoverable by criminal proceedings in name of state.

Right to recover penalty.

Cited in *Com. v. Sherman*, 85 Ky. 686, 4 S. W. 790, holding right to recover penalty under statute not affected by constitutional objection as to unlimited discretion as to imprisonment.

Construction of term "forfeit."

Cited in *Ex parte Alexander*, 39 Mo. App. 108, holding term "forfeit" as used in criminal law to denote punishment, equivalent to word "fine;" *Harrington v. Neville*, 83 Mo. App. 589, holding term "forfeit" one of transfer of title when used in contract providing for forfeiture of rights for noncompliance with requirements.

Bet as violation of statute.

Cited in *Com. v. Leak*, 116 Ky. 540, 76 S. W. 368, holding that election bet made after election, is not violative of statute.

29 AM. REP. 435, VARBLE v. BIGLEY, 14 BUSH, 698.

Who liable as common carrier.

Cited in *Bassett v. Aberdeen Coal & Min. Co.* 120 Ky. 728, 88 S. W. 318, holding that owner of tow boat is not liable as common carrier; *Jamiet v. American Storage & Moving Co.* 109 Mo. App. 257, 84 S. W. 128, holding that one moving household goods from one residence to another is not liable as common carrier.

Cited in reference note in 69 A. S. R. 300, on towboat as a common carrier.

29 AM. REP. 442, TEMPLE v. COM. 14 BUSH, 769.

Right of accused to be present.

Cited in *Howard v. Com.* 118 Ky. 1, 80 S. W. 211 (dissenting opinion), on right of accused to be present when jury impanelled.

Cited in reference note in 31 A. R. 31, on receiving verdict of felony in absence of prisoner as acquittal.

Validity of verdict in criminal case.

Cited in *Allen v. Com.* 86 Ky. 642, 6 S. W. 645, holding verdict submitted in absence of accused, void; *State v. McDonald*, 16 S. D. 78, 91 N. W. 447, holding that verdict in criminal case is not invalidated because by adjournment of court when jury out.

Cited in notes in 30 A. R. 498, on right to poll jury; 43 L.R.A. 78, on necessity of unanimity of jury to validity of verdict.

Former jeopardy as bar.

Cited in *Maden v. Emmons*, 83 Ind. 331, holding dispersion of jury without direction of court upon discovering that one juror was not resident of county, bar to second trial on ground of former jeopardy.

29 AM. REP. 445, GILLESPIE v. BAILEY, 12 W. Va. 70.**Infant's affirmance of deed.**

Cited in *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206, holding that infant's deed is not affirmed by mere silence after reaching majority.

Cited in reference notes in 40 A. R. 801, on time for disaffirmance of contract made during infancy; 47 A. R. 798, on time for disaffirmance of contract made during infancy; 13 A. S. R. 339, on ratification of contracts by infants after coming of age.

Cited in notes in 18 A. S. R. 583, on validity of infant's deed of conveyance; 18 A. S. R. 677, on disaffirmance of deeds within reasonable time after reaching majority; 18 A. S. R. 668, on infant's disaffirmance by suit; 12 L.R.A. 138, as to what acts are necessary to disaffirm an infant's contracts; 41 L. ed. U. S. 763, on validity of ratification and disaffirming of infants' contracts.

Infancy as defense.

Cited in *Wallace v. Leroy*, 57 W. Va. 263, 110 A. S. R. 777, 50 S. E. 243, holding defendant entitled to plead infancy as defense to action for purchase price of goods without offering to return goods.

Cited in notes in 76 A. D. 218, on necessity for infant's restoration of consideration before disaffirmance of contract; 18 A. S. R. 691, 692, on infant's obligation to restore consideration on disaffirmance; 26 L.R.A. 178, on necessity of returning consideration in order to disaffirm infant's contract if still in his possession; 26 L.R.A. 184, on necessity of returning consideration in order to disaffirm executed contracts of infant.

Power of next friend of infant.

Cited in *Fletcher v. Parker*, 53 W. Va. 422, 97 A. S. R. 991, 44 S. E. 422, denying power of next friend of infant to compromise judgment.

Validity of married woman's deed.

Cited in *Moore v. Ligon*, 22 W. Va. 292, holding married woman's deed of equitable separate estate, void.

Discontinuance of action.

Cited in *Buster v. Holland*, 27 W. Va. 510, holding that case is not discontinued by failure for thirteen years to make entry thereof; *Thomasson v. Simmons*, 57 W. Va. 576, 50 S. E. 740, holding that case in justice's court is not discontinued because no order of continuance entered; *Richmond v. Richmond*, 62 W. Va. 206, 57 S. E. 736, holding that decree in partition when pro confesso cannot be set aside after term at which it is entered.

Abatement of action as to title.

Cited in *Zane v. Fink*, 18 W. Va. 693, holding that action affecting title does not abate by transfer of land during pendency of suit.

Power of equity.

Cited in *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447, sustaining power of equity to retain jurisdiction of case to grant final relief.

Report by commissioners on partition.

Cited in *Wamsley v. Mill Creek Coal & Lumber Co.* 56 W. Va. 296, 49 S. E. 141, holding that commissioners to partition coal lands are not required to report extent of deposits.

29 AM. REP. 452, MILLER v. INSURANCE CO. 12 W. VA. 116.**Right to new trial or vacation of verdict.**

Cited in *State v. Muncey*, 28 W. Va. 494; *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 86, 24 L.R.A. 50, 19 S. E. 571,—holding fact that appellate court would have reached different verdict no ground for new trial; *State v. Sullivan*, 55 W. Va. 597, 47 S. E. 267, holding party not entitled to new trial because judge would, as juror, have found different verdict; *State v. Yates*, 21 W. Va. 761; *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385; *Jones v. Singer Mfg. Co.* 38 W. Va. 147, 18 S. E. 478; *Maxwell v. Cunningham*, 50 W. Va. 298, 40 S. E. 499; *Bosley v. Baltimore & O. R. Co.* 54 W. Va. 563, 66 L.R.A. 871, 46 S. E. 613; *Richards v. Riverside Iron Works*, 56 W. Va. 510, 49 S. E. 437; *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385,—denying motion to set aside verdict in absence of clear proof of error; *Werner Co. v. Calhoun*, 55 W. Va. 246, 46 S. E. 1024; *Robinson v. Lowe*, 56 W. Va. 308, 49 S. E. 250,—denying new trial for erroneous instruction in absence of proof of injury to party; *Welch v. County Ct.* 29 W. Va. 63, 1 S. E. 337, sustaining right to new trial where lower court has abused discretion; *Beard v. Indemnity Ins. Co.* 65 W. Va. 283, 64 S. E. 119, holding that verdict, fairly rendered, in case fairly submitted to jury, should not be set aside unless manifestly unjust.

— Where evidence is conflicting.

Cited in *Corder v. Talbott*, 14 W. Va. 277; *Dower v. Church*, 21 W. Va. 23; *Reynolds v. Tompkins*, 23 W. Va. 229; *Probst v. Braeunlich*, 24 W. Va. 356; *State v. Cooper*, 26 W. Va. 338; *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. 13; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489; *Hamey v. Pittsburgh, C. C. & St. L. R. Co.* 38 W. Va. 570, 18 S. E. 748; *Grogan v. Chesapeake & O. R. Co.* 39 W. Va. 415, 19 S. E. 563; *Laidley v. Kanawha County Ct.* 44 W. Va. 566, 30 S. E. 109,—denying right to new trial where verdict is based on conflicting evidence; *Chancey v. Roane County Ct.* 51 W. Va. 252, 41 S. E. 156, sustaining right to new trial when verdict is against weight of evidence; *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981 (dissenting opinion), on right to new trial when verdict is based on conflict of evidence.

Construction of contract.

Cited in *Bettman v. Harness*, 42 W. Va. 433, 36 L.R.A. 566, 26 S. E. 271, holding that words "or" and "and" when used in contract will be transposed when clearly so intended to be used; *Medley v. German Alliance Ins. Co.* 55 W. Va. 342, 47 S. E. 101, 2 A. & E. Ann. Cas. 99, holding policy to be construed strongly against company.

Cited in notes in 132 Am. St. Rep. 439, on "earthquake" clause in fire insurance policies; 14 E. R. C. 48, on rule as to admission of evidence of custom of

merchants or understanding of merchants to explain expressions in policy of insurance which are inadequate to explain themselves; 14 E. R. C. 25, on rules of construction of contracts of insurance.

Change of possession avoiding policy.

Cited in *Cleavenger v. Franklin F. Ins. Co.* 47 W. Va. 595, 35 S. E. 998, holding policy containing provision making same void for change of possession not avoided by sale on execution after loss, insured purchasing.

Rights of mortgagee under policy.

Cited in *Colby v. Parkersburg Ins. Co.* 37 W. Va. 789, 17 S. E. 303, holding mortgagee entitled to recover on policy although mortgage covers only part of property insured.

29 AM. REP. 455, JONES v. REID, 12 W. VA. 350.

Husband's right to wife's earnings.

Cited in *Bailey v. Gardner*, 31 W. Va. 94, 13 A. S. R. 847, 5 S. E. 636; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482; *Davis v. Webb*, 46 W. Va. 6, 33 S. E. 97,—holding wife's earnings property of husband; *Lapham v. Lapham*, 30 W. Va. 222, 4 S. E. 273,—holding husband entitled to earnings of wife having separate estate.

Cited in reference note in 38 A. R. 201, on wife's right to compensation for services in family.

Cited in note in 58 A. S. R. 494, on agreements between husband and wife to compensate each other's services, or to relinquish claims on each other's earnings or profits.

Necessary parties to action.

Cited in *State v. Seabright*, 15 W. Va. 590; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378; *Turk v. Hevener*, 49 W. Va. 204, 38 S. E. 476; *McConaughey v. Bennett*, 50 W. Va. 172, 40 S. E. 540,—holding personal representatives only, necessary parties in establishing claim against estate.

29 AM. REP. 458, STONE v. CHICAGO & N. W. R. CO. 47 IOWA, 82.

Rights of passenger under ticket.

Cited in *Hanlon v. Illinois C. R. Co.* 109 Iowa, 136, 80 N. W. 223, holding that carrier's acceptance of one ticket after expiration is no waiver of right to refuse other purchased at same time; *Bonasera v. Buffalo & L. E. Traction Co.* 63 Misc. 644, 118 N. Y. Supp. 748, holding passenger's contract entire one; *Hatten v. Newark & J. C. R. Co.* 39 Ohio St. 375, holding that passenger leaving train before reaching destination is not entitled to continue on another train; *Watson v. Louisville & N. R. Co.* 104 Tenn. 194, 49 L.R.A. 454, 56 S. W. 1024, holding that purchaser of round trip ticket is not excused from complying with conditions thereon because unable to read or write; *Pennsylvania R. Co. v. Parry*, 55 N. J. L. 551, 39 A. S. R. 654, 22 L.R.A. 251, 27 Atl. 914; *Gulf, C. & S. F. R. Co. v. Henry*, 84 Tex. 678, 16 L.R.A. 318, 19 S. W. 870,—denying right of holder of through ticket to take train going part of distance and continue on other train which he should have taken first.

Cited in notes in 29 A. R. 464, on right of passenger ejected for nonpayment of fare to re-enter same train after purchasing ticket; 16 L.R.A. 53, 55, on payment of back fare for distance already ridden, as condition of being carried further; 28 L.R.A. 773, on right of passenger to stop over.

Who are trespassers on train.

Cited in *Hendryx v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 377, 25 Pac. 893, holding one riding in box car on freight train, trespasser not entitled to recover for personal injuries; *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641, holding that one riding in box car against rules of railroad, paying fare to brakeman, trespasser not entitled to recover for negligent injuries.

Liability of carrier for ejection of passenger as trespasser.

Cited in *Kansas City, P. & G. R. Co. v. Holden*, 66 Ark. 602, 53 S. W. 45, holding carrier ejecting passenger after tender of fare, liable; *Shortsleeves v. Capital Traction Co.* 28 App. D. C. 365, 8 L.R.A.(N.S.) 287, holding that street car company is not liable for ejection of passenger entering car at point other than transfer point; *Trezona v. Chicago G. W. R. Co.* 107 Iowa, 22, 43 L.R.A. 136, 77 N. W. 486, holding one riding on ticket he knows has expired, trespasser not entitled to recover for ejection; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342, 35 A. R. 278, 3 N. W. 121; *Curl v. Chicago, R. I. & P. R. Co.* 63 Iowa, 417, 16 N. W. 69; *Pickens v. Richmond & D. R. Co.* 104 N. C. 312, 10 S. E. 556,—holding that carrier ejecting passenger for want of ticket is not bound to permit him to continue upon tender of fare; *Bowsher v. Chicago, B. & Q. R. Co.* 113 Iowa, 16, 84 N. W. 958,—sustaining carrier's right to eject passenger for refusal to pay extra fare required of those without tickets.

Cited in notes in 41 A. D. 477, on ejection of passengers for not showing or surrendering ticket or paying fare; 5 L.R.A. 820, on right to remove trespasser from train; 31 L.R.A.(N.S.) 995, on sufficiency of tender of fare to prevent ejection.

Ejection of trespasser as negligence.

Cited in *Southern Kansas R. Co. v. Sanford*, 45 Kan. 372, 11 L.R.A. 432, 25 Pac. 891, holding that ejection of trespasser from train moving slowly is not negligence per se.

Reasonability of rules of carrier as to fares.

Cited in *Manning v. Louisville & N. R. Co.* 95 Ala. 392, 36 A. S. R. 225, 16 L.R.A. 55, 11 So. 8, holding rule of carrier requiring passenger using forfeited ticket to pay for part of route already traveled, reasonable; *Swan v. Manchester & L. R. Co.* 132 Mass. 116, 42 A. R. 432, holding rule of railroad requiring higher rate of fare from those failing to procure tickets, reasonable.

Cited in reference note in 36 A. S. R. 227, on regulations as to railroad tickets.

Cited in notes in 41 A. D. 480, on validity of rules limiting time in which ticket is to be used and as to "stop-over" tickets; 45 A. D. 193, 194, on reasonableness of rule that passengers shall not stop over without "stop-over tickets."

Proof as to negligence.

Cited in *Laverenz v. Chicago Rock Island & P. R. Co.* 53 Iowa, 321, 5 N. W. 156, holding plaintiff whose intestate was killed by engine bound to show railroad's negligence and intestate's lack of negligence.

Negligence as question for jury.

Cited in note in 41 L. ed. U. S. 83, as to when contributory negligence is a question for the jury.

Mental anguish as element of damage.

Cited in *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 57 A. S. R. 294, 28

L.R.A. 72, 62 N. W. 1, holding mental anguish element of damages in action for nondelivery of message announcing time of funeral of sender's mother.

Validity of instruction by court.

Cited in *Youll v. Sioux City & P. R. Co.* 66 Iowa, 346, 23 N. W. 736, holding that direction by court to render verdict for defendant, without requiring defendant to admit all facts proved by plaintiff, is not reversible error.

— Oral.

Cited in *Johnson v. Rider*, 84 Iowa, 50, 56 N. W. 36, holding verbal instructions by court to find for plaintiff on vote, valid; *Meadows v. Hawkeye Ins. Co.* 67 Iowa, 57, 24 N. W. 591; *Young v. Burlington Wire Mattress Co.* 79 Iowa, 415, 44 N. W. 693; *Leggett & M. Tobacco Co. v. Collier*, 89 Iowa, 144, 56 N. W. 417,—holding oral direction by court to render verdict for defendant, valid. When evidence is assumed to be true.

Cited in *Welch v. Jenks*, 58 Iowa, 694, 12 N. W. 727; *Marshall v. Harney Peak Tin Min. & Mill. Mfg. Co.* 1 S. D. 350, 47 N. W. 290,—holding evidence of opposite party assumed to be true upon granting nonsuit or direction of verdict.

29 AM. REP. 464, STATE v. MERRIHEW, 47 IOWA, 112.

Discharge of surety on bail bond.

Cited in *Havis v. State*, 62 Ark. 500, 37 S. W. 957, holding that surety on bond of one charged with one crime are not discharged by escape of defendant held under another charge.

Cited in reference notes in 35 A. R. 437; 25 A. S. R. 527,—on effect of principal's imprisonment in another state on surety's obligation to pay; 37 A. R. 52, on imprisonment in another county as excusing sureties.

Cited in note in 99 A. D. 220, on subsequent arrest or indictment of principal as exoneration of bail.

Forfeiture of bail bond.

Cited in *State v. Baldwin*, 78 Iowa, 737, 36 N. W. 908, holding prosecution presumed to be continued to term at which bail bond forfeited; *State v. Stewart*, 74 Iowa, 336, 37 N. W. 400, denying right to change of venue in action on forfeited bond for school money on ground that county real party in interest.

Cited in note in 23 L.R.A.(N.S.) 140, on liability of bail where principal cannot appear.

Sufficiency of bail bond.

Cited in *Territory ex rel. Thacker v. Conner*, 17 Okla. 135, 87 Pac. 591; *United States v. Eldredge*, 5 Utah, 161, 13 Pac. 673,—holding bail bond sufficient without stating crime.

Cited in notes in 10 L.R.A. 847, on requisites of recognizance; 1 L.R.A.(N.S.) 849, on power of clerk of court to take bail.

Ground for change of venue.

Cited in note in 74 A. D. 244, on impossibility of impartial trial as ground for change of venue.

29 AM. REP. 468, VAN BRUNT v. VAUGHN, 47 IOWA, 145.

Service of notice of nonpayment.

Cited in *Aldine Mfg. Co. v. Warner*, 96 Ga. 370, 23 S. E. 404, holding transmission to one indorser of notice of nonpayment addressed to prior indorser, insufficient, in absence of proof that same sent to latter; *Vaughan v. Potter*,

131 Ill. App. 334, holding indorser for collection entitled to notice of non-payment.

Cited in reference note in 1 A. S. R. 602, on sufficiency of notice of protest by mail.

Cited in note in 38 A. D. 611, on who are parties residing in same place for purposes of notice of dishonor of bills and notes.

29 AM. REP. 470, SWARTZ v. BALLOU, 47 IOWA, 188.

Validity and operation of deed as to name of grantee.

Cited in *Allen v. Withrow*, 110 U. S. 119, 28 L. ed. 90, 3 Sup. Ct. Rep. 517, holding that no interest passed by deed with blank for name of grantee; *Curtis v. Cutler*, 37 L.R.A. 737, 22 C. C. A. 16, 40 U. S. App. 233, 76 Fed. 16, holding assignment of mortgage in which assignee's name is blank, void; *State v. Matthews*, 44 Kan. 596, 10 L.R.A. 308, 25 Pac. 36, holding one advancing money on strength of deed, incomplete as to grantee, in which mortgagor claimed to be grantee, entitled to enforce mortgage against property; *Mason Lumber Co. v. Collier*, 74 Mich. 241, 41 N. W. 913, holding purchaser of certificate of purchase of swamp lands incomplete as to name, vested with legal title; *Hall v. Kary*, 133 Iowa, 465, 119 A. S. R. 639, 110 N. W. 930; *Creveling v. Banta*, 138 Iowa, 47, 115 N. W. 598; *Mahoney v. Salsbury*, 83 Neb. 488, 493, 131 A. S. R. 647, 120 N. W. 144; *McClain v. McClain*, 52 Iowa, 272, 3 N. W. 60,—holding one taking deed incomplete as to grantee vested with legal title; *Quinn v. Brown*, 71 Iowa, 376, 34 N. W. 13, holding wife of grantor signing deed blank as to grantee and consideration not entitled to attack title of purchaser; *McCleery v. Wakefield*, 76 Iowa, 529, 2 L.R.A. 529, 41 N. W. 210, holding sale of land to another who is given authority to insert name of grantee in deed, valid; *Golden v. Hardesty*, 93 Iowa, 622, 61 N. W. 913, holding deed incomplete as to grantee obtained by fraud, void; *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. 492; *Exchange Nat. Bank v. Fleming*, 63 Kan. 139, 65 Pac. 213,—holding deed in which name of grantee inserted after execution, valid.

Cited in note in 2 L.R.A. 530, on validity of deed delivered, with name of grantee blank, to grantee or another for him, with oral instructions to fill blank.

Parol authority to fill blanks in sealed instrument.

Cited in *Bulkley v. Devine*, 27 Ill. App. 145, holding parol authority to fill blanks in sealed lease, sufficient; *Garland v. Wells*, 15 Neb. 298, 18 N. W. 132; *Cribben v. Deal*, 21 Or. 211, 28 A. S. R. 746, 27 Pac. 1046; *Threadgill v. Butler*, 60 Tex. 599,—holding verbal authority to fill in name of grantee in deed, sufficient.

Cited in reference notes in 54 A. R. 442, on validity of assignment of mortgage to agent with authority to fill and deliver; 8 A. S. R. 250, on estoppel of grantee to deny validity of deed signed in blank and filled in and delivered by agent.

Cited in note in 5 E. R. C. 182, on authority to fill up blank in deed after delivery.

Forgery in procuring blank deed.

Cited in *State v. Tripp*, 113 Iowa, 698, 84 N. W. 546, holding fraud in procuring execution of deed in which name of grantee blank, indictable as forgery under statute.

Recovery of expense in defending title.

Cited in *Meservey v. Snell*, 94 Iowa, 222, 58 A. S. R. 391, 62 N. W. 767, holding grantor warranting title, liable for attorney's fees expended by grantee defending same; *Alexander v. Staley*, 110 Iowa, 607, 81 N. W. 803, holding one conveying with covenants of warranty liable for attorney's fees in action to enjoin ejectment.

29 AM. REP. 476, STEWART v. MERCHANTS' DESPATCH TRANSP. CO. 47 IOWA, 229.

Liability of carrier of goods.

Cited in *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.* 130 Iowa, 123, 5 L.R.A.(N.S.) 882, 106 N. W. 498, 8 A. & E. Ann. Cas. 45, holding carrier liable for loss of goods by unusual flood because of delay in transporting same; *Galveston, H. & H. R. Co. v. Allison*, 59 Tex. 193, holding carrier agreeing to forward goods to destination, liable for negligent loss on connecting line.

Cited in note in 5 E. R. C. 290, on duty of carrier to proceed by usual route.

Limitation of carrier's liability for loss of goods.

Cited in *Merchants' Despatch Transp. Co. v. Bloch Bros.* 86 Tenn. 392, 6 A. S. R. 847, 6 S. W. 881, holding stipulation exempting carrier for loss of goods by default of agent, void.

Cited in note in 38 A. D. 424, on effect of particular stipulations in bill of lading.

— On connecting line.

Cited in *Hartley v. St. Louis, K. & N. W. R. Co.* 115 Iowa, 612, 89 N. W. 88; *Eckles v. Missouri P. R. Co.* 112 Mo. App. 240, 87 S. W. 99,—sustaining right of carrier of goods to limit liability on connecting line; *McCarn v. International & G. N. R. Co.* 84 Tex. 352, 31 A. S. R. 51, 16 L.R.A. 39, 19 S. W. 547, sustaining right of carrier to limit liability for loss on own line.

29 AM. REP. 479, WILDE v. MERCHANTS' DESPATCH TRANSP. CO. 47 IOWA, 247.

Who are common carriers.

Cited in *Merchants' Despatch Transp. Co. v. Bloch Bros.* 86 Tenn. 392, 6 A. S. R. 847, 6 S. W. 881, holding company transporting goods over lines of other carriers, common carrier.

Cited in note in 31 L.R.A.(N.S.) 66, on liability of connecting carrier for loss beyond own line.

29 AM. REP. 482, BANCROFT v. MERCHANTS' DESPATCH TRANSP. CO. 47 IOWA, 262.

Liability of carrier of goods.

Cited in *Palmer v. Chicago, B. & Q. R. Co.* 56 Conn. 137, 13 Atl. 818, holding initial carrier agreeing to deliver goods at point beyond own line, liable for loss on connecting line; *Pittsburg, C. C. & St. L. R. Co. v. Viers*, 113 Ky. 526, 68 S. W. 469, holding connecting carrier liable on contract of initial carrier by accepting goods from latter without limitation.

Cited in reference note in 24 A. S. R. 613, on carrier's liability as warehouseman.

Cited in note in 97 A. S. R. 96, on change of liability to that of warehouseman as to goods in hands of connecting carrier.

Rights of intermediate carrier.

Cited in *Adams Exp. Co. v. Harris*, 120 Ind. 73, 16 A. S. R. 315, 7 L.R.A. 214, 21 N. E. 340, holding that intermediate carrier not designated in contract with initial carrier is not entitled to benefits of contract limiting liability.

Cited in reference notes in 41 A. R. 309, on right of second carrier to take advantage of limitations of first carrier's contract with shipper; 2 A. S. R. 325, on liability of connecting carriers; 16 A. S. R. 319, on rights and liabilities of connecting carriers.

Cited in notes in 72 A. D. 238, on what constitutes delivery to succeeding carrier; 72 A. D. 242, on when subsequent carriers not entitled to benefit of exemptions in initial carrier's contract.

Who are common carriers.

Cited in *Merchants' Despatch Transp. Co. v. Bloch Bros.* 86 Tenn. 392, 6 A. S. R. 847, 6 S. W. 881, holding transportation company controlling no means of conveyance but contracting with carriers, common carrier.

29 AM. REP. 484, ADYE v. HANNA, 47 IOWA, 264.**Validity of contract.**

Cited in *Burke v. Chicago*, 127 Ill. App. 161; *Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 130, 33 N. W. 603; *Daniels v. Des Moines*, 108 Iowa, 484, 79 N. W. 269; *Wesson v. Collins*, 72 Miss. 844, 18 So. 917,—holding agreement by public officer to accept less than salary in discharge of duties, void as against public policy.

— Between attorney and client.

Cited in *Langan v. Sankey*, 55 Iowa, 52, 7 N. W. 393, holding agreement by attorney to pay costs if client would make test case by appealing, void; *Atchison, T. & S. F. R. Co. v. Johnson*, 29 Kan. 218; *Hyatt v. Burlington, C. R. & N. R. Co.* 68 Iowa, 662, 27 N. W. 815,—holding contract by attorney to prosecute negligence case, paying expenses, for part of recovery, void; *Wallace v. Chicago, M. & St. P. R. Co.* 112 Iowa, 565, 84 N. W. 662, holding agreement by attorney to prosecute negligence case against railroad for half of recovery, valid; *Barngrover v. Pettigrew*, 128 Iowa, 533, 111 A. S. R. 206, 2 L.R.A.(N.S.) 260, 104 N. W. 904, holding agreement to pay attorney for services conditioned upon obtaining divorce, void; *Donaldson v. Eaton*, 136 Iowa, 650, 125 A. S. R. 275, 14 L.R.A.(N.S.) 1168, 114 N. W. 19, holding contract by client to transfer property to attorney to procure divorce, void; *Cochran v. Zachery*, 137 Iowa, 585, 126 A. S. R. 307, 16 L.R.A.(N.S.) 235, 115 N. W. 486, holding agreement by one not acting as attorney to defeat probate of will for consideration, void.

Cited in notes in 27 A. R. 319, on champerty; 13 A. S. R. 299, as to what contracts of attorneys are void as against public policy.

29 AM. REP. 487, ADAMS v. BEADLE, 47 IOWA, 439.**Nursery stock as part of land.**

Cited in *Woodrum v. Carraher*, 69 Iowa, 145, 28 N. W. 483, holding that nursery stock taxable as real property; *Dubois v. Bowles*, 30 Colo. 44, 69 Pac. 1067; *Batterman v. Albright*, 122 N. Y. 484, 19 A. S. R. 510, 11 L.R.A. 800, 25 N. E. 856; *Hamilton v. Austin*, 36 Hun, 138,—holding nursery stock covered by mortgage of land.

Cited in reference note in 1 A. S. R. 379, on what are fixtures as between mortgagor and mortgagee.

Cited in notes in 15 L.R.A. 57, on efficacy of chattel mortgage on fixtures as against real estate mortgage; 12 E. R. C. 224, on right of tenant to remove fixtures placed on land.

29 AM. REP. 489, CALLOWAY v. LAYDON, 47 IOWA, 456.

Proof and damages in action for sales of intoxicating liquors.

Cited in *Welch v. Jugenheimer*, 56 Iowa, 11, 41 A. R. 77, 8 N. W. 673, holding evidence that husband used abusive language to wife inadmissible in action by her for damages for injuries caused by sale of liquors to husband; *Ward v. Thompson*, 48 Iowa, 588, holding wife entitled to recover for mental suffering caused by sales of liquors to husband.

Cited in notes in 48 A. D. 628, on action by relative for injury to the person; 52 A. R. 160, on application of proximate and remote cause to cases arising under civil damage act; 85 A. S. R. 454, on measure of damages against liquor sellers for acts of persons becoming intoxicated; 7 L.R.A. 301, on wife's action under civil damage acts.

Right of action by husband or wife.

Cited in *Times-Democrat Pub. Co. v. Mozee*, 136 Fed. 761, sustaining right of wife to maintain action for libel affecting her.

— **For alienation of affections.**

Cited in *Duffies v. Duffies*, 76 Wis. 374, 20 A. S. R. 79, 8 L.R.A. 420, 45 N. W. 522, denying right of wife to maintain action for alienation of husband's affections; *Price v. Price*, 91 Iowa, 693, 51 A. S. R. 360, 29 L.R.A. 150, 60 N. W. 202, sustaining right of wife under statute to maintain action for alienation of husband's affections; *Taylor v. Bliss*, 26 R. I. 16, 57 Atl. 939, sustaining right of husband to maintain action for alienation of wife's affections as injury to his "person" within statute.

29 AM. REP. 492, SWAN v. BOURNES, 47 IOWA, 501.

Innkeepers' and livery stable keepers' lien.

Cited in *Munson v. Porter*, 63 Iowa, 453, 19 N. W. 290, holding that lien of livery stable keeper attaches to exempt property; *Thorn v. Whitbeck*, 11 Misc. 171, 32 N. Y. Supp. 1088, holding exempt property subject to lien of boarding house keeper.

Cited in reference note in 38 A. S. R. 569, on innkeeper's liens.

Cited in notes in 107 A. S. R. 869, on existence of innkeeper's lien; 21 L.R.A. 229, on innkeeper's lien.

Entry of judgment.

Cited in *Simmons v. Chicago, B. & Q. R. Co.* 128 Iowa, 306, 103 N. W. 954, denying right of district court to enter final judgment upon dismissal of writ of error.

Effect of incorrect ruling of court on prior correct one.

Cited in *Barnhart v. Davis*, 30 Kan. 520, 2 Pac. 633, holding subsequent valid ruling not affected by prior erroneous one.

29 AM. REP. 493, RONA v. MEIER, 47 IOWA, 607.

Limitations upon devise.

Cited in *Stivers v. Gardner*, 88 Iowa, 307, 55 N. W. 516, holding life estate given en husband subject to reversion upon marriage terminated by his marriage;

Timas v. Neidt, 101 Iowa, 348, 70 N. W. 203, holding unconditional devise limited by subsequent direction to divide among others; *Hambel v. Hambel*, 109 Iowa, 459, 80 N. W. 528, holding that absolute devise to wife is not cut down by direction to divide part left at death among children; *Gannon v. Albright*, 183 Mo. 238, 105 A. S. R. 471, 67 L.R.A. 97, 81 S. W. 1162, holding that devise to certain persons and heirs forever is not cut down by subsequent declaration that shares go over if they die without issue.

Cited in reference notes in 38 A. R. 602, on effect of absolute devise with condition that devisees shall not sell or mortgage property; 24 A. S. R. 657, on devisee's power to act as owner of fee as affecting limitation over.

Cited in notes in 8 L.R.A. 744, on construction of will in case of repugnancy; 11 L.R.A. 610, on effect of power of disposal in first taker of legacy; 5 L.R.A. (N.S.) 325, on effect of subsequent gift over after an absolute devise; 25 E. R. C. 478, on construction of general terms appended to gift in will.

— Validity.

Cited in *Bernstein v. Bramble*, 81 Ark. 480, 8 L.R.A.(N.S.) 1028, 99 S. W. 682, 11 A. & E. Ann. Cas. 343, holding provision in will after devising fee to one directing disposition to another upon former's death, void; *Wilson v. Turner*, 164 Ill. 398, 45 N. E. 820, holding subsequent limitation on devise of rents without restriction with full power of disposition, void; *Killmer v. Wuchner*, 74 Iowa, 359, 37 N. W. 778; *Bills v. Bills*, 80 Iowa, 269, 20 A. S. R. 418, 8 L.R.A. 696, 45 N. W. 748; *Meyer v. Weiler*, 121 Iowa, 51, 95 N. W. 254; *Killefer v. Bassett*, 146 Mich. 1, 109 N. W. 21,—holding clause following devise in fee disposing of portion remaining after devisee's death, void; *Re Kimball*, 20 R. I. 619, 40 Atl. 847, holding subsequent limitations over in devise rendered void by absolute power of disposition given first taker.

Cited in note in 23 E. R. C. 72, on validity of gift over after absolute gift.

Creation of estates by will.

Cited in *Re Proctor*, 95 Iowa, 172, 63 N. W. 670, holding life estate only created by devise to wife for life with power to sell for support; *Podaril v. Clark*, 118 Iowa, 264, 91 N. W. 1091, holding that devise to wife for life is not enlarged by subsequent power to sell during life time.

— In fee.

Cited in *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659, holding estate in fee created by devise with absolute power of sale; *Re Burbank*, 69 Iowa, 378, 28 N. W. 648, holding devise in fee given by will giving wife entire control of estate after payment of debts to be disposed of as she thinks best; *Alden v. Johnson*, 63 Iowa, 124, 18 N. W. 696; *Kelley v. Meins*, 135 Mass. 231; *Halliday v. Stickler*, 78 Iowa, 388, 43 N. W. 228,—holding devise in fee created by ungratified devise followed by direction to divide part remaining at devisee's death; *Law v. Douglass*, 107 Iowa, 606, 78 N. W. 212, holding fee given to wife by clause giving life estate with absolute power of sale.

Cited in reference note in 1 A. S. R. 361, as to when devisee takes fee, remainder over being void for repugnancy.

29 AM. REP. 496, STATE v. HARDIE, 47 IOWA, 647.

What constitutes manslaughter.

Cited in *State v. Moore*, 129 Iowa, 514, 106 N. W. 16, holding one guilty of manslaughter by killing another by carelessly driving upon him; *State v. Emery*, 78 Mo. 77, 47 A. R. 92, holding killing another when carelessly hand-

ling firearm, manslaughter; *State v. Justus*, 11 Or. 178, 50 A. R. 470, 8 Pac. 337, holding one guilty of manslaughter by killing another when carelessly shooting at mark.

Cited in reference notes in 31 A. R. 28, 606, on unintentional killing of person while trying to frighten with revolver as manslaughter; 8 A. S. R. 435, on what amounts to manslaughter; 8 A. S. R. 426, on accidental killing of another while attempting to commit suicide; 10 A. S. R. 113, giving instances of killings adjudged to be manslaughter only.

Cited in notes in 38 A. S. R. 80, on causing death by act calculated to produce fatal results as murder or manslaughter; 90 A. S. R. 582, on unintentional homicide in pointing gun or pistol at another; 29 L.R.A. 155, on liability for killing or injuring trespassers by means of spring guns, traps, and other dangerous instruments; 61 L.R.A. 279, on distinction between different degrees of negligent homicide; 63 L.R.A. 387, 388, on homicide while drawing dangerous weapon contrary to law; 63 L.R.A. 389, 391, on homicide while carelessly and negligently handling dangerous weapon; 63 L.R.A. 401, on sufficiency of evidence on trial for homicide in commission of unlawful act.

29 AM. REP. 499, RODNEY v. WILSON, 67 MO. 123.

Parol evidence as to writing.

Cited in *Standard Box Co. v. Mutual Biscuit Co.* 10 Cal. App. 746, 103 Pac. 938, holding rule that prior or contemporaneous negotiations cannot be used to contradict or vary written contract applies to its legal effect as well as to the letter; *Weir Furnace Co. v. Bodwell*, 73 Mo. App. 389, denying admissibility of parol evidence to show that another party to contract was to be bound.

—As to note and indorsements.

Cited in *Day v. Thompson*, 65 Ala. 269; *Skelton v. Dustin*, 92 Ill. 49,—holding parol evidence inadmissible to limit indorser's liability; *Farwell v. St. Paul Trust Co.* 45 Minn. 495, 22 A. S. R. 742, 48 N. W. 326; *Beeler v. Frost*, 70 Mo. 185,—holding parol evidence inadmissible to show waiver of notice of dishonor of note; *Kingman v. Cornell-Tebbetts Mach. & Buggy Co.* 150 Mo. 282, 51 S. W. 727, holding parol evidence admissible as between parties to prove character of indorsement; *Jones v. Shaw*, 67 Mo. 667; *Higgins v. Cartwright*, 25 Mo. App. 609,—holding evidence of prior oral agreement inadmissible to vary terms of absolute note; *Smith v. Caro*, 9 Or. 278, holding parol evidence inadmissible in action by indorsee against immediate indorser to vary terms of indorsement; *Lewis v. Dunlap*, 72 Mo. 174, denying admissibility of oral evidence as against subsequent indorsee that indorsement made without recourse; *Gardner v. Mathews*, 81 Mo. 627, denying admissibility of oral evidence to vary indorsement of accommodation maker; *Barnard State Bank v. Feeler*, 89 Mo. App. 217, denying admissibility of parol evidence to show that maker giving three notes is liable on one only; *Christian University v. Hoffman*, 95 Mo. App. 488, 69 S. W. 474, denying admissibility of oral evidence to show note payable on condition; *Third Nat. Bank v. Reichert*, 101 Mo. App. 242, 73 S. W. 893, denying admissibility of parol evidence to vary terms of note; *Warden v. Salter*, 90 Ill. 160 (dissenting opinion), on admissibility of parol evidence to vary indorsement on note.

Cited in reference notes in 32 A. R. 181, on admissibility of payee's parol exoneration of maker, guarantor, or indorser of note from liability; 31 A. R.

499, on effect upon remote indorsee of agreement between payee and his immediate indorsee limiting payee's liability; 31 A. R. 610, on admissibility of parol evidence to vary the terms of a promissory note; 39 A. R. 116, on admissibility of parol evidence to vary liability of one indorsing after payee; 38 A. S. R. 498, on admissibility of parol evidence to control or vary effect of indorsement of negotiable instruments.

Negotiability of instrument.

Cited in *Davis v. Helm*, 34 Mo. App. 332, holding note not payable to order of payee or bearer nonnegotiable.

Release of surety on note.

Cited in *Edwards v. Shields*, 7 Ill. App. 70, holding surety on note relieved by failure to make demand and give notice of nonpayment.

Indorsement "without recourse."

Cited in note in 87 A. D. 389, on effect of indorsement "without recourse."

29 AM. REP. 501, PIER v. HEINRICHSHOFFEN, 67 MO. 163.

Service of notice by mail.

Cited in *Reynolds v. Maryland Casualty Co.* 30 Pa. Super. Ct. 456, holding notice of illness as required by policy properly given by depositing same in street letter box.

— Notice of protest.

Cited in *Faulkner v. Faulkner*, 73 Mo. 327, holding notice of protest properly given by proof that same was mailed; *Goucher v. Carthage Novelty Co.* 116 Mo. App. 99, 91 S. W. 447, holding service of notice of dishonor of note not shown by evidence that same was placed with outgoing mail without proof that mail was taken to post office.

Presumption as to receipt of letter.

Cited in *Bankers' Mut. Casualty Co. v. People's Bank*, 127 Ga. 326, 56 S. E. 429, holding letter properly addressed, stamped and deposited presumed to have been received; *Ward v. D. A. Morr Transfer & Storage Co.* 119 Mo. App. 83, 95 S. W. 964, holding letters mailed presumed to have been received by addressee.

Construction of term "mailed."

Cited in *Provident Sav. Life Assur. Soc. v. Nixon*, 19 C. C. A. 414, 44 U. S. App. 316, 73 Fed. 144, holding prepayment of postage presumed by use of term "mailed" in notice of forfeiture of policy; *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. 51, holding prepayment of postage implied in term "mailed" used in notice of protest.

Admissibility of impression copies.

Cited in *Samuel Hardin Grain Co. v. Missouri P. R. Co.* 120 Mo. App. 203, 96 S. W. 681, holding impression copies inadmissible after failure to produce stenographer to show that originals were mailed.

29 AM. REP. 506, STATE v. CLINTON, 67 MO. 360.

Impeachment of witness in criminal case.

Cited in *State v. Miller*, 71 Mo. 590; *State v. Grant*, 79 Mo. 113, 49 A. R. 218,—sustaining right to impeach witness in murder case by proof of general moral character.

Cited in notes in 82 A. S. R. 26, on evidence admissible as bearing on credi-

bility or bias of witness; 82 A. S. R. 30, on impeachment of witness by proof of character; 14 L.R.A.(N.S.) 698, on impeachment of character of witnesses.

— **Of accused testifying in own behalf.**

Cited in *Lockard v. Com.* 87 Ky. 201, 8 S. W. 266, sustaining right of state to attack veracity and character of accused testifying in own behalf; *State v. Vandiver*, 149 Mo. 502, 50 S. W. 892, sustaining right to impeach accused by evidence of other specific acts throwing light on crime; *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *State v. Rugan*, 68 Mo. 214; *State v. Beaty*, 25 Mo. App. 214; *Shaefer v. Missouri P. R. Co.* 98 Mo. App. 445, 72 S. W. 154; *Peck v. State*, 86 Tenn. 259, 6 S. W. 389; *Hill v. State*, 91 Tenn. 521, 19 S. W. 674; *Powers v. State*, 117 Tenn. 363, 97 S. W. 815,—sustaining right of state to impeach accused as ordinary witness; *Quintana v. State*, 29 Tex. App. 401, 25 A. S. R. 730, 16 S. W. 258, holding that defendant testifying in his own behalf may be cross examined same as any other witness; *Chappell v. State*, 71 Ala. 322, denying right of state to impeach accused testifying in own behalf; *State v. Brooks*, 92 Mo. 542, 5 S. W. 330 (dissenting opinion), on right to impeach accused testifying in own behalf.

Cited in reference note in 11 A. S. R. 229, on impeachment of accused testifying in his own behalf.

Cited in note in 75 A. S. R. 332, on privilege of witness as to incriminating witness.

Cross-examination of accused.

Cited in *State v. Testerman*, 68 Mo. 408; *State v. Avery*, 113 Mo. 475, 21 S. W. 193; *State v. Douglass*, 15 Mo. App. 1,—sustaining right to cross examine accused testifying in own behalf on any matter pertinent to issue; *State v. Saunders*, 14 Or. 300, 12 Pac. 441, holding accused testifying in own behalf subject to cross examination as to matters not touched on direct examination; *State v. Hathhorn*, 166 Mo. 229, 65 S. W. 756, holding accused testifying in own behalf subject to cross examination as other witnesses; *State v. Porter*, 75 Mo. 171; *State v. Palmer*, 88 Mo. 568; *State v. Bulla*, 89 Mo. 595, 1 S. W. 764; *State v. Graves*, 95 Mo. 510, 8 S. W. 739; *State v. Taylor*, 98 Mo. 240, 11 S. W. 570,—denying right to cross examine accused taking stand in own defense as to matters not touched on direct examination.

Cited in note in 15 L.R.A. 670, 672, on cross examination of defendant in criminal cases.

Evidence as to reputation of accused.

Cited in *State v. Taylor*, 45 La. Ann. 605, 12 So. 927; *State v. Cox*, 67 Mo. 392; *State v. Beckner*, 194 Mo. 281, 3 L.R.A.(N.S.) 535, 91 S. W. 892,—denying right of state to attack reputation of one on trial for murder until evidence on subject offered by defendant; *State v. Beaucleigh*, 92 Mo. 490, 4 S. W. 666, sustaining right of state to attack reputation of accused who introduced evidence as to good reputation; *State v. Clawson*, 30 Mo. App. 139, holding reputation for unchastity inadmissible to impeach evidence of male witness; *State v. Pollard*, 174 Mo. 607, 74 S. W. 969, holding evidence as to general moral character of accused admissible on trial for rape.

Cited in note in 20 L.R.A. 616, on impeaching character of accused for credibility.

Evidence as to handwriting by way of comparison.

Cited in *State v. Minton*, 116 Mo. 605, 22 S. W. 808; *Singer Mfg. Co. v. Clay*, 53 Mo. App. 412; *Doud v. Reid*, 53 Mo. App. 553,—holding proof as to gen-

uineness of signatures used as comparison necessary before admission in evidence; *Elsenrath v. Kallmeyer*, 61 Mo. App. 430, holding affidavit filed for allowance against estate, available for comparison of handwriting with signature in question; *State v. Tompkins*, 71 Mo. 613, holding admitted handwriting of defendant admissible by way of comparison to prove authorship of forgery; *Springer v. Hall*, 83 Mo. 693, 53 A. R. 598; *Rose v. First Nat. Bank*, 91 Mo. 399, 60 A. R. 258, 3 S. W. 876; *McCombs v. Foster*, 62 Mo. App. 303; *Tucker v. Kellogg*, 8 Utah, 11, 28 Pac. 870; *Hanriot v. Sherwood*, 82 Va. 1,—holding expert testimony admissible to test genuineness of disputed writing by comparison with admitted writings; *Lachance v. Loeblein*, 15 Mo. App. 460, sustaining right to compare disputed writing with signature conceded to be genuine.

Cited in notes in 12 L.R.A. 462, on expert and opinion testimony as to handwriting; 62 L.R.A. 847, on comparison of handwriting.

Sufficiency of indictment for forgery.

Cited in *People v. Herzog*, 47 Misc. 50, 93 N. Y. Supp. 357, 19 N. Y. Crim. Rep. 371, holding indictment for forgery of entry in book sufficient without setting out copy of entry.

Cited in note in 31 L.R.A. (N.S.) 229, on necessity of setting out instrument in indictment for forgery or uttering forgery.

Distinguished in *People v. Tilden*, 242 Ill. 536, 134 A. S. R. 341, 31 L.R.A. (N.S.) 215, 90 N. E. 218, 17 A. & E. Ann. Cas. 496, holding that indictment which purports to give only substance of instrument, without showing instrument is inaccessible, is fatally defective though instrument is set out in *haec verba*.

Validity and construction of statute.

Cited in *State v. Stewart*, 90 Mo. 507, 2 S. W. 790, holding statute providing that indictment for forgery need not set out whole writing, valid; *Gregory v. Menefee*, 83 Mo. 413; *Perry v. Strawbridge*, 209 Mo. 621, 123 A. S. R. 510, 16 L.R.A. (N.S.) 644, 108 S. W. 641, 14 A. & E. Ann. Cas. 92; *Black v. Brittain*, 116 Mo. App. 386, 92 S. W. 500,—holding that statute in derogation of common law must be strictly construed.

29 AM. REP. 512, STATE EX REL. TOWNSHIP v. POWELL, 67 MO. 295.

Liability of surety on official bond.

Cited in *United States v. Bryan*, 82 Fed. 290, holding sureties on postmaster's bond liable for money embezzled by postmaster's clerk; *Board of Education v. Jewell*, 44 Minn. 427, 20 A. S. R. 586, 46 N. W. 914, holding surety on school treasurer's bond liable for funds lost by burglary; *Bush v. Johnson County*, 48 Neb. 1, 58 A. S. R. 673, 32 L.R.A. 223, 66 N. W. 1023, holding that surety on treasurer's bond is not discharged by failure of bank after settlement with county at close of first term of office; *State v. Nevin*, 19 Nev. 162, 3 A. S. R. 873, 7 Pac. 650, holding sureties on bond of county treasurer liable for money lost by theft; *People ex rel. Nash v. Faulkner*, 38 Hun, 607, holding sureties on bond of surrogate liable for latter's failure to pay over money arising on sale of real estate to pay debts; *Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832, 17 A. & E. Ann. Cas. 926, holding custodian of public money liable as insurer.

Cited in reference notes in 31 A. R. 284, on liability of public officer for

money lost by insolvency of depositary; 3 A. S. R. 881, on liability of public treasurer or collector on official bond for money stolen without his fault.

Cited in note in 67 A. D. 368, on extent of liability of officers having custody of public moneys.

Validity of bond.

Cited in *Johnson v. Ragsdale*, 73 Mo. App. 594, holding bond indemnifying constable for act of disobedience in refusing to set out exempt property of debtor, void.

Liability of bailee or officer for loss of deposit.

Cited in *Coleman v. Lipscomb*, 18 Mo. App. 443, holding bailee of fund depositing same in own name liable to owner upon failure of bank; *State ex rel. Mississippi County v. Moore*, 74 Mo. 413, 41 A. R. 322, holding county treasurer liable for loss of funds by failure of bank in which deposited; *Tillinghast v. Merrill*, 151 N. Y. 135, 56 A. S. R. 612, 34 L.R.A. 678, 45 N. E. 375, holding town supervisor liable for loss of public funds by failure of banking firm; *People ex rel. Nash v. Faulkner*, 107 N. Y. 477, 14 N. E. 415, denying liability of surrogate for loss of surplus money arising on foreclosure deposited in good faith in bank of good standing; *State v. Gramm*, 7 Wyo. 329, 40 L.R.A. 690, 52 Pac. 533, denying liability of state treasurer for funds lost by failure of bank in which deposited with due care.

Cited in reference note in 100 A. D. 303, on liability of trustees for loss of trust funds through theft.

Cited in note in 22 L.R.A. 451, on liability on official bond for loss by theft or bank failure.

Check as assignment.

Cited in *St. Louis Brew. Asso. v. Drulinger*, 62 Mo. App. 482, holding that check drawn on no particular fund is not assignment of deposit before acceptance by drawee; *Dickinson v. Coates*, 79 Mo. 250, 49 A. R. 228, holding that bank check is not assignment pro tanto of deposit, creating lien.

Bank as debtor of depositor.

Cited in *Gregg v. Farmers' & M. Bank*, 80 Mo. 251, holding bank receiving deposit from one as "supt." debtor of real owner; *Butler County v. Boatmen's Bank*, 143 Mo. 13, 44 S. W. 1047, holding bank receiving county funds from treasurer debtor of treasurer, not county.

Cited in note in 45 A. R. 357, on rights as against the bank of a holder of an unaccepted check.

Party to action relating to public funds.

Cited in *State v. Rubey*, 77 Mo. 610, denying right of state to maintain action for county funds deposited in bank; *Salem Twp. v. Cunningham*, 45 Mo. App. 614, holding action against surety on bond of ex officio treasurer of school fund properly brought in name of town.

Preference by deposit.

Cited in *Paul v. Draper*, 158 Mo. 197, 81 A. S. R. 296, 59 S. W. 77, holding that preference is not created by deposit by guardian of minor's funds known by bank to be such funds.

Following trust deposit.

Cited in *Paul v. Draper*, 73 Mo. App. 566 (dissenting opinion), on liability of assets of insolvent bank for trust deposit.

Am. Rep. Vol. XVII.—7.

Executrix as subject to mandamus.

Cited in *State ex rel. Lionberger v. Tolle*, 71 Mo. 645, holding executrix of will trustee of estate not subject to mandamus to compel giving notice of sale.

29 AM. REP. 515, BOYD v. MEXICO SOUTHERN BANK, 67 MO. 537.**Effect of payment in bad money.**

See *First Nat. Bank v. Buchanan*, 87 Tenn. 32, 10 A. S. R. 617, 1 L.R.A. 199, 9 S. W. 202, holding that payment in bad money leaves original debt in full force.

29 AM. REP. 518, POEPPERS v. MISSOURI, K. & T. R. CO. 67 MO. 715.

Followed without discussion in *Hightower v. Missouri, K. & T. R. Co.* 67 Mo. 726.

Liability of railroad company for injury to or destruction of property.

Cited in *Brink v. Kansas City, St. J. & C. B. R. Co.* 17 Mo. App. 177, holding railroad company liable for destruction of crops by flood caused by obstruction of stream.

—By fires.

Cited in *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661, holding railroad company liable for burning of property caused by failure to provide spark arrester; *Union P. R. Co. v. McCollum*, 2 Kan. App. 319, 43 Pac. 97, holding railroad company liable for burning of buildings by prairie fire set by engine; *J. Q. Lloyd Chemical Co. v. G. Mathes & Sons Rag Co.* 145 Mo. App. 675, 123 S. W. 528, holding that one who kindles fire must regulate care used to prevent damage in proportion to risk reasonably to be apprehended; *Phillips v. Durham & C. R. Co.* 138 N. C. 12, 50 S. E. 462, 3 A. & E. Ann. Cas. 384, holding railroad company liable for damage done by fire spreading from right of way across lands of several intervening owners.

Proximate cause of injury.

Cited in *The Ontario*, 37 Fed. 220, holding standing of boat to save from total loss in storm, and not storm, proximate cause of loss resulting; *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 39 A. S. R. 251, 33 N. E. 795, holding negligence of railroad company in furnishing brakeman defective lantern, proximate cause of injury resulting from inability to give signals; *Fishburn v. Burlington & N. W. R. Co.* 127 Iowa, 483, 103 N. W. 481, holding negligence of railroad company in erecting snowshed proximate cause of injury to child on whom it again fell after he had set it up; *Dunn v. Cass Ave. & F. G. R. Co.* 21 Mo. App. 188, holding failure of conductor to stop car from which boy alighted safely when in motion, not proximate cause of injury by car moving in opposite direction.

Cited in reference note in 2 A. S. R. 608, on what negligence is proximate cause of injury.

Cited in notes in 42 A. R. 391, on proximate and remote cause; 36 A. S. R. 810, on ability to foresee result as test of proximate cause in cases involving wrongful acts; 7 L.R.A. 132, on instances of proximate cause of injury; 20 L.R.A.(N.S.) 94, on weather conditions as independent, intervening, efficient cause.

— By fire.

Cited in *Small v. Chicago, R. I. & P. R. Co.* 55 Iowa, 582, 8 N. W. 437, holding negligent fires set by railroad proximate cause of burning of elevator catching from another building; *St. Louis & S. F. R. Co. v. League*, 71 Kan. 79, 80 Pac. 46, holding negligence of railroad in setting fires proximate cause of destruction of buildings after owner had supposedly guarded against spreading; *Alabama & V. G. R. Co. v. Barrett*, 78 Miss. 432, 28 So. 820, holding negligent escape of fire from locomotive proximate cause of burning of property adjoining right of way.

Cited in reference notes in 50 A. R. 81, on liability of owner of premises for negligently starting fire thereon which is communicated to other property; 5 A. S. R. 737, on liability for communication of fire to adjoining premises; 73 A. S. R. 726, on liability of railroad company for loss from fire running across intermediate lands.

Cited in notes in 38 A. D. 77, on negligence of railroad company as proximate or remote cause of fire; 52 A. R. 158, on application of proximate and remote causes to cases of communication of fire; 36 A. S. R. 825, as to whether wind breaks causation on spread of fire; 21 L.R.A. 261, on effect of distance on liability for setting fires which spread to property of others.

Question for jury as to negligence and proximate cause.

Cited in *Paden v. Van Blarcom*, 181 Mo. 117, 79 S. W. 1195 (affirming 100 Mo. App. 185, 74 S. W. 124), holding it question for jury whether employer guilty of negligence in turning gas on new stove before testing valves thereby causing explosion injuring servant; *Adams v. Young*, 44 Ohio St. 80, 58 A. R. 789, 4 N. E. 599, holding it question for jury whether fire negligently thrown from mill smokestack, proximate cause of burning of property by fire spreading from buildings first set.

Fires as proof of negligence.

Cited in *Palmer v. Missouri P. R. Co.* 76 Mo. 217; *Feddeck v. St. Louis Car Co.* 125 Mo. App. 24, 102 S. W. 675; *Wise v. Joplin R. Co.* 85 Mo. 178,—holding escape of fire from locomotive prima facie evidence of negligence.

29 AM. REP. 528, HALL v. ROOD, 40 MICH. 46.**Right to injunction.**

Cited in *Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. 54, denying right of owners of water ditch to enjoin locator of mining claim from running tunnel into mountain under ditch; *Big Rapids v. Comstock*, 65 Mich. 78, 31 N. W. 811, denying right of city to enjoin erection of building because of slight encroachment on street; *Potter v. Saginaw Union Street R. Co.* 83 Mich. 285, 10 L.R.A. 176, 47 N. W. 217, denying right to enjoin substitution of electricity as motive power on street railway, in absence of proof of injury; *Campau v. National Film Co.* 159 Mich. 169, 123 N. W. 606, holding that injunction may be withheld if likely to inflict greater injury than grievance complained of; *Perrin v. Crescent City Stockyard & Slaughter-house Co.* 119 La. 83, 43 So. 938, 12 A. & E. Ann. Cas. 903, sustaining right to enjoin maintenance of tallow factory, on ground of nuisance; *Ives v. Edison*, 124 Mich. 402, 83 A. S. R. 329, 50 L. R.A. 134, 83 N. W. 120, sustaining right to enjoin changing easement in stair way created by deed; *Warren v. Cavanaugh*, 33 Mo. App. 102, sustaining right to enjoin opening of stone quarry as forbidden by ordinance; *Lakenan v. Han-*

nibal & St. J. R. Co. 36 Mo. App. 363; sustaining right to enjoin closing private way furnishing only convenient egress to highway.

Cited in reference note in 83 A. S. R. 337, on injunction to protect easement.

Cited in notes in 52 A. R. 574, on right to enjoin obstruction of highway; 53 A. R. 350, on irreparable injury in trespass justifying injunction; 99 A. S. R. 744, on injunction against erecting buildings and other structures; 3 L.R.A. 614, on when injunction against nuisance will not be issued.

—As to water rights.

Cited in *Howard v. Bellows*, 148 Mich. 410, 111 N. W. 1047, denying right to enjoin flooding lands by logging operations which have been carried on for many years without complaint; *Buchanan v. Grand River & G. Log Running Co.* 48 Mich. 364, 12 N. W. 490, sustaining right to enjoin injury to mill rights by log-driving; *Turner v. Hart*, 71 Mich. 128, 15 A. S. R. 243, 38 N. W. 890, sustaining right to enjoin flooding of land by maintaining dam at unlawful height.

Extinguishment of easement.

Cited in note in 10 E. R. C. 305, on extinguishment of easement by alteration of dominant tenement.

29 AM. REP. 530, SUMMER v. BUTTS, 40 MICH. 322.

Sufficiency and validity of contract.

Cited in *North Chicago Street R. Co. v. Chicago Union Traction Co.* 150 Fed. 612, holding contract that one party shall be bound at his option void for want of mutuality; *Booz v. Philadelphia & L. Transp. Co.* 124 Fed. 430, holding that charter party giving one lien on all property of charterer is not void for uncertainty; *Ellis v. Denver, L. & G. R. Co.* 7 Colo. App. 350, 43 Pac. 457, holding memorandum failing to state subject matter of contract, insufficient under statute of frauds; *Davie v. Lumberman's Min. Co.* 93 Mich. 491, 24 L.R.A. 357. 53 N. W. 625, denying right to maintain action for breach of contract to work "as long as we can make it pay."

29 AM. REP. 534, PEOPLE EX REL. TREMPER v. BROOKS, 40 MICH. 333.

Property subject to levy or garnishment.

Cited in *Rockland Sav. Bank v. Alden*, 103 Me. 230, 14 L.R.A.(N.S.) 1220, 68 Atl. 863, 13 A. & E. Ann. Cas. 806, holding funds in hands of trustee in bankruptcy are not subject to garnishment; *Cohnen v. Sweeney*, 105 Mich. 643, 63 N. W. 641, holding surplus money in hands of receiver on foreclosure, subject to garnishment; *Gardner v. Caldwell*, 16 Mont. 221, 40 Pac. 590, holding property in hands of receiver not subject to levy under execution; *Citizens' Commercial & Sav. Bank v. Bay*, 110 Mich. 633, 68 N. W. 649; *Campau v. Detroit Driving Club*, 135 Mich. 575, 98 N. W. 267; *Russell v. Millett*, 20 Wash. 212, 55 Pac. 44,—holding money in hands of receiver not subject to garnishment.

Cited in note in 13 L.R.A.(N.S.) 760, on right to garnish or attach funds in custodia legis after order of payment.

Right to sue receiver.

Cited in *Burk v. Muskegon Mach. & Foundry Co.* 98 Mich. 614, 57 N. W. 804; *Earle v. Humphrey*, 121 Mich. 518, 80 N. W. 370; *Prather Engineering Co. v. Detroit, F. & S. R. Co.* 152 Mich. 582, 116 N. W. 376,—denying right to sue receiver without permission of court.

Cited in reference notes in 59 A. S. R. 91, on attachment of property in custody of receiver; 63 A. S. R. 698, on interference with possession of receivers; 67 A. S. R. 70, on suits against receivers.

Cited in notes in 71 A. S. R. 372, on garnishment of receiver; 74 A. S. R. 286, on right to prosecute receiver or person for whom he is appointed without leave of court; 21 L. ed. U. S. 448, on powers and duties of receiver.

Power to issue garnishment order.

Cited in *Sievers v. Woodburn Sarven Wheel Co.* 43 Mich. 275, denying right of one justice to garnish judgment rendered by another.

29 AM. REP. 536, HERBAGE v. McENTEE, 40 MICH. 337.

Liability as joint maker of note.

Cited in *Cook v. Brown*, 62 Mich. 473, 4 A. S. R. 870, 29 N. W. 46, holding one signing under name of payor liable as joint maker; *Strickland v. Barber*, 78 Mich. 310, 43 N. W. 449; *Allison v. Kinne*, 104 Mich. 141, 62 N. W. 152; *Peninsular Sav. Bank v. Hosie*, 112 Mich. 351, 70 N. W. 890; *Borden v. Fletcher*, 131 Mich. 220, 91 N. W. 145,—holding one placing name on back of note before negotiation, liable as joint maker.

Cited in reference notes in 29 A. R. 558, on liability of payee to order on indorsement of negotiable instrument; 29 A. R. 745, on liability of blank indorser before utterance; 36 A. S. R. 103, as to when indorsers are joint makers.

Cited in note in 72 A. S. R. 678, on effect of indorsement by stranger before delivery.

29 AM. REP. 537, HEYER v. LEE, 40 MICH. 353.

Construction of terms in conveyance.

Cited in *Jones v. Pashby*, 62 Mich. 614, 29 N. W. 374; *Hartford Iron Min. Co. v. Cambria Min. Co.* 80 Mich. 491, 45 N. W. 351,—holding term "half" used in conveyance of east half of land should be construed to mean half in quantity.

Evidence of statements as to quantity of land.

Cited in *Seitz v. People's Sav. Bank*, 140 Mich. 106, 103 N. W. 545, holding admission of evidence of statements that property was 30 by 100 feet in action for breach of covenant of warranty, harmless where measurement abstract and notice showed lot to be of that size.

29 AM. REP. 539, GRAND RAPIDS v. BLAKELY, 40 MICH. 367.

Action for money had and received.

Cited in *Michigan Sanitarium & Benev. Asso. v. Battle Creek*, 138 Mich. 676, 101 N. W. 855, sustaining right to recover for money had and received under common counts.

Cited in note in 52 A. D. 759, on recovery on count for money had and received of money obtained by fraud or other tort or by duress or by mistake.

—Sum paid for void tax.

Cited in *Grand Rapids v. Leonard*, 40 Mich. 370; *Daniels v. Watertown Twp.* 55 Mich. 376, 21 N. W. 350,—holding assumpsit maintainable to recover money paid for illegal tax; *Raleigh v. Salt Lake City*, 17 Utah, 130, 53 Pac. 974, holding money paid as tax under void ordinance, recoverable; *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843, sustaining right to recover money paid for illegal

tax; *Re O'Berry*, 179 N. Y. 285, 72 N. E. 109, sustaining right to recover interest on sum paid for illegal tax.

Cited in note in 45 A. D. 164, on recovery of illegal taxes paid under protest.

Validity of tax.

Cited in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding tax invalidated for failure to annex affidavit to return.

Liability of city for interest.

Cited in *Shipley v. Hacheney*, 34 Or. 303, 55 Pac. 971, holding city liable for interest on warrants.

29 AM. REP. 541, SCRIBNER v. COLLAR, 40 MICH. 375.

Right of agent or broker to commissions.

Cited in *Wadsworth v. Adams*, 138 U. S. 380, 34 L. ed. 984, 11 Sup. Ct. Rep. 303, holding agent to sell notes failing to notify principal that buyer would pay more if first offer not accepted, is not entitled to agreed commissions; *Humphrey v. Eddy Transp. Co.* 107 Mich. 163, 65 N. W. 13, holding agent to sell property not deprived of right to commissions for failure to disclose that he is stockholder in purchaser.

Cited in reference note in 12 A. S. R. 589, as to when broker is entitled to commission on sale of real estate.

Cited in note in 93 A. D. 173, 178, on nature of employment and duties of broker other than stockbrokers.

— Right to commissions from both parties.

Cited in *Green v. Southern States Lumber Co.* 163 Ala. 511, 50 So. 917, holding that broker who is agent of both buyer and seller cannot recover commission unless inconsistent relation known and consented to by both parties; *Talcott v. Chew*, 27 Fed. 273; *Hobbie v. Jennison*, 40 Fed. 887; *St. Louis Electric Light & P. Co. v. Edison General Electric Co.* 64 Fed. 997; *Rauer's Law & Collection Co. v. Bradbury*, 3 Cal. App. 256, 84 Pac. 1007; *McDonald v. Maltz*, 94 Mich. 172, 34 A. S. R. 331, 53 N. W. 1058; *Friar v. Smith*, 120 Mich. 411, 46 L.R.A. 229, 79 N. W. 633; *Flattery v. James Cunningham, Son & Co.* 125 Mich. 467, 84 N. W. 625; *Kronenberger v. Fricke*, 22 Ill. App. 550; *Carr v. Ubsdell*, 97 Mo. App. 326, 71 S. W. 112; *Winter v. Carey*, 127 Mo. App. 601, 106 S. W. 539; *Hannan v. Prentis*, 124 Mich. 417, 83 N. W. 102,—holding agent for sale of property accepting commissions from buyer not entitled to commissions from seller; *McLure v. Luke*, 84 C. C. A. 1, 154 Fed. 647; *Ranney v. Donovan*, 78 Mich. 318, 44 N. W. 276,—holding agent bringing parties together merely, entitled to receive commissions from both; *Aiple-Hemmelmann Real Estate Co. v. Spellbrink*, 211 Mo. 671, 111 S. W. 480, 14 A. & E. Ann. Cas. 652, holding broker acting for both parties to their knowledge, entitled to commissions on sale; *Jacobs v. George*, 3 Ariz. 9, 20 Pac. 183; *De Steiger v. Hollington*, 17 Mo. App. 382; *Reese v. Garth*, 36 Mo. App. 641,—holding double employment of agent defense to action for commissions for sale of property; *Hogle v. Meyering*, 161 Mich. 472, 126 N. W. 1063; *Plotner v. Chillson*, 21 Okla. 224, 129 A. S. R. 776, 95 Pac. 775,—holding that broker is not entitled to double commissions; *Campbell v. Baxter*, 41 Neb. 729, 60 N. W. 90, holding broker for sale of property receiving commission from one owner bound to return commission received from other owner; *Orton v. Scofield*, 61 Wis. 382, 21 N. W. 261, holding middleman

bringing parties together thereby effecting exchange of property, entitled to commissions.

Cited in notes in 46 A. R. 38, on agent's right to recover compensation for sale of land where he acts for both vendor and vendee; 7 A. S. R. 280, on rescission of transaction by principal where agent has adverse interest, or is in secret employment of other party; 12 L.R.A. 396, on right of agent to act in double capacity; 45 L.R.A. 44, 45, 48, on doubling commissions by real estate brokers; 45 L.R.A. 50, on effect of principal's knowledge of or consent to dealings by real-estate broker with other party as affecting right to commissions; 45 L.R.A. 51, 52, on right of mere middleman to commissions from both parties.

Distinguished in *McLure v. Luke*, 24 L.R.A.(N.S.) 659, 84 C. C. A. 1, 154 Fed. 647, holding dual employment not inconsistent or contrary to public policy where broker is employed merely to bring principals together and is without discretionary power to negotiate sale.

Validity of contract.

Cited in *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 86 Fed. 929, holding agreement between one reorganizing railroad and president of company to share benefits of former's contract, void as against public policy; *Alvord v. Cook*, 174 Mass. 120, 64 N. E. 499, holding that agreement between brokers to share commissions is not fraud avoiding sale; *Finnerty v. Fritz*, 5 Colo. 174; *Green v. Knoch*, 92 Mich. 26, 52 N. W. 80,—holding agent's contract to sell to himself made without owner's knowledge void; *McClure v. Ullman*, 102 Mo. App. 697, 77 S. W. 325, holding contract of sale made by agent acting for both owners without their knowledge, void.

29 AM. REP. 544, DART v. WOODHOUSE, 40 MICH. 399.

Taxability of books of abstract.

Cited in *Perry v. Big Rapids*, 67 Mich. 146, 11 A. S. R. 570, 34 N. W. 530; *McLean v. Prudential Ins. Co.* 130 Mich. 591, 90 N. W. 405,—holding books of abstracts of title not taxable; *Leon Loan & Abstract Co. v. Board of Equalization*, 86 Iowa, 127, 41 A. S. R. 486, 17 L.R.A. 199, 53 N. W. 94, holding books of abstract of title, taxable.

Cited in reference note in 11 A. S. R. 572, on unpublished manuscripts as subject to execution or taxation.

Cited in notes in 51 L.R.A. 358, on common-law rights of compilers in intellectual productions; 51 L.R.A. 381, on rights of creditors of intellectual productions of debtor.

Liability of books of abstract or account to levy.

Cited in *Rosenthal v. Dickerman* (*Rosenthal v. Muskegon Circuit Judge*), 98 Mich. 208, 39 A. S. R. 535, 22 L.R.A. 693, 57 N. W. 112, holding books of account subject to attachment; *Washington Bank v. Fidelity Abstract & Secur. Co.* 15 Wash. 487, 55 A. S. R. 902, 37 L.R.A. 115, 46 Pac. 1036, holding set of abstract books subject to sale on execution.

29 AM. REP. 545, DEWAR v. PEOPLE, 40 MICH. 401.

Validity of ordinance or statute relating to sales of liquors.

Cited in *Mt. Pleasant v. Vansice*, 43 Mich. 361, 38 A. R. 193, 5 N. W. 378, holding ordinance licensing sales of liquors, void as in violation of constitution

forbidding enactment of license laws; *Kenaston v. Riker*, 146 Mich. 163, 109 N. W. 278; *Fitzpatrick v. Weaver*, 147 Mich. 382, 111 N. W. 163,—holding ordinance prescribing license for keeping saloon where intoxicating liquors sold. void as in conflict with statute against sales; *Seneca Min. Co. v. Osmun* (*Seneca Min. Co. v. Secretary of State*), 82 Mich. 573, 9 L.R.A. 770, 47 N. W. 25, holding statute authorizing corporations to extend corporate existence, valid.

Cited in reference note in 31 A. R. 648, on effect of repeal of prohibitory clause in constitution upon license law unconstitutional before such repeal.

Power of cities to regulate sales of liquors.

Cited in *Wolf v. Lansing*, 53 Mich. 367, 19 N. W. 38, holding that cities are not prevented from regulating sales of liquors by enactment of general liquor law.

29 AM. REP. 547, JACOX v. JACOX, 40 MICH. 473.

Competency to contract or make deed.

Cited in *Mason v. Dunbar*, 43 Mich. 407, 38 A. R. 201, 5 N. W. 432, holding that one in exclusive care of children is not legally incompetent to make contract; *Stringfellow v. Hanson*, 25 Utah, 480, 71 Pac. 1052 (dissenting opinion), on power of one afflicted with loss of memory to execute deed.

—Presumption as to.

Cited in *Sands v. Sands*, 112 Ill. 225, holding deed by one enfeebled in mind by old age and disease, presumptively void; *Slayback v. Witt*, 151 Ind. 378, 50 N. E. 389, holding that no presumption of undue influence is created by fact that woman 91 years of age gave deed to son who had been kind to her.

Validity of conveyance by incompetent person.

Cited in *Paddock v. Pulsifer*, 43 Kan. 718, 23 Pac. 1049, holding deed obtained from aged person by fraud properly set aside; *Smith v. Cuddy*, 96 Mich. 562, 56 N. W. 89, holding conveyance by one mentally incompetent properly set aside; *Lockwood v. Lockwood*, 124 Mich. 627, 83 N. W. 613, holding conveyance by aged widow to son, reserving only life estate with no provision for payment of taxes, insurance or repairs, properly set aside in equity.

Burden of proof as to capacity and fairness.

Cited in *Dorsey v. Wolcott*, 173 Ill. 539, 50 N. E. 1015, holding one taking deed from aged person bound to show donor's capacity and want of fraud; *Tee-garden v. Lewis*, 145 Ind. 98, 44 N. E. 9, holding burden of proof upon one alleging invalidity of gift for incapacity of donor; *Duncombe v. Richards*, 46 Mich. 166, 9 N. W. 149, holding one taking assignment of mortgage from another on death bed bound to show fairness.

Cited in reference note in 2 A. S. R. 361, on presumption of undue influence in conveyance by father of all his property to son.

Cited in notes in 33 A. R. 739, on burden of proof as to undue influence in gift from patient to physician; 11 A. S. R. 758, on burden of proof as to fraudulent conveyances; 11 A. S. R. 759, on presumptions and proof as to fraud between persons in fiduciary relations; 36 L.R.A. 724, on presumption of sanity with relation to contracts and conveyances; 36 L.R.A. 733, on burden of proof as to sanity with relation to contracts and conveyances; 6 E. R. C. 877, on degree of proof necessary on part of one who occupies position of trust or sustains position of legal or natural authority over another, to establish validity

of gift or benefit from latter to former or any financial settlement between them.

Right of guardian to purchase ward's property.

Cited in *Thornton v. Gilman*, 67 N. H. 392, 39 Atl. 900, denying right of guardian de son tort to purchase ward's land at tax sale.

Cited in reference note in 30 A. R. 577, on validity of conveyance by minor to a person in loco parentis on day of majority.

29 AM. REP. 553, MYER v. HART, 40 MICH. 517.

Validity of provision in instrument.

Cited in *Merchants' Nat. Bank v. Sevier*, 14 Fed. 662, holding provision in note for payment as attorney's fee of 10 per cent of sum due, void; *Boozer v. Anderson*, 42 Ark. 167; *Dow v. Updike*, 11 Neb. 95, 7 N. W. 857,—holding stipulation in note for attorney's fees on default in addition to interest, void; *Peyser v. Cole*, 11 Or. 39, 50 A. R. 451, 4 Pac. 520, holding stipulation in note for attorney's fees in case of default, valid; *L'Engle v. L'Engle*, 21 Fla. 131; *Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555,—holding stipulation in mortgage for reasonable attorney's fee on foreclosure, valid; *Millard v. Truax*, 47 Mich. 251, 10 N. W. 358, holding statutory foreclosure not invalidated by provision for attorney's fee; *Bendey v. Townsend*, 109 U. S. 665, 27 L. ed. 1065, 3 Sup. Ct. Rep. 482; *Canfield v. Conkling*, 41 Mich. 371, 2 N. W. 191; *Vosburgh v. Lay*, 45 Mich. 455, 8 N. W. 91; *Louder v. Burch*, 47 Mich. 109, 10 N. W. 129; *Damon v. Deeves*, 62 Mich. 465, 29 N. W. 42; *Kittermaster v. Brossard*, 105 Mich. 219, 53 A. S. R. 437, 63 N. W. 75,—holding provision in mortgage for attorney's fee, void; *Northwestern Mut. L. Ins. Co. v. Butler*, 57 Neb. 198, 77 N. W. 667, holding provision in mortgage for expense of abstract in case of foreclosure, void; *Balfour v. Davis*, 14 Or. 47, 12 Pac. 89, holding provision in mortgage for payment of attorney's fees of twenty per cent of sum unpaid, void as against public policy.

Effect on negotiability of provision for attorney's fees.

Cited in *Trader v. Chidester*, 41 Ark. 242, 48 A. R. 38; *Chase v. Whitmore*, 68 Cal. 545, 9 Pac. 942,—holding negotiability of note destroyed by provision for attorney's fees on default; *Tinsley v. Hoskins*, 111 N. C. 340, 32 A. S. R. 801, 16 S. E. 325, holding stipulation for collection of fee, in promissory note, unenforceable; *Oppenheimer v. Farmers' & M. Bank*, 97 Tenn. 19, 56 A. S. R. 778, 33 L.R.A. 767, 36 S. W. 705, holding note not made non-negotiable by stipulation for attorney's fees in case of default.

Cited in notes in 29 A. R. 406, on effect of provision in note for attorney's fee; 55 A. S. R. 444, on validity of stipulation for attorneys' fees; 1 L.R.A. 547, on effect of stipulation for attorney's fees on negotiability of note.

Right of mortgagee to charge for his own services on foreclosure.

Cited in *Bank of Benson v. Hove*, 45 Minn. 40, 47 N. W. 449, denying right of mortgagee to charge for his own services under stipulation in mortgage for attorneys' fee on foreclosure.

Cited in reference note in 87 A. S. R. 118, on provision in mortgage for attorneys' fees.

Liability for statutory penalty.

Cited in *Parkhurst v. First Nat. Bank*, 53 Kan. 136, 35 Pac. 1116; *Renard v. Clink*, 91 Mich. 1, 30 A. S. R. 458, 51 N. W. 692; *Schumacher v. Falter*, 113 Wis. 563, 89 N. W. 485,—holding that one refusing in good faith to dis-

charge mortgage claimed to be paid is not liable to statutory penalty; *Weaver v. Grand Rapids & L. R. Co.* 107 Mich. 300, 65 N. W. 225, denying right to recover penalty for failure to transmit message where omission due to mere neglect, not discrimination.

Stipulation in contract as a penalty.

Cited in *Tilley v. American Bldg. & L. Asso.* 52 Fed. 618; *McDonald v. Algeo*, 96 Ill. App. 75,—holding sum stipulated in contract as damages for breach, regarded as penalty where no proof of damage shown; *Condon v. Kemper*, 47 Kan. 126, 13 L.R.A. 671, 27 Pac. 829, holding sum stipulated in contract as damages for nonperformance, penalty; *Ross v. Loescher*, 152 Mich. 386, 125 A. S. R. 418, 116 N. W. 193, holding provision in building contract for forfeiture of \$20 per day for failure to perform not void as excessive.

Cited in reference note in 32 A. R. 457, on stipulation in mortgage for attorneys' fees as penalty or liquidated damages.

Cited in note in 6 E. R. C. 560, on distinction between a penalty and liquidated damages mentioned as payable in event of nonperformance of contract.

29 AM. REP. 558, SMITH v. LONG, 40 MICH. 555.

Liability as joint maker of note.

Cited in *Sibley v. Muskegon Nat. Bank*, 41 Mich. 196, 1 N. W. 930, holding stranger placing name on back of note before indorsement by payee liable as joint maker; *Brewer v. Boynton*, 71 Mich. 254, 39 N. W. 49, holding that indorser signing name below that of payee is not liable as joint maker.

Notice of nonpayment of note.

Cited in *Belford v. Bangs*, 15 Ill. App. 76, holding indorser on note presumed to be injured by holder's failure to give notice of nonpayment.

29 AM. REP. 560, STOKOE v. UPTON, 40 MICH. 581.

Tenant's right to fixtures.

Cited in *Dreiske v. People's Lumber Co.* 107 Ill. App. 285, holding tenant's right to remove fixtures lost by holding over.

29 AM. REP. 562, MIZNER v. FRAZIER, 40 MICH. 592.

Exclusion of remote and speculative damages.

Cited in 1 *Joyce Damages*, § 91, on exclusion of damages which are too remote, or are contingent or speculative in character.

29 AM. REP. 565, DAY v. MUTUAL BEN. L. INS. CO. 1 McARTH. 41.

Affirmed in 95 U. S. 380, 24 L. ed. 499.

Representations as affecting policy.

Cited in reference notes in 37 A. S. R. 372; 19 A. S. R. 386,—as to when representations by insured amount to warranties; 22 A. S. R. 882, on representations or suppressions of facts in insurance application; 50 A. S. R. 86, on false representations and warranties in application for life insurance; 56 A. S. R. 626, on effect of representations in life insurance policy; 66 A. S. R. 164, on false or fraudulent answers in application for insurance.

—As to health.

Cited in *Fidelity Mut. Life Asso. v. McDaniel*, 25 Ind. App. 608, 57 N. E.

645, holding that life policy was not avoided by failure of applicant to state that he had been treated for la grippe, where no serious effect produced on health; *Ball v. Granite State Mut. Aid Asso.* 64 N. H. 291, 9 Atl. 103, holding representations by applicant as to health made warranties by provision in policy that same shall be void if representations false.

Cited in note in 53 L.R.A. 196, on innocent misrepresentations as to health of insured when he has an undiscovered disease.

Construction of renewal policy.

Cited in *Bickford v. Aetna Ins. Co.* 101 Me. 124, 63 Atl. 552, 8 A. & E. Ann. Cas. 92, holding renewal policy properly construed as subject to terms of original policy.

29 AM. REP. 578, WASHINGTON CITY v. MEIGS, 1 McARTH. 53.

Validity of statute relating to dogs.

Cited in *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, holding statute limiting recovery for killing of dog to value declared by owner on assessment roll, valid as within police power; *State ex rel. Curtis v. Topeka*, 36 Kan. 76, 59 A. R. 529, 12 Pac. 310, holding statute taxing dogs, valid.

Cited in reference notes in 30 A. R. 152, on validity of statute exempting one dog in each family and taxing all others; 48 A. R. 459, on taxation of dogs; 30 A. S. R. 528, on taxation and regulation of dogs; 68 A. S. R. 136, on regulations as to keeping of dogs.

Cited in notes in 8 A. S. R. 512, on what impositions may be sustained as exercise of taxing power; 67 A. S. R. 298, on property in dogs subject to police power; 78 A. S. R. 271, on power to make violation of municipal ordinances a crime; 40 L.R.A. 522, on license and tax laws as to dogs.

Right of action for injury to dog.

Cited in *Salley v. Manchester & A. R. Co.* 54 S. C. 481, 71 A. S. R. 810, 32 S. E. 526, denying right to maintain action for injury to dog.

Cited in notes in 31 A. R. 517; 40 A. R. 83; 28 A. S. R. 922,—on dogs as subjects of larceny; 67 A. S. R. 291, on remedies of owner to protect property right in dogs, and measure of recovery for injury thereto; 37 L.R.A. 659, on liability of railroad for killing dogs; 9 E. R. C. 687, on whether dogs are property.

Liability for injury by dog.

Cited in *Murphy v. Preston*, 5 Mackey, 514, holding proof of owner's knowledge of character of dog necessary in action for biting.

29 AM. REP. 582, SPENCER v. BOARD OF REGISTRATION, 1 McARTH. 169.

Right of suffrage, generally.

Cited in reference note in 52 A. S. R. 34, on constitutionality of registration laws.

Cited in notes in 91 A. S. R. 685, on right of electors to vote for candidate whose name is not printed on the official ballot; 1 L.R.A. 111, on nature of right of suffrage; 1 L.R.A. 112, on source of right of suffrage; 53 L.R.A. 660, on existence of Federal control of elections; 23 L. ed. U. S. 563, on construction and effect of 15th Amendment to Federal Constitution.

Political rights of women.

Cited in *State v. County Ct.* 90 Mo. 593, 2 S. W. 788, holding that women residing in the city or town, and owning property in their own right must be counted in determining whether petition for dramshop license is signed by a majority of assessed taxpaying citizens.

Cited in reference note in 59 A. S. R. 521, on political rights of women.

Cited in notes in 1 L.R.A. 113, on citizenship of women; 8 L.R.A. 337, on possession of political rights as essential to citizenship.

— Right to vote.

Cited in *Gougar v. Timberlake*. 148 Ind. 38, 62 A. S. R. 487, 37 L.R.A. 644, 40 N. E. 339, holding that United States Constitution confers on state right of suffrage, and that legislative act conferring right on every male citizen of twenty-one years necessarily excludes women; *People v. Barber*, 48 Hun, 198, holding suffrage not natural right of citizen, and woman not entitled to vote under statute restricting right to vote to male citizens; *Solon v. State*, 54 Tex. Crim. Rep. 261, 114 S. W. 349, holding that no one is entitled to vote unless people in their sovereign capacity have conferred on him that right; *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 23 L.R.A.(N.S.) 839, 122 N. W. 473 (dissenting opinion), on right to vote.

Cited in notes in 62 A. S. R. 496; 69 A. S. R. 241; 21 L.R.A. 662,—on right of women to vote.

29 AM. REP. 591, CAMPBELL v. AMERICAN POPULAR L. INS. CO. 1 McARTH. 246.**Condition precedent to action.**

Cited in *Sullivan v. Susong & Co.* 30 S. C. 305, 9 S. E. 156, denying right to maintain action on contract for grading until performance of agreement to compute extent of work.

— For submission to arbitration, generally.

Cited in *Laffin v. Chicago, W. & N. R. Co.* 34 Fed. 859, holding refusal to arbitrate loss as agreed, bar to action at law for damages; *Norton v. Hayden*, 109 Mich. 682, 67 N. W. 909, holding making of award, condition precedent to action for interest in firm where amount agreed to be determined by arbitration.

Cited in reference notes in 38 A. R. 54, on effect of condition in building contract that all claims be arbitrated; 36 A. S. R. 423, on validity of agreement as to necessity of architects' certificates.

Cited in notes in 2 A. S. R. 569; 15 A. S. R. 386,—on validity of agreement to arbitrate; 15 L.R.A. 144, on agreement to arbitrate as a bar to an action; 15 L.R.A.(N.S.) 212, on decision of surgeon as to cause assured's death; 3 E. R. C. 387, on effect of arbitration clause in contract.

— To action on policy.

Cited in *Western Assur. Co. v. Hall*, 112 Ala. 318, 20 So. 447, denying right to maintain action upon policy before offer to submit to arbitration, as required by policy; *National Union v. Thomas*, 10 App. D. C. 277, holding establishing proof of death, condition precedent to action on policy payable upon satisfactory evidence of death; *Eighmy v. Brotherhood of Railway Trainmen*, 113 Iowa, 681, 83 N. W. 1051, holding decision of officers as to disability, condition precedent to action on certificate providing that claims shall be referred to such officers.

Cited in reference notes in 63 A. S. R. 46; 57 A. S. R. 326,—on provision for arbitration as condition precedent to suit on insurance policy.

**29 AM. REP. 605, OULD v. WASHINGTON HOSPITAL FOR FOUND-
LINGS, 1 McARTH. 541, Affirmed in 95 U. S. 303, 24 L. ed. 450.**

Invalidity of trust for indebtedness.

Cited in *District of Columbia v. Washington Market Co.* 3 MacArth. 559, holding trust created for benefit of poor of certain city, void for indefiniteness.

Cited in reference notes in 35 A. R. 555, on sufficiency of grant or devise for charitable use; 1 A. S. R. 416, on validity of devises and bequests to charitable uses; 55 A. S. R. 602, on inapplicability to charitable trust of rule against perpetuities.

Cited in notes in 49 A. S. R. 127, on rule against perpetuities as applicable to charitable uses; 63 A. S. R. 262, on charitable uses or trusts for hospitals, homes, etc.; 1 L.R.A. 453, on application of statute against perpetuities.

29 AM. REP. 612, STANTON v. HASKIN, 1 McARTH, 558.

Deed or contract as champertous.

Cited in *Peck v. Heurich*, 167 U. S. 624, 42 L. ed. 302, 17 Sup. Ct. Rep. 927, holding deed to attorney in trust to sell lands for part of proceeds, void for champerty; *Johnson v. Van Wyck*, 4 App. D. C. 294, 41 L.R.A. 520, holding agreement by attorney to prosecute suit at own expense for half of recovery, champertous.

Cited in reference notes in 12 A. S. R. 472, 512, as to when law of champerty is applicable; 74 A. S. R. 90, on what agreements are champertous.

Cited in notes in 66 A. D. 508, on validity of contracts for lawyers' professional services; 83 A. S. R. 185, on legal contracts between attorneys and clients; 83 A. S. R. 168, on champerty, barratry, and maintenance.

**29 AM. REP. 616, DISTRICT OF COLUMBIA v. SAVILLE, 1 Mc-
ARTH. 581.**

Power to regulate theaters.

Cited in notes in 110 A. S. R. 526, on power to regulate theaters and like shows; 7 E. R. C. 282, on reasonableness of ordinance made by municipal corporation.

29 AM. REP. 618, WEED v. BLACK, 2 McARTH. 268.

Validity of contract to procure legislation.

Cited in *Houlton v. Dunn*, 60 Minn. 26, 51 A. S. R. 493, 30 L.R.A. 737, 61 N. W. 698, holding contract to procure passage of certain bills, void; *Owens v. Wilkinson*, 20 App. D. C. 51; *Richardson v. Scott's Bluff County*, 59 Neb. 400, 80 A. S. R. 682, 48 L.R.A. 294, 81 N. W. 309,—holding contract to procure certain legislation, void; *Sussman v. Porter*, 137 Fed. 161, holding that agreement to obtain municipal franchise to operate trolley line for fee contingent upon success is void.

Cited in reference notes in 31 A. R. 213, on validity of contracts for lobbying; 29 A. R. 618; 34 A. S. R. 613,—on invalidity of contract to procure legislation; 55 A. S. R. 619, on invalidity of contracts with public officers.

Cited in notes in 66 A. D. 507, on invalidity of lobbying contracts; 121 A. S. R. 735, on illustrations of lobbying contracts; 117 A. S. R. 522, on enforceability of contracts with officials tending to bias their public actions; 30 L.R.A. 740, on validity of contract for personal influence or lobby services to procure legislation.

29 AM. REP. 621, SMITH v. THOMPSON, 2 McARTH. 291.**Rights of married women over separate property.**

Cited in reference notes in 34 A. R. 600, on married woman's right to charge separate property; 9 A. S. R. 326, on married woman's right to convey or encumber her equitable separate estate; 10 A. S. R. 289, on right of married women to hold and dispose of separate property.

Cited in notes in 30 A. D. 241, on power of feme covert over separate estate in absence of statutory regulation; 57 A. D. 348, 349, on statutes affecting power of married women to make wills; 10 A. S. R. 165, on right of married woman to dispose of separate property.

29 AM. REP. 626, GRUMBINE v. WASHINGTON, 2 McARTH, 578.**Liability of municipal corporation for act of officers.**

Cited in *Caspary v. Portland*, 19 Or. 496, 20 A. S. R. 842, 24 Pac. 1036, denying liability of municipal corporation for act of officers in converting property.

Cited in reference notes in 38 A. R. 791, on city's liability for torts of its officers; 39 A. R. 771, on liability of municipal corporation for permitting firing of cannon in street; 13 A. S. R. 686, on liability of municipal corporation for torts of its police officers and other agents.

Cited in notes in 35 A. R. 782, on municipal liability for misfeasance of officers; 15 L.R.A. 783, on liability of municipal corporation for acts of policemen; 44 L.R.A. 797, 798, 801, on municipal liability for false imprisonment and unlawful arrest; 18 L.R.A.(N.S.) 410, on municipal liability for attempt to enforce void ordinance regulating business or conduct of those within its limits.

29 AM. REP. 628, RE POOLE, 2 McARTH. 583.**Right to habeas corpus to obtain possession of child.**

Cited in *Brown v. Robertson*, 76 S. C. 161, 9 L.R.A.(N.S.) 1173, 56 S. E. 786, denying right of stranger to writ of habeas corpus to remove child from custody of nurse to whom given by parent.

Cited in reference note in 31 A. R. 375, on right of brothers, sole relatives, to custody of minor brother.

Cited in notes in 98 A. D. 734, on power of equity as to custody of infants; 9 L.R.A.(N.S.) 1173, on right of stranger to writ of habeas corpus.

29 AM. REP. 635, STONE v. HILLS, 45 CONN. 44.**Liability of master for tort of servant or child.**

Cited in *Houston, C. A. & N. R. Co. v. Bolling*, 59 Ark. 395, 43 A. S. R. 38, 27 L.R.A. 190, 27 S. W. 492, holding railroad not liable for injury to child riding on hand car at invitation of employee contrary to rules; *Peter Anderson & Co. v. Diaz*, 77 Ark. 606, 113 A. S. R. 180, 4 L.R.A.(N.S.) 649, 92 S. W. 861, holding saloonkeeper not liable for act of bar-tender in saturating foot of patron with alcohol and setting fire to it; *Fiske v. Enders*, 73 Conn. 338, 47 Atl. 681, holding master not liable for negligent injuries by servant directed to exercise horses, caused while using them solely for own amusement; *Ritchie v. Waller*, 63 Conn. 150, 38 A. S. R. 361, 27 L.R.A. 161, 28 Atl. 29, holding master liable for injuries caused by servant leaving team unhitched in street to perform errand for himself; *Loomis v. Hollister*, 75 Conn. 718, 55 Atl. 561, holding master liable for negligence of servant in leaving horses unhitched in street while latter returning from delivering ice went to postoffice on own business; *Carl Corper Brewing &*

Malting Co. v. Huggins, 96 Ill. App. 144, holding master not liable for negligent injury by servant on vacation; *Gregory v. Jones*, 121 Mo. App. 270, 73 S. W. 899, holding principal giving agent automobile to sell on commissions not liable for negligent injuries when agent on pleasure trip; *Danforth v. Fisher*, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 71 Atl. 535, holding owner not liable for injury, caused by automobile while being used by chauffeur for own business; *Holler v. Ross*, 68 N. J. L. 324, 96 A. S. R. 546, 59 L.R.A. 943, 53 Atl. 472, holding master not liable for act of watchman in shooting trespasser who refuses to leave premises; *Bennett v. Busch*, 75 N. J. L. 240, 67 Atl. 188, holding that whether chauffeur was within general scope of his authority when collision occurred was question for jury, although use of machine was in disobedience to instructions; *Waalder v. Great Northern R. Co.* 18 S. D. 420, 112 A. S. R. 794, 70 L.R.A. 731, 100 N. W. 1097, denying liability of railroad company for assault by servant upon employee of owner upon whose land former was erecting snow fence.

Cited in reference notes in 29 A. R. 679, on liability of carrier of passengers to child riding free by permission of servant; 36 A. R. 336, 403, as to when servant is acting within scope of his employment so as to render master liable for his torts; 15 A. S. R. 763, on master's liability for servants' wrongful acts; 30 A. S. R. 585, on test of master's liability for acts of servant; 66 A. S. R. 541, on relation of master to servant temporarily under direction of third person.

Cited in notes in 40 A. R. 229, on master's liability for consequences of servant's unauthorized use of team and the like; 35 A. D. 194; 54 A. S. R. 82,—on master's liability for acts of servants while deviating from employment; 88 A. S. R. 789, 792, on necessity that unauthorized act of agent be in execution of employment to hold principal liable; 27 L.R.A. 165, on liability of master for wrongful or negligent act of servant while assisting third person; 21 L.R.A.(N.S.) 652, on liability of general employer for negligence of employee while assisting third person without former's knowledge or consent; 9 L.R.A.(N.S.) 1035, on master's liability for injury by horse when used by servant for his own business or pleasure; 17 E. R. C. 283, on liability of master for act of servant outside master's business.

Existence of relationship of master and servant.

Cited in notes in 22 A. S. R. 462, on when relation of master and servant exists; 37 L.R.A. 43, on person for whom act complained of was done, as master.

Liability of parent for act of minor child.

Cited in *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228, denying liability of father for act of son, 20 years old, in frightening horses with motor car owned by former.

29 AM. REP. 642, DUNHAM v. AVERILL, 45 CONN. 61.

Extrinsic evidence as to will.

Cited in *Bulkeley v. Worthington*, 78 Conn. 334, 62 Atl. 151, holding extrinsic evidence inadmissible to vary clear language of will.

Cited in reference note in 48 A. S. R. 202, on admissibility of parol evidence to establish mistake in revoking will.

Cited in notes in 3 L.R.A. 848, 849, on admissibility of parol evidence to vary, control, or enlarge terms of will; 6 L.R.A. 38, on admissibility of parol evidence to vary terms of written contract; 6 L.R.A.(N.S.) 948, on inadmissibility of extrinsic evidence to correct misdescription of land in will in absence of am-

biguity; 6 L.R.A.(N.S.) 952, on necessity that wills be in writing to place correction of misdescription; 6 L.R.A.(N.S.) 963, 964, on finality of will as to testator's intention in description of land; 2 E. R. C. 726, on admissibility of parol evidence to explain latent ambiguity.

— As to beneficiary in will.

Cited in *Fairfield v. Lawson*, 50 Conn. 501, 47 A. R. 669; *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472, 22 Atl. 848; *Security Co. v. Snow*, 70 Conn. 288, 66 A. S. R. 107, 39 Atl. 153; *Preston v. Foster*, 75 Conn. 709, 55 Atl. 558; *Covert v. Lebern*, 73 Iowa, 584, 35 N. W. 936,—holding parol evidence admissible to identify beneficiary named in will.

Cited in reference note in 10 A. S. R. 593, on admissibility of evidence dehors a will to show testator mistakenly supposed son to be dead.

Cited in notes in 46 A. R. 76, on admissibility of parol evidence to identify legatee; 50 A. S. R. 287, on extrinsic evidence to identify beneficiary under will; 6 L.R.A. 323, on admissibility of parol evidence to identify beneficiary under will.

Who entitled to bequest.

Cited in *Beardsley v. American Home Missionary Soc.* 45 Conn. 327, holding bequest to "Home Mission Society" properly given to "American Home Missionary Society," upon proof showing that latter must be intended.

Revocation of will.

Cited in *Strong's Appeal*, 70 Conn. 123, 118 A. S. R. 138, 6 L.R.A.(N.S.) 1107, 63 Atl. 1089, holding that will is not revoked by tearing and writing upon it "superseded by the written one," where latter ineffectual.

Cited in reference note in 48 A. S. R. 200, 201, on revocation of will under erroneous assumption of fact.

Cited in notes in 28 A. S. R. 346, on necessity for intent to revoke will; 37 L.R.A. 572, on express revocation of will by codicil.

Validity of bequest.

Cited in *Cavanagh v. Boston*, 139 Mass. 426, 52 A. R. 716, 1 N. E. 834, holding bequest "to aid in propagating the Holy religion of Jesus Christ," good as charitable gift.

Cited in note in 14 E. R. C. 815, as to what lands will pass by deed or will under general description with addition of words particularly denoting certain subject comprised in general description.

29 AM. REP. 663, *PETERS v. STEWART*, 45 CONN. 103.

Right to maintain replevin.

Cited in *Belknap Sav. Bank v. Robinson*, 66 Conn. 542, 34 Atl. 495, holding that fact that wrongful detention of goods was based on act of conversion in another state is no bar to action under statute for replevin; *Robinson v. Besarich*, 150 Mass. 141, 30 N. E. 553, sustaining right to maintain replevin against receptor who became bailee of officer for attached goods.

New trial of entire case.

Cited in *Fritts v. New York & N. E. R. Co.* 63 Conn. 452, 28 Atl. 529, holding new trial of entire cause required by granting new trial regardless of where errors committed.

29 AM. REP. 668, POND v. COOKE, 45 CONN. 126.**Right of action by foreign receiver or assignee.**

Cited in *Cooke v. Orange*, 48 Conn. 401, sustaining right of action by receiver appointed in foreign state for corporation located there on debt due here; *Robertson v. Stued*, 135 Mo. 135, 58 A. S. R. 569, 33 L.R.A. 203, 36 S. W. 610, sustaining foreign receiver's right of action to replevin property detained in this state under attachment; *Stoddard v. Lum*, 159 N. Y. 265, 70 A. S. R. 541, 45 L.R.A. 551, 53 N. E. 1108, holding assignee appointed for foreign corporation in state where located entitled to enforce here stockholder's contractual liability on subscription.

Cited in reference note in 73 A. D. 677, on extraterritorial effect of statutes.

Cited in notes in 6 A. S. R. 188, as to jurisdiction in suits by receivers appointed in other states; 8 A. S. R. 51; 6 L.R.A. 794,—on extraterritorial authority of receivers; 1 L.R.A. 654, on receivers of insolvent corporations; 20 L.R.A. 392, as to jurisdiction of receiver over property outside of jurisdiction of court appointing him; 23 L.R.A. 54, on rights of receiver as to property outside of jurisdiction in which he is appointed after obtaining possession.

Liability of property in hands of foreign receiver or assignee.

Distinguished in *The Willamette Valley*, 13 C. C. A. 635, 29 U. S. App. 447, 66 Fed. 565, sustaining right to enforce lien for supplies furnished vessel in receiver's hands while in port other than that which appointed him.

— Liability to attachment.

Cited in *Chicago, M. & St. P. R. Co. v. Keokuk Northern Line Packet Co.* 108 Ill. 317, 48 A. R. 557, denying resident creditor's right to attach property brought into state by foreign receiver in performance of duty; *Woodhull v. Farmers' Trust Co.* 11 N. D. 157, 95 A. S. R. 712, 90 N. W. 795, holding that creditor's cannot reach property brought into this state by receiver in course of duty by instituting attachment proceedings here; *Somerset Coal Co. v. Diamond State Steel Co.* 224 Pa. 217, 132 A. S. R. 775, 73 Atl. 442, holding property taken in foreign jurisdiction by receiver not subject to attachment by creditor in such jurisdiction; *Humphreys v. Hopkins*, 81 Cal. 551, 15 A. S. R. 76, 6 L.R.A. 792, 22 Pac. 892 (dissenting opinion), majority sustaining resident creditor's right to attach property of foreign railroad corporation brought into state by receiver; *First Nat. Bank v. Walker*, 61 Conn. 154, 23 Atl. 696, denying resident creditor's right to attach debt due from resident to nonresident who had assigned same by conveyance valid where made.

Cited in reference notes in 35 A. R. 716, on right of foreign receiver to replevy property against attaching creditor; 48 A. R. 557, on right of foreign receiver over attaching creditor; 71 A. S. R. 212, on rights of nonresident attaching creditor.

Cited in note in 71 A. S. R. 365, on attachment of property in possession of receiver.

Rights of receivers, generally.

Cited in *Florence Gas, Electric Light & P. Co. v. Hanby*, 101 Ala. 15, 13 So. 130, sustaining receiver's right to complete contract when necessary to discharge of duties and powers expressly imposed and conferred by statute.

Distinguished in *Central Trust Co. v. Worcester Cycle Mfg. Co.* 114 Fed. 659, holding order appointing receiver in foreclosure suit not intended to cover property not included in mortgage though purporting to cover all property.

. Am. Rep. Vol. XVII.—8.

Eligibility of receiver.

Cited in *Jenkins v. Purcell*, 29 App. D. C. 209, 9 L.R.A.(N.S.) 1074, holding owner of cattle in which another has interest for services eligible for appointment as receiver for such interest.

Right of action on receipt for attached property.

Cited in *Pond v. Cummins*, 50 Conn. 375, denying officer's right of recovery on receipt taken for attached property when not accountable therefor to creditor or owner.

29 AM. REP. 674, ATWATER v. TUPPER, 45 CONN. 144.**Judgment in trover as transfer of title.**

Cited in *Miller v. Hyde*, 161 Mass. 472, 42 A. S. R. 424, 25 L.R.A. 42, 37 N. E. 760 (dissenting opinion), on judgment in trover operating as transfer of title to defendant.

Cited in notes in 11 A. D. 524, on title passing by judgment in trover or trespass de bonis asportatis; 11 A. D. 525, on when title passes in trover and trespass de bonis asportatis; 42 A. S. R. 434, on vesting of title by judgment for value of personal property in action of trespass or trover.

Unsatisfied judgment as bar.

Cited in *Woodworth v. Gorsline*, 30 Colo. 186, 58 L.R.A. 417, 69 Pac. 705, holding that unsatisfied judgment in replevin against sheriff for wrongful seizure is no bar to subsequent action in trover against those on indemnity bond; *Mills v. Britton*, 64 Conn. 4, 24 L.R.A. 536, 29 Atl. 231, holding that unsatisfied judgment against one joint trespasser is no bar to action against cotrespasser; *Ledbetter v. Embree*, 12 Ind. App. 617, 40 N. E. 928, holding that unsatisfied judgment in replevin is no bar to another action for same property against another defendant.

Joint and several liability of tortfeasors.

Cited in *Chapin v. Babcock*, 67 Conn. 255, 34 Atl. 1039, to point that liability of tort feorsors is several, as well as joint, both before and after judgment.

Cited in note in 58 L.R.A. 415, on effect of judgment against one joint tort feasor on liability of other.

Measure of damages in conversion.

Cited in notes in 11 A. D. 526, on measure of damages in trover and trespass de bonis asportatis; 2 L.R.A. 449, on rule of damages in action for conversion.

29 AM. REP. 677, WARD v. DICK, 45 CONN. 235.**Limitation of number of witnesses.**

Cited in *Markham v. Herrick*, 82 Mo. App. 327, denying right of court to limit number of witnesses as to general reputation of plaintiff in action for breach of promise; *St. Louis, M. & S. E. R. Co. v. Aubachon*, 199 Mo. 352, 116 A. S. R. 499, 9 L.R.A.(N.S.) 426, 97 S. W. 867, 8 A. & E. Ann. Cas. 822, denying right of court to limit number of witnesses on question of damages suffered.

Cited in note in 116 A. S. R. 518, on court's right to limit number of witnesses.

29 AM. REP. 679, BRENNAN v. FAIRHAVEN & W. R. CO. 45 CONN. 284.**Liability of railroad company for injuries.**

Cited in *Edington v. Burlington*, C. R. & N. R. Co. 116 Iowa, 410, 57 L.R.A.

561, 90 N. W. 95, holding railroad maintaining turntable near public alley liable for injury to 7-year old child due to failure to fasten turntable.

Cited in reference note in 29 A. R. 642, on liability of master for wilful misconduct of servant.

Cited in notes in 27 L.R.A. 171, on master's liability for negligent ejection from train by servant acting within scope of employment; 40 A. R. 226; 17 E. R. C. 276,—on liability of master for acts of servant in scope of his employment.

—To one riding without payment.

Cited in Little Rock Transaction & Electric Co. v. Nelson, 66 Ark. 494, 52 S. W. 7, holding that 10-year old boy riding free on street car on invitation of motorman is not trespasser without right to recover for negligent injuries; Simmons v. Oregon R. Co. 41 Or. 151, 69 Pac. 440, holding railroad employee traveling free on own business entitled to recover for negligent injuries; Wynn v. City & Suburban R. Co. 91 Ga. 344, 17 S. E. 649, denying liability of street car company for negligent injuries to boy stealing ride in dangerous place; Denison & S. R. Co. v. Carter, 98 Tex. 196, 107 A. S. R. 626, 82 S. W. 782, denying liability of street car company for injury to 10-year old boy riding on front platform at invitation of motorman and injured by jumping from car while in motion.

Cited in notes in 118 A. S. R. 462, on who are passengers on street railway; 21 L. ed. U. S. 628, on liability of common carrier for injury to passenger carried free or riding on pass.

Rights of child on street car.

Cited in Metropolitan Street R. Co. v. Moore, 83 Ga. 453, 10 S. E. 730, holding 9-year old boy riding on street car entitled to rights of passenger whether fare is paid or not.

Cited in note in 49 A. S. R. 433, on acts or omissions as constituting negligence toward infant.

Child as capable of contributory negligence.

Cited in Rohloff v. Fair Haven v. W. R. Co. 76 Conn. 689, 58 Atl. 5, holding that 8-year old child is not, as matter of law, incapable of guilt of contributory negligence in running in front of street car.

Cited in notes in 38 L.R.A. 789, on negligence of children in getting on or off moving street cars; 21 L. ed. U. S. 745, on degree of care required from infants to avoid injury.

Contributory negligence as defeating recovery.

Cited in Saunders v. Southern P. Co. 13 Utah, 275, 44 Pac. 932 (dissenting opinion), on contributory negligence as defeating passenger's right to recover for injuries.

Review of conclusions of court.

Cited in Farrell v. Waterbury Horse R. Co. 60 Conn. 239, 21 Atl. 675, denying power of appellate court to review conclusions of lower court on subject of negligence.

29 AM. REP. 683, BLAKE v. WATSON, 45 CONN. 323.

What constitutes a warranty.

Cited in Phillips v. Crosby, 69 N. J. L. 612, 55 Atl. 814, holding representations as to productiveness of company regarded as warranties in action for breach of warranty in sale of stock.

29 AM. REP. 687, HARTFORD v. WEST MIDDLE DIST. 45 CONN. 462.**Taxation of property for public improvements.**

Cited in *New York, N. H. & H. R. Co. v. New Britain*, 49 Conn. 40, holding railroad land used for storage of cars, taxable for sewer; *Naugatuck R. Co. v. Waterbury*, 78 Conn. 193, 61 Atl. 475, holding that railroad land in actual use is not taxable for street improvements; *Park Ecclesiastical Soc. v. Hartford*, 47 Conn. 89, holding that sewer assessment is not void because lands assessed had sufficient sewer, where same also benefited by new sewer; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781, holding only property benefited by sewer taxable for construction.

Cited in notes, in 83 A. S. R. 407, on property exempt from taxation; 1 L.R.A. 613, on exemption from taxation under general law; 4 L.R.A. 295, on special tax for local improvements; 6 L.R.A. 803, on reassessment of special assessment for local improvement; 132 Am. St. Rep. 313, 317, on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest.

— Public property.

Cited in *Edwards & W. Constr. Co. v. Jasper County*, 117 Iowa, 365, 94 A. S. R. 301, 90 N. W. 1006, holding that city property used for public purposes by county is not exempt from taxation for street improvement; *Big Rapids v. Mecosta County*, 99 Mich. 351, 58 N. W. 358, holding that court house property is not subject to tax for local improvement; *Pittsburgh v. Sterrett Subdistrict School*, 204 Pa. 635, 61 L.R.A. 183, 54 Atl. 463, holding that property owned by sub-school district and used exclusively for educational purposes is not taxable for local improvements; *Erie v. School Dist.* 17 Pa. Super. Ct. 33, denying liability of school district for cost of pavement in front of property used exclusively for school purposes.

29 AM. REP. 688, RAYMOND v. HILLHOUSE, 45 CONN. 467.**Per capita or per stirpes division of estate.**

Cited in *McIntire v. McIntire*, 192 U. S. 116, 48 L. ed. 369, 24 Sup. Ct. Rep. 196, holding residue to be divided per capita under will directing equal division between children of testator's brothers; *Crane's Estate*, 2 Cof. Prob. Dec. 535, holding that under bequest to "heirs" of deceased sister, such heirs take by right of representation; *Heath v. Bancroft*, 49 Conn. 220, holding per stirpes rule applicable to will directing division of estate among heirs of certain children according to the number surviving; *Lockwood's Appeal*, 55 Conn. 157, 10 Atl. 517, holding that per stirpes division intended in will directing that property be equally divided among heirs of specified persons; *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106, holding per stirpes division of estate intended in will directing that residuary estate be divided among heirs; *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33, holding that term "issue" when used as word of purchase includes descendants of every degree; *Lyon v. Ford*, 9 Mackey, 530, holding per stirpes division of money intended in will directing equal division among certain persons and children of another; *Maclean v. Williams*, 116 Ga. 257, 50 L.R.A. 125, 42 S. E. 485, holding per stirpes division of estate intended by will directing that property be distributed in equal shares to those in being who are heirs of testator; *Auger v. Tatham*, 92 Ill. App. 194, holding per capita division of estate intended by use of words "share and share alike;" *Swinburne's*

Petition, 16 R. I. 208, 14 Atl. 850, holding that heirs of specified person take per stirpes under bequest to heirs of such person; *Collins v. Feather*, 52 W. Va. 107, 94 A. S. R. 912, 61 L.R.A. 660, 43 S. E. 323, holding that legatees take per capita under bequest to persons living and to children of another who is dead.

29 AM. REP. 693, DAY v. CONNECTICUT GENERAL L. INS. CO. 45 CONN. 480.

Recovery upon cancelation of policy.

Cited in *Mutual Reserve Fund Life Asso. v. Ferrenbach*, 7 L.R.A.(N.S.) 1163, 75 C. C. A. 304, 144 Fed. 342, holding amount of policy less cost of carrying to maturity, measure of damages for wrongful cancelation of assessment policy; *Krebs v. Security Trust & L. Ins. Co.* 156 Fed. 294, holding difference between cost of new policy in other company and carrying charges of former policy, measure of damages for wrongful cancelation; *Brooklyn L. Ins. Co. v. Weck*, 9 Ill. App. 358; *Kenyon v. National Life Asso.* 39 App. Div. 276, 57 N. Y. Supp. 60; *Metropolitan L. Ins. Co. v. McCormick*, 19 Ind. App. 49, 65 A. S. R. 392, 49 N. E. 44,—holding assured entitled to recover present value of policy upon forfeiture by company; *National L. Ins. Co. v. Tullidge*, 39 Ohio St. 240, holding assured entitled to recover back premiums upon rescission of policy by company; *Continental L. Ins. Co. v. Houser*, 111 Ind. 26^c, 12 N. E. 479, denying right to recover back premiums paid upon policy during continuance as for money had and received; *Skudera v. Metropolitan L. Ins. Co.* 17 Misc. 367, 39 N. Y. Supp. 1059, denying right to maintain assumpsit to recover premiums paid on life policy wrongfully forfeited by insurer.

Cited in reference note in 39 A. S. R. 499, on recovery of premiums where policy is void.

Rights upon cancelation or forfeiture of policy.

Cited in *Wilmont v. Charter Oak L. Ins. Co.* 46 Conn. 483, holding rights of assured not affected by wrongful cancelation of policy until his election to treat policy as rescinded; *Continental L. Ins. Co. v. Houser*, 89 Ind. 258, on rights of assured upon forfeiture of life policy.

Cited in reference note in 65 A. S. R. 398, on remedy where insurer refuses to receive premiums.

Cited in note in 30 L.R.A. 69, on right to rescind or abandon insurance contract because of other party's default.

Right to issuance or restoration of policy.

Cited in *Standley v. Northwestern Mut. L. Ins. Co.* 95 Ind. 254, sustaining right of assured to compel issuance of policy to which he is entitled; *Bradbury v. Mutual Reserve Fund Life Asso.* 53 N. J. Eq. 306, 31 Atl. 775, holding that mandamus is not proper remedy to compel restoration of policy alleged to have been wrongfully forfeited.

Policy holder as creditor of company.

Cited in *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120, holding policy holder creditor of company upon its dissolution.

Parties to action on policy.

Cited in *Merrick v. Northwestern Nat. L. Ins. Co.* 124 Wis. 221, 109 A. S. R. 931, 102 N. W. 593, holding that husband and heirs are not necessary parties to action by wife as beneficiary under policy against company for wrongful forfeiture.

29 AM. REP. 703, MOOTRY v. DANBURY, 45 CONN. 550.

Liability of municipal corporation for damages.

Cited in *Healey v. New Haven*, 47 Conn. 305, holding city liable for injury to property by change of street grade and filling in dirt; *Greenwood v. Westport*, 60 Fed 560, holding town operating draw bridge liable for negligent damages to boat; *Judd v. Hartford*, 72 Conn. 350, 77 A. S. R. 312, 44 Atl. 510, holding city liable for damage due to stoppage of sewage for failure to remove obstruction; *Morse v. Fair Haven East*, 48 Conn. 220; *Young v. Kansas*, 27 Mo. App. 101,—holding city liable for damage by water due to insufficiency of culvert; *Garson v. Hartford*, 48 Conn. 68, denying liability of city for injury to property due to abandonment of street; *Bronson v. Wallingford*, 54 Conn. 513, 9 Atl. 393, denying liability of borough under statute for damage by flooding not due to negligent work in construction; *Hoyt v. Danbury*, 69 Conn. 341, 37 Atl. 1051, denying liability of city for injuries in highway due to defect in plan of construction; *Colwell v. Waterbury*, 74 Conn. 568, 57 L.R.A. 218, 51 Atl. 530, denying liability of city for injuries to employee by defective stone crusher.

Cited in notes in 66 A. D. 440, on liability of municipality for obstruction of natural stream; 30 A. S. R. 390, on municipal liability for grading streets so as to interfere with water course; 1 L.R.A. 296, on corporation's power to create nuisance; 21 L.R.A. 598, on right of railroad companies to collect or divert surface water in masses; 23 L.R.A. 301, on injunction against drainage nuisance maintained by municipal corporation; 59 L.R.A. 856, on liability of public for damming back water of stream by bridges; 61 L.R.A. 702, on liability of municipality for injuries due to drains; 65 L.R.A. 284, on liability of municipal corporation with respect to surface waters; 67 L.R.A. 259, on municipal liability for interference with rights in streets by defective plan of street construction; 1 L.R.A.(N.S.) 51, on effect of legislative authority on liability for private nuisance.

Distinguished in *Salzman v. New Haven*, 81 Conn. 389, 22 L.R.A.(N.S.) 333, 71 Atl. 500, holding municipality not liable in damages for consequential injuries to building of adjoining proprietor, incident to discharge of its duty to repair highways.

29 AM. REP. 707, WILLIAMSON v. HARRIS, 57 ALA. 40.

Notes as personal property.

Cited in *Boyd v. Selma*, 96 Ala. 144, 16 L.R.A. 729, 11 So. 393, holding notes "personal property" within charter relating to taxation of such property.

Debtor's selection of exemptions.

Cited in *Enzor v. Hurt*, 76 Ala. 595, sustaining right of debtor to claim wages as part of property exempted by statute; *McLean v. Martin*, 155 Ala. 208, 45 So. 295, holding that widow and minor children are entitled to exemption of personal property out of life insurance policy payable to husband's estate; *Thibault v. Lennon*, 39 Or. 280, 87 A. S. R. 657, 64 Pac. 449, sustaining right of execution debtor to make own selection of property as exempt.

Cited in reference notes in 31 A. R. 232, as to whether money can be selected by execution debtor as exempt property; 87 A. S. R. 660, on debtor's duty as to claiming exemptions.

29 AM. REP. 710, WARE v. RUSSELL, 57 ALA. 43.**Defenses against note held as security.**

Cited in *Haden v. Lehman*, 83 Ala. 243, 3 So. 528, holding note held as collateral security only subject to all defenses existing against payee.

Cited in note in 46 L.R.A. 779, on payment as a defense to negotiable paper transferred after maturity.

Pledgee's right to income of property.

Cited in *McCrea v. Yule*, 68 N. J. L. 465, 53 Atl. 210, sustaining right of pledgee of property held as security to collect income.

Cited in note in 43 L.R.A. 745, on implied authority of pledgee to sell choses in action pledged.

Transfer of security as payment.

Cited in *Gilliam v. Davis*, 7 Wash. 332, 35 Pac. 69, holding secured debt paid pro tanto by pledgee's transfer to maker of note held as security.

Judgment as conclusive against purchaser from debtor.

Cited in *Aderhold v. Blumerthal*, 95 Ala. 66, 10 So. 230, holding landlord's judgment in attachment against tenant conclusive as against purchasers from tenant of landlord's right to maintain action.

29 AM. REP. 712, MOBILE v. BALDWIN, 57 ALA. 61.**Validity of tax law.**

Cited in *Hadley v. Hadley*, 114 Tenn. 156, 87 S.W. 250, holding statute making taxes assessed to life tenant lien on remainder, valid.

Cited in note in 69 L.R.A. 441, on legislative power to fix situs of tangible personal property of domestic corporation for purpose of taxation.

Situs of property for purposes of taxation.

Cited in *Boyd v. Selma*, 96 Ala. 144, 16 L.R.A. 729, 11 F. 293, holding credits taxable at owner's residence; *Bessemer v. Southern R. Co.* 157 Ala. 428, 48 So. 103, on situs of personal property for purpose of taxation; *Standard Oil Co. v. Bachelor*, 89 Ind. 1, holding that property of nonresident awaiting shipment at railroad station is not taxable in state where located.

Cited in reference note in 34 A. R. 208, on place of taxation of personal property.

Cited in note in 56 A. D. 533, on where tangible chattels of nonresident taxable.

— Of live stock.

Cited in *Rosasco v. Tuolumne County*, 143 Cal. 430, 77 Pac. 148, holding stock temporarily grazing in another county to be assessed in county of owner's residence; *Barens v. Woodbury*, 17 Nev. 383, 30 Pac. 1068, holding that situs of cattle for purpose of taxation is not determined by owner's residence.

— Of vessel.

Cited in *National Dredging Co. v. State*, 99 Ala. 462, 12 So. 720, holding tugboat used in Alabama taxable in that state; *North American Dredging Co. v. Taylor*, 56 Wash. 565, 29 L.R.A. (N.S.) 105, 106 Pac. 162, holding steam dredger taxable where built and engaged in work, though home port and ownership in another state; *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 499, 37 L.R.A. 518, 19 So. 640 (dissenting opinion), on situs of boat for purpose of taxation.

Cited in notes in 56 A. D. 526, 527, on where vessels taxed; 37 L.R.A. 518, as to where ships are taxable as between different jurisdictions within same

state; 60 L.R.A. 654, on taxation of vehicles of commerce; 69 L.R.A. 448, on situs for taxing purposes of water craft of domestic corporations.

Injunction against collection of taxes.

Cited in *Elyton Land Co. v. Ayres*, 62 Ala. 413; *Montgomery v. Sayre*, 65 Ala. 564; *Strenna v. Montgomery*, 86 Ala. 340, 5 So. 115; *Ensley v. McWilliams*, 145 Ala. 159, 117 A. S. R. 26, 41 So. 296,—denying injunction restraining collection of tax for alleged invalidity of statute; *Albertville v. Rains*, 107 Ala. 691, 18 So. 255, denying right to enjoin collection of municipal taxes in absence of proof of attempt to collect; *New Decatur v. Nelson*, 102 Ala. 556, 15 So. 275, denying right to enjoin collection of municipal taxes in absence of proof of injury; *Perry County v. Selma M. & M. R. Co.* 58 Ala. 546, on right to enjoin collection of illegal taxes.

Cited in notes in 49 A. R. 287, on right to injunction to restrain a sale of property for taxes; 22 L.R.A. 704, on relief granted in injunction to restrain collection of illegal taxes to avoid multiplicity of suits; 22 L.R.A. 708, on injunction against collection of illegal personal tax; 69 A. D. 203, on injunctions to restrain enforcement of taxes or assessments against personal property.

Right to sue state.

Cited in *State ex rel. Hart v. Burke*, 33 La. Ann. 498, denying right to sue state in own courts without its consent.

Operation of statutory bar to action.

Cited in *Jones v. Randle*, 68 Ala. 258, holding statutory bar to action for recovery of land sold for taxes operative from time of execution of deed by probate judge.

29 AM. REP. 719, MYER v. HOBBS, 57 ALA. 175.

Liability for act of independent contractor.

Cited in *Chattahoochee & G. R. Co. v. Behrman*, 136 Ala. 508, 35 So. 132, denying liability of railroad company for injury to land by erection of embankment by independent contractor; *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591, 7 So. 94, denying liability of railroad company for negligent injury to employee of independent contractor.

Cited in reference note in 60 A. R. 700, on liability of employer for act of contractor claimed to be nuisance.

Cited in notes in 33 A. S. R. 473, on owner's liability for independent contractor's acts in violation of right of lateral support; 76 A. S. R. 395, on doctrine of respondent superior as applied to liability for negligence and other torts of independent contractor; 76 A. S. R. 424, on liability for negligence of independent contractors in withdrawing lateral support; 9 L.R.A. 604, on railroad's liability for independent contractor's negligence; 65 L.R.A. 630, on distinction between real and personal property in reference to employer's liability for torts of independent contractors; 65 L.R.A. 850, on employer's liability for injury to collateral support of adjoining owner by independent contractor; 10 E. R. C. 161, on right of lateral support of land.

Right of lateral support.

Cited in notes in 33 A. S. R. 453, on right of lateral support for buildings and other artificial structures; 33 A. S. R. 468, on liability for negligent excavations; 68 L.R.A. 684, on nature of "right to support" of land in its natural condition; 6 L.R.A.(N.S.) 243, on liability for injuries to buildings on adjoining land by negligent removal of lateral support of soil.

29 AM. REP. 722, TOOMER v. RUTLAND, 57 ALA. 379.

What constitutes material alteration of note.

Cited in *First Nat. Bank v. Barnum*, 160 Fed. 245, holding changing place of payment of note, material alteration; *Winter v. Pool*, 104 Ala. 580, 16 So. 543, holding addition of place of payment of note, material alteration; *Montgomery v. Crossthwait*, 90 Ala. 553, 24 A. S. R. 832, 12 L.R.A. 140, 8 So. 498, holding addition of term "& Co." to name of maker of note, material alteration; *Green v. Sneed*, 101 Ala. 205, 46 A. S. R. 119, 13 So. 277, holding insertion of erroneous amount in note signed in blank, material alteration; *Brown v. Johnson Bros.* 127 Ala. 292, 85 A. S. R. 134, 51 L.R.A. 403, 28 So. 579, holding payee's addition of another name as comaker of note, material alteration; *Simmons v. Atkinson & L. Co.* 69 Miss. 862, 23 L.R.A. 599, 12 So. 263, holding insertion of words "or bearer" and name of bank after word "at" in note, material alteration.

Cited in reference note in 33 A. S. R. 706, on effect of filling in blanks.

Cited in notes in 86 A. S. R. 98, on materiality of alteration of place of payment; 86 A. S. R. 110, on excess of implied authority to fill blanks by addition of unnecessary terms or by erasures, etc.; 86 A. S. R. 111, on alteration of instrument by agent of maker in excess of express authority to fill blanks; 86 A. S. R. 114, on intent with which alteration of instrument is made; 35 L.R.A. 464, on alteration of note as affecting bona fide holders; 31 L.R.A. (N.S.) 644, 648, on alteration of note by inserting place of payment; 4 E. R. C. 647, on liability to bona fide holder of party issuing negotiable paper left blank in material part.

29 AM. REP. 727, WILSON v. BROWN, 58 ALA. 62.

Retroactive effect of statutes.

Cited in *Clark v. Spencer*, 75 Ala. 49; *McDonald v. Berry*, 90 Ala. 464, 7 So. 838,—holding statute increasing exemptions inoperative as to debts contracted before its enactment.

Cited in reference notes in 83 A. S. R. 780, on legislative power to increase exemption from execution as to existing debts; 1 L.R.A. 359, on state insolvency laws as impairing obligations of contracts; 21 L. ed. U. S. 212, on constitutionality of laws changing exemption from execution.

What laws govern right to exemptions.

Cited in *Preiss v. Campbell*, 59 Ala. 635; *Horn v. Wiatt*, 60 Ala. 297; *Nelson v. McCrary*, 60 Ala. 301; *Hardy v. Sulzbacher*, 62 Ala. 44; *Randolph v. Little*, 62 Ala. 396; *Blum v. Carter*, 63 Ala. 235; *Fellows v. Lewis*, 65 Ala. 343, 39 A. R. 1; *Smith v. Cockrell*, 66 Ala. 64; *Corr v. Shackelford*, 68 Ala. 241; *Slaughter v. McBridge*, 69 Ala. 510; *Cochran v. Miller*, 74 Ala. 50,—holding homestead exemptions governed by laws in force when debt contracted.

Right to interpose exemption to levy.

Cited in *Toenes v. Moog*, 78 Ala. 558, sustaining right to interpose exemption to levy at any time before sale.

Burden of proof as to failure of execution.

Cited in *Abbott v. Gillespy*, 75 Ala. 180; *Smith v. Castellow*, 88 Ala. 355, 6 So. 750,—holding burden upon sheriff in action for failure to make money on execution to show legal excuse.

Presumption that property is subject to levy.

Cited in *Smith v. Heineman*, 118 Ala. 195, 72 A. S. R. 150, 24 So. 364, holding property attached by sheriff presumptively subject to levy.

29 AM. REP. 729, EINSTEIN v. MARSHALL, 58 ALA. 153.

False representations as actionable.

Cited in *Wilcox v. Henderson*, 64 Ala. 535, holding that false statement as to quality of article is not actionable when mere statement of opinion; *Baker v. Trotter*, 73 Ala. 277, holding false representation that another trustworthy, actionable; *Clark v. Dunham Lumber Co.* 86 Ala. 220, 5 So. 560, holding one liable for false representations as to another's credit whereby latter obtains goods; *Sims v. Eiland*, 57 Miss. 607, holding that one writing letter of introduction whereby bearer obtains credit is not liable for deceit if statements honestly believed to be true.

Cited in reference note in 32 A. R. 562, on liability for false recommendation of another for credit.

Cited in notes in 85 A. S. R. 378, on liability for misrepresentations as to financial responsibility; 37 L.R.A. 614, on right to rely on statements of third persons made to effect contract as basis for charge of fraud.

What is guaranty of performance of contract.

Cited in *Goldering v. Thompson*, 58 Fla. 248, 25 L.R.A.(N.S.) 418, 51 So. 46, holding that note directing shipment of goods to third person containing words "your money is good" constitutes guaranty of debt; *Kenneweg Co. v. Finney*, 98 Md. 114, 56 Atl. 482, holding that letter that contract of sale good is not guaranty of performance.

29 AM. REP. 739, GREENE v. STATE, 58 ALA. 190.

Validity of statutes relating to whites and blacks.

Cited in *Berea College v. Com.* 123 Ky. 209, 124 A. S. R. 344, 94 S. W. 623, 13 A. & E. Ann. Cas. 337, holding statute requiring separation of white and colored students, valid.

Cited in note in 27 L. ed. U. S. 836, on civil rights.

—As to adultery or marriage between.

Cited in *Pace v. State*, 69 Ala. 231, holding statute imposing heavier penalty for adultery between whites and blacks than between white persons, valid; *Hoover v. State*, 59 Ala. 57; *Dodson v. State*, 61 Ark. 57, 31 S. W. 977; *Francois v. State*, 9 Tex. App. 144,—holding statute prohibiting marriage between whites and blacks, valid.

Cited in reference note in 30 A. R. 131, on constitutionality of statute making it a felony for white person to marry negro.

Cited in notes in 79 A. S. R. 383, on validity of marriages between white persons and colored persons of African descent; 2 L.R.A.(N.S.) 533, on legislative power to forbid miscegenation.

Legitimation of children.

Cited in *Colwell's Succession*, 34 La. Ann. 265, holding children of marriage prohibited by law legitimized by repeal of statute forbidding such marriages.

29 AM. REP. 745, HOOKS v. ANDERSON, 58 ALA. 238.

Liability of indorser on commercial paper.

Cited in *Marks v. First Nat. Bank*, 79 Ala. 550, 58 A. R. 620, holding one

indorsing note before negotiation, liable to payee as indorser; *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 A. S. R. 95, 22 So. 580, holding one indorsing bill at instance of bank for purpose of identification, liable as irregular indorser; *Mobile Sav. Bank v. McDonnell*, 83 Ala. 595, 4 So. 346, denying liability of indorser on noncommercial paper in absence of proof of compliance with statute fixing liability; *Carter v. Odom*, 121 Ala. 162, 25 So. 774, denying right of payee to recover of irregular indorsers without proof of demand and notice of nonpayment; *Carrington v. Odom*, 124 Ala. 529, 27 So. 510, denying indorser's liability on note in absence of proof of demand and notice of nonpayment.

Cited in notes in 72 A. S. R. 682, on liability of stranger indorsing commercial paper before delivery; 4 E. R. C. 550, on order of liability of parties to bill or note.

29 AM. REP. 748, POTTER v. GRACIE, 58 ALA. 303.

Validity of conveyance or chattel mortgage.

Distinguished in *Hays v. Montgomery*, 118 Ind. 91, 20 N. E. 646, holding conveyance made in consideration of agreement to support grantor, valid.

— As to creditors.

Cited in *Hayes v. Westcott*, 91 Ala. 143, 24 A. S. R. 875, 11 L.R.A. 488, 8 So. 337, holding chattel mortgage on stock of goods with power in mortgagor to sell, void; *Houston v. Blackman*, 66 Ala. 559, 41 A. R. 756, holding husband's conveyance to wife in consideration of one dollar, void as to former's creditors; *Pique v. Arendale*, 71 Ala. 91, holding that conveyance in payment of debt is not presumptively fraudulent although deed recited money paid; *Ruse v. Bromberg*, 88 Ala. 619, 7 So. 384, holding conveyance to wife of land paid for by husband, fraudulent as to latter's creditors; *Caldwell v. King*, 76 Ala. 149; *First Nat. Bank v. Kennedy*, 91 Ala. 470, 8 So. 652,—holding conveyance by insolvent presumptively fraudulent; *Ogden State Bank v. Barker*, 12 Utah, 13, 40 Pac. 765, holding deed to grantor's children for nominal consideration thereby stripping former of property, void as to creditors.

Cited in notes in 14 A. S. R. 742, on what transfers are voluntary; 20 L.R.A. 110, on parol evidence as to consideration for deed in action by creditor to set it aside.

Burden of proof as to consideration.

Cited in *Hubbard v. Allen*, 59 Ala. 283; *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 18 A. S. R. 137, 9 L.R.A. 645, 8 So. 137,—holding grantee in conveyance by insolvent debtor bound to show valuable consideration.

Evidence of fraud on creditors.

Cited in *Gordon v. Tweedy*, 71 Ala. 202, holding inadequacy of consideration for conveyance evidence of fraud on creditors.

29 AM. REP. 754, DAWKINS v. STATE, 58 ALA. 376.

Construction of term "abuse."

Cited in *Castleberry v. State*, 135 Ala. 24, 33 So. 431, construing term "abuse" as used in statute relating to abuse of child, as referring to injury to genital parts; *Chambers v. State*, 46 Neb. 447, 64 N. W. 1078, holding word "abuse" as used in § 12, Criminal Code, is synonymous with word "ravish."

Force as element of rape.

Cited in *McQuirk v. State*, 84 Ala. 435, 5 A. S. R. 381, 4 So. 775, holding force necessary element of crime of rape.

Proof of rape.

Cited in *Jones v. State*, 90 Ala. 628, 24 A. S. R. 850, 8 So. 383, holding proof that defendant placed hand on woman's shoulder, followed her and made indecent proposal, insufficient to sustain conviction of rape.

Charging crime in different forms in indictment.

Cited in *Beason v. State*, 72 Ala. 191, holding offense of rape and carnal knowledge of female child properly charged in same indictment.

29 AM. REP. 757, JUDGE v. STATE, 58 ALA. 406.**Guilt of murder or manslaughter.**

Cited in *Ex parte Nettles*, 58 Ala. 268, holding one killing another with whom he fought with knife he happened to be using on finger nails guilty of murder; *Wills v. State*, 74 Ala. 21, holding one giving intentional blow guilty of murder although one hit not intended; *Ex parte Brown*, 65 Ala. 446; *Cleveland v. State*, 86 Ala. 1, 5 So. 426,—holding one killing another after deliberation, guilty of murder; *Cross v. State*, 63 Ala. 40; *Ingram v. State*, 67 Ala. 67; *Bain v. State*, 70 Ala. 4,—holding that killing to escape grievous bodily harm is not murder; *Jenkins v. State*, 82 Ala. 25, 2 So. 150, holding one accidentally killing another with whom he had dispute over game is not entitled to acquittal; *Holmes v. State*, 88 Ala. 26, 16 A. S. R. 17, 7 So. 193, holding one guilty of manslaughter by killing resulting from accidental discharge of pistol in scuffle with deceased who was attempting to prevent quarrel.

Provocation for homicide.

Cited in *Mitchell v. State*, 60 Ala. 26; *Mutt v. State*, 63 Ala. 180; *McKee v. State*, 82 Ala. 32, 2 So. 451,—holding deceased's use of insulting language to defendant insufficient to reduce killing from murder to manslaughter; *People v. Maughas*, 149 Cal. 253, 86 Pac. 187, holding verbal abuse no excuse for manslaughter; *State v. Walker*, 50 La. Ann. 420, 23 So. 967, holding provocation not causing instant resentment, insufficient to reduce intentional killing to manslaughter.

Cited in note in 4 L.R.A.(N.S.) 154, on insulting words or conduct as provocation to homicide.

Use of weapon as implying malice.

Cited in *Grant v. State*, 62 Ala. 233, holding malice implied from intentional use of deadly weapon.

Cited in note in 5 L.R.A.(N.S.) 822, on disproportionate retaliation as acknowledging passion or malice as controlling factor in homicide.

Degrees of murder.

Cited in *Smith v. State*, 68 Ala. 424; *Green v. State*, 69 Ala. 6,—on degrees of murder.

Cited in notes in 5 L.R.A.(N.S.) 821, on effect of seeking or provoking difficulty on mitigation or reduction of degree of homicide because of heat of passion; 5 L.R.A.(N.S.) 826, on determination as to existence and sufficiency of passion to mitigate or reduce degree of homicide.

What constitutes murder and manslaughter.

Cited in *Hawes v. State*, 88 Ala. 37, 7 So. 302, on sufficiency of definition of what constitutes murder and manslaughter given in charge on prosecution.

Instructions in criminal cases.

Cited in *Duvall v. State*, 63 Ala. 12, holding that instructions to jury in criminal case must be given in accordance with evidence.

29 AM. REP. 762, GRIGGS v. STATE, 58 ALA. 425.**Who guilty of larceny.**

Cited in *Weaver v. State*, 77 Ala. 26, holding one taking bag of money from owner when asleep, guilty; *Dozier v. State*, 130 Ala. 57, 30 So. 396, holding one feloniously converting to own use property directed to be conveyed to depot, guilty.

— Of lost property.

Cited in *Burgers v. State*, 83 Ala. 36, 3 So. 319, holding one feloniously keeping stray horse guilty; *Rountree v. State*, 58 Ala. 381, holding one feloniously carrying away goods which had fallen from train, guilty; *Beckham v. State*, 100 Ala. 15, 14 So. 859, holding that one taking hog without felonious intent is not guilty; *Smith v. State*, 103 Ala. 40, 16 So. 12, holding one keeping lost property from rightful owner, guilty; *State v. Hayes*, 98 Iowa, 619, 60 A. S. R. 219, 37 L.R.A. 116, 67 N. W. 673, holding one guilty of larceny of lost pocket book by formation of intent to keep same after discovering money therein; *Beatty v. State*, 61 Miss. 18; *Lamb v. State*, 40 Neb. 312, 58 N. W. 963,—holding one appropriating stray animal to own use, guilty; *Robinson v. State*, 11 Tex. App. 403, 40 A. R. 790, holding one keeping goods of another found in trunk purchased, guilty.

Cited in reference note in 31 A. R. 143, on larceny of lost goods.

Cited in notes in 88 A. S. R. 603, on intent as element of larceny in case of finding lost property; 37 L.R.A. 123, on formation of felonious intent to steal after finding of lost property; 37 L.R.A. 124, on means of finding owner of property as element of larceny.

Lost property as subject of larceny.

Cited in *Allen v. State*, 91 Ala. 19, 24 A. S. R. 856, 8 So. 665, holding lost property subject of larceny.

Cited in reference note in 33 A. R. 526, on conversion of lost property as larceny.

Cited in notes in 57 A. D. 284, on larceny by finders of lost goods or estrays; 37 L.R.A. 126, on larceny by finder of property not lost.

Presumption on appeal in support of judgment.

Cited in *Hood v. Pioneer Min. & Mfg. Co.* 95 Ala. 461, 11 So. 10, holding appellate court justified in presuming that judgment is upheld by other proof where bill of exceptions does not contain whole evidence.

29 AM. REP. 770, PIEDMONT & A. L. INS. CO. v. YOUNG, 58 ALA. 476.**Authority of agent to bind principal.**

Cited in *Shrimpton v. Brice*, 102 Ala. 655, 15 So. 452, holding principal bound by order for goods signed by clerk in former's name at his direction.

—Agent of carrier.

Cited in *Alabama G. S. R. Co. v. Thomas*, 83 Ala. 343, 3 So. 302, holding carrier of goods liable for loss due to gross negligence of employee; *Montgomery & E. R. Co. v. Kolb*, 73 Ala. 396, 49 A. R. 54, holding carrier liable for act of shipping agent in failing to give receipt for goods; *South & North Ala. R. Co. v. Huffman*, 76 Ala. 492, 52 A. R. 349, holding carrier liable for erroneous advice by agent as to train passenger should take.

—Insurance agent, generally.

Cited in *Home Ins. Co. v. Adler*, 71 Ala. 516, holding foreign insurance company bound by resident agent's refusal to pay loss; *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571, 1 So. 202, holding company bound by knowledge of agent soliciting insurance that part of building is on another's land; *Queens Ins. Co. v. Young*, 86 Ala. 424, 11 A. S. R. 51, 5 So. 116, holding company bound by notice to soliciting agent of fact material to risk; *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 So. 379, holding insurer bound by agent's act in receiving premiums with notice to latter of breach of condition as to title; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 So. 46, holding agent with authority to solicit insurance and sign policies empowered to waive further proofs of loss; *Robinson v. Aetna Ins. Co.* 128 Ala. 477, 30 So. 665, holding agent empowered to solicit insurance not authorized to receive notice of failure of insured to comply with conditions; *Morrison v. Insurance Co. of N. A.* 69 Tex. 353, 5 A. S. R. 63, 6 S. W. 605, holding general agent with power to cancel and renew policies authorized to permit additional insurance; *Kahn v. Traders Ins. Co.* 4 Wyo. 419, 62 A. S. R. 47, 34 Pac. 1059, holding general agent intrusted with blank policies authorized to consent to additional insurance; *Insurance Co. of N. A. v. Thornton*, 130 Ala. 222, 89 A. S. R. 30, 55 L.R.A. 547, 30 So. 614 (dissenting opinion), on power of general agent to appoint subagents.

Cited in reference notes in 32 A. R. 330, on power of insurance agent to waive breach of condition in policy; 54 A. S. R. 510, on waiver of condition as to prepayment of insurance premium.

—Agent's authority to cancel policy.

Cited in *Commercial Union Assur. Co. v. State*, 113 Ind. 331, 15 N. E. 518, holding insurer liable on policy issued by agent without authority and cancelled by former without notice to insured; *Insurance Co. v. Raden*, 87 Ala. 311, 13 A. S. R. 36, 5 So. 876, holding agent to procure insurance not authorized to consent to cancellation of policy.

Cancellation of policy for nonpayment.

Cited in *Home Protection v. Avery*, 85 Ala. 348, 7 A. S. R. 54, 5 So. 143; *New York L. Ins. Co. v. Smith*, 139 Ala. 303, 35 So. 1004,—denying right to cancel policy for nonpayment of premiums where note accepted in payment.

Cited in note in 15 L.R.A. 454, on paidup and non-forfeiting policies of life insurance.

Construction of policy in favor of insured.

Cited in *Central City Ins. Co. v. Oates*, 86 Ala. 558, 11 A. S. R. 67, 6 So. 83, holding that requirements as to notice of loss will be construed liberally in favor of insured; *Tubb v. Liverpool & L. & G. Ins. Co.* 106 Ala. 651, 17 So. 615, holding that conditions in policy as to forfeiture will be construed in favor of insured; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 So. 399, holding that conditions in policy will be construed in favor of insured.

Cited in note in 59 A. R. 818, on construction of insured's statements in application for insurance, as to whether warranties or not.

Representation as to health as Warranty.

Cited in *Alabama Gold L. Ins. Co. v. Johnston*, 80 Ala. 467, 60 A. R. 112, 2 So. 125; *Weil v. New York L. Ins. Co.* 47 La. Ann. 1405, 17 So. 853,—holding representation as to health of applicant material to risk, warranty.

29 AM. REP. 779, PERRY INS. & T. CO. v. FOSTER, 58 ALA. 502.

Validity of mortgage or trust deed.

Cited in *Hill v. Ryan Grocery Co.* 23 C. C. A. 624, 41 U. S. App. 714, 78 Fed. 21, holding that deed of trust covering farming tools and crops for ensuing year to secure debt in excess of their value not void as to creditors; *Murray, D. & Co. v. McNealy & C.* 86 Ala. 234, 11 A. S. R. 33, 5 So. 565, holding that chattel mortgage authorizing mortgagor to sell goods paying over proceeds to mortgagee is not void on face; *Louchein v. First Nat. Bank*, 98 Ala. 521, 13 So. 374, holding that mortgage is not invalidated by provision that surplus upon sale be paid to mortgagor; *Pugh v. Harwell*, 108 Ala. 486, 18 So. 535, holding that mortgage by insolvent grantor upon crops is not void as reserving benefit to mortgagor because latter permitted to consume part of crops on premises; *Hendon v. Morris*, 110 Ala. 106, 20 So. 27, holding that mortgage security is not invalidated by act of mortgagee in taking lien on crop as additional security; *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L.R.A. 252, 75 N. W. 911, holding that deed of trust for creditors is not void because trustee permitted to continue debtor's business.

What constitutes an assignment for benefit of all creditors.

Cited in *Danner v. Brewer*, 69 Ala. 191, holding transfer of all of insolvent debtor's property to one person operative as general assignment; *Warten v. Matthews*, 80 Ala. 429, holding mortgage covering all of insolvent's property properly declared general assignment for creditors; *Inman v. Schloss*, 122 Ala. 461, 25 So. 739, holding partial assignment by insolvent for benefit of particular creditors not within statute making same inure to benefit of all creditors; *Parsons v. Johnson*, 84 Ala. 254, 4 So. 385, holding burden on one seeking to have mortgage declared general assignment, to show that all of property of insolvent mortgagor covered; *Smith v. McCadden*, 138 Ala. 284, 36 So. 376 (dissenting opinion), on conveyance by debtor of all property to indorser on note as general assignment for benefit of all creditors.

Cited in note in 37 L.R.A. 338, as to whether a preference by mortgage or sale is an assignment for creditors.

Rights of attaching creditor under assignment for creditors.

Cited in *Drew Glass Co. v. Baldwin*, 27 Mo. App. 44 (dissenting opinion), on rights of attaching creditor under subsequent assignment for creditors.

Cited in note in 41 L.R.A. 708, on effect of preferring usurious debt in an assignment for creditors.

NOTES

ON THE

AMERICAN REPORTS.

CASES IN 30 AM. REP.

30 AM. REP. 1, MONTGOMERY v. SCOTT, 9 S. C. 20.

Fraud as affecting writing signed without reading.

Cited in *Pacific Guano Co. v. Anglin*, 82 Ala. 492, 1 So. 852, holding that married woman cannot avoid mortgage on ground of misrepresentations, where none were made at time of execution of mortgage which she signed without reading; *Kinney v. Ensminger*, 87 Ala. 340, 6 So. 72, holding allegations in bill that complainant could not speak English well and that contract was negotiated by agent who colluded with other party as to writing, relieve him from imputation of negligence; *Ballou v. Young*, 42 S. C. 170, 20 S. E. 84, holding fraudulent vendee's assignee acquires no title by deed executed by illiterate and nearly blind woman under false representations; *Baldwin v. Postal Teleg. Cable Co.* 78 S. C. 419, 59 S. E. 67, on contract being executed through party's negligence in not reading.

Equitable relief against consequences of negligence.

Cited in *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927, holding that assignee of stock under code, may show acts of negligence, not known by him, which estop rightful owner from showing title.

Cited in notes in 4 L.R.A. 483, as to whether equity will relieve a party against the consequences of his own negligence; 37 L.R.A. 599, on right to rely on representations made to effect contract as basis for charge of fraud where defrauded person had means of knowing the truth.

30 AM. REP. 13, BAMBERG v. SOUTH CAROLINA R. CO. 9 S. C. 61.

Liability of carrier for injury inflicted by animals on themselves.

Cited in *Louisville, N. O. & T. R. Co. v. Bigger*, 66 Miss. 319, 6 So. 234, holding railroad company not liable for injury to mule inflicted by itself or other mules in transportation; *Comer v. Columbia, N. & L. R. Co.* 52 S. C. 36, 29 S. E. 637, on carrier of live animals being liable for damages occasioned by animals goring or trampling upon each other.

Cited in notes in 67 A. D. 209; 1 A. S. R. 696; 37 L. ed. U. S. 292,—on duty and liability of common carriers of live stock; 37 A. S. R. 639, on duty of carrier of live stock to furnish suitable cars; 63 A. S. R. 549, on respective duties of carriers and shippers of live stock; 130 Am. St. Rep. 441, on carrier's liability for loss of, or injury to, live stock; 18 L.R.A.(N.S.) 92, as to whether carrier is an insurer of live stock transported; 3 E. R. C. 143, on liability of carrier for injury to animal caused by inherent vice of animal.

30 AM. REP. 20, EX PARTE BOND, 9 S. C. 80.

Right to avoid erroneous or excessive judgment by habeas corpus.

Cited in *Re Taylor*, 7 S. D. 382, 58 A. S. R. 843, 45 L.R.A. 136, 64 N. W. 253, holding excessive sentence of prisoner convicted of embezzlement cannot be avoided on habeas corpus; *Smith v. Hess*, 91 Ind. 424; *Lowery v. Howard*, 103 Ind. 440, 3 N. E. 124,—holding erroneous judgment of court having jurisdiction cannot be collaterally assailed on habeas corpus.

Cited in notes in 26 A. D. 45, on necessity that defect in judgment or process be such as to render proceeding void to permit review on habeas corpus; 45 L.R.A. 146, on refusal of discharge on habeas corpus in case of excessive sentence.

Distinguished in *Ex parte Cox*, 3 Idaho, 530, 95 A. S. R. 29, 32 Pac. 197, holding prisoner sentenced to imprisonment for period greater than allowed by statute, may be released on habeas corpus.

What matters may be considered on habeas corpus.

Cited in *State ex rel. Hull v. Wolfer*, 68 Minn. 465, 71 N. W. 681, holding judgment of court which is defective in omitting to sentence prisoner to hard labor cannot be collaterally impeached on habeas corpus; *State v. Garlington*, 56 S. C. 413, 34 S. E. 689, holding court cannot enquire into errors at law under writ of habeas corpus in proceedings under which petitioner has been imprisoned by magistrate; *Ex parte Hollman*, 79 S. E. 9, 21 L.R.A.(N.S.) 242, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105 (dissenting opinion), on testing constitutionality of statute under writ of habeas corpus; *Ex parte Hollman*, 79 S. C. 9, 21 L.R.A.(N.S.) 242, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105 (dissenting opinion), on right to determine on habeas corpus errors of law committed by trial court in rendition of voidable judgment.

Cited in notes in 23 A. S. R. 110, on review on habeas corpus of sentence in excess of jurisdiction of court; 87 A. S. R. 192, on review on habeas corpus of place of incarceration; 87 A. S. R. 194, on review on habeas corpus of extent of punishment.

Erroneous conviction or excessive sentence as affecting validity of same.

Cited in *Kelly v. People*, 115 Ill. 583, 56 A. R. 184, 4 N. E. 644, holding erroneous conviction on indictment for robbery on waiver of jury trial by prisoner, not void; *Perry v. Pernet*, 165 Ind. 67, 74 N. E. 609, 6 A. & E. Ann. Cas. 533, holding excessive sentence in civil contempt case, not void because of such erroneous excess; *Ex parte Tani*, 29 Nev. 385, 13 L.R.A.(N.S.) 518, 91 Pac. 137, holding that sentence to penitentiary instead of county jail as law directed for failure to pay fine did not vitiate entire sentence.

Cited in notes in 55 A. S. R. 274, on validity of sentence above maximum authorized by law; 45 L.R.A. 138, on effect of excessive sentence in state courts.

Extent of sentence for assault.

Cited in *State v. Welah*, 29 S. C. 4, 6 S. E. 894, holding person convicted of assault and battery with intent to kill may be sentenced to imprisonment at hard labor in penitentiary under statute.

What constitutes imprisonment.

Cited in *State v. Williams*, 40 S. C. 373, 19 S. E. 5, on sentence to hard labor on streets being part punishment or imprisonment.

**30 AM. REP. 23, WILMINGTON, ETC. R. CO. v. GREENVILLE, ETC.
R. CO. 9 S. C. 325.**

Liability of connecting carriers.

Cited in reference note in 2 A. S. R. 325, on liability of connecting carriers.

30 AM. REP. 26, WILLIAMS v. VANCE, 9 S. C. 344.

What constitutes liquidated damages.

Cited in *American Freehold Land Mortg. Co. v. Whaley*, 63 Fed. 743, holding provision in mortgage for payment of attorney's fee of \$500 by mortgagor in case of foreclosure, construed as liquidated damages on breach of contract; *Keeble v. Keeble*, 85 Ala. 552, 5 So. 149, holding provision in contract of hire for payment of certain sum by employee on becoming intoxicated, is for liquidated damages; *Henderson v. Murphree*, 109 Ala. 556, 20 So. 45, holding provision for forfeiture of party's interest in partnership on becoming intoxicated, is for liquidated damages; *Mansur & T. Implement Co. v. Tissier Arms & Hardware Co.* 136 Ala. 597, 33 So. 818, holding agreement to pay 20 per cent of invoice price of goods ordered if countermanded, deemed penalty; *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642, 72 N. E. 643, holding sum fixed in contract for delivery of milk for breach thereof, deemed liquidated damages, where same is not disproportionate to loss; *Norwood v. Faulkner*, 22 S. C. 367, 53 A. R. 717, holding agreement to pay commissions on bales not shipped under contract to ship, valid as liquidated damages; *Witte v. Weinberg*, 37 S. C. 579, 17 S. E. 681, holding liquidated damages per bale mentioned in contract for failure to ship certain number of bales, recoverable as such; *Illinois C. R. Co. v. Southern Seating & Cabinet Co.* 104 Tenn. 568, 78 A. S. R. 933, 50 L.R.A. 729, 58 S. W. 303, holding certain sum per day mentioned in building contract as forfeiture for delay, may be recovered as liquidated damages; *Allen-West Commission Co. v. Carroll*, 104 Tenn. 489, 58 S. W. 314, holding contract to furnish factor certain bales of cotton on certain commission, or account for commission, valid; *Stevens v. Pillsbury*, 57 Vt. 205, 52 A. R. 121, holding party paying certain sum for agreement that hotel will not be used as such secured by deed thereof, may recover sum paid as liquidated damages on breach; *Jackson v. Hunt*, 76 Vt. 284, 56 Atl. 1010, holding agreement in contract for delivery of logs that specified sum will be deducted if required quantity is not delivered, liquidated damages; *Ancrum v. Camden Water, Light & Ice Co.* 82 S. C. 284, 21 L.R.A.(N.S.) 1029, 64 S. E. 151, to the point that when parties stipulate what shall be consequence of breach of agreement, other consequences are excluded; *Moses v. Autuono*, 56 Fla. 499, 20 L.R.A.(N.S.) 350, 47 So. 925, holding that damages for breach of contract will be determined by law instead of by stipulation in contract as to amount when breach is not one contemplated in making stipulation.

Cited in reference notes in 35 A. R. 160; 57 A. R. 783; 24 A. S. R. 480; 39

A. S. R. 636; 78 A. S. R. 941; 85 A. S. R. 479; 91 A. S. R. 492, 584,—on distinction between penalty and liquidated damages; 31 A. R. 607, as to whether penalty named in a bond is liquidated damages or a penalty; 25 A. S. R. 110, on liquidated damages for breach of contract; 43 A. S. R. 273, on mode of determining between penalty and liquidated damages; 47 A. S. R. 627, on promise to pay sum for failure to complete contract at stated time, as liquidated damages; 55 A. S. R. 349, on when stipulated sum will be held to be liquidated damages.

Cited in notes in 108 A. S. R. 63, on sale of personal property as contract for liquidated damages; 108 A. S. R. 51, on intention of parties as test for determining as between liquidated damages or penalty; 108 A. S. R. 52, on uncertainty of actual damages as test for determining as between liquidated damages and penalty; 6 E. R. C. 559, 560, 562, on distinction between a penalty and liquidated damages mentioned as payable in event of nonperformance of contract.

Right of creditor to direct application of payment.

Cited in *Clark v. Smith*, 13 S. C. 585, holding moneys paid by father to daughter after attaining majority, may be applied by her as credits upon father's indebtedness other than that arising from receipts for daughter during infancy; *Greig v. Smith*, 29 S. C. 426, 7 S. E. 610, holding mortgagees may apply cotton shipped without direction to unsecured account where they have made advances over security.

Distinguished in *Pelzer v. Steadman*, 22 S. C. 279, on right of creditor in absence of instruction to apply proceeds of cotton shipped to credit of unsecured indebtedness.

30 AM. REP. 37, RICKENBACKER v. ZIMMERMAN, 10 S. C. 110.

What constitutes an advancement.

Cited in *Heyward v. Middleton*, 65 S. C. 493, 43 S. E. 956, holding money received from parent by child without consideration must be accounted for on settlement of estate as advancement; *Waldron v. Taylor*, 52 W. Va. 284, 45 S. E. 336, holding transfer of property to brother before death in consideration of love, not advancement to be brought into hotchpot; *Morrison v. Morrison*, 43 Tex. Civ. App. 339, 96 S. W. 100, holding that gift of money from parent to child is presumed to be given as advancement.

Cited in notes in 80 A. D. 560, on what property advancements made; 80 A. D. 564, on effect of advancement and how valued; 3 A. S. R. 125; 3 A. S. R. 213; 2 E. R. C. 263,—on what constitutes an advancement.

How value of advancement estimated.

Cited in *Culberhouse v. Culberhouse*, 68 Ark. 405, 59 S. W. 38, holding value of advancement of insurance policy, estimated as of time of insured's death; *Wilson v. Kelly*, 21 S. C. 535, holding value of slaves given to children cannot be charged as advancement on father's death after emancipation; *Cazassa v. Cazassa*, 92 Tenn. 573, 36 A. S. R. 112, 20 L.R.A. 178, 22 S. W. 560, holding insurance taken out by father in name of child, valued as advancement at net amount realized therefrom.

30 AM. REP. 46, BRIGGS v. WINSMITH, 10 S. C. 133.

Rate of interest after maturity.

Cited in *Carolina Sav. Bank v. Parrott*, 30 S. C. 61, 8 S. E. 199, holding holder

of note cannot recover more than legal rate of interest thereon after same becomes due; *Wilks v. Walker*, 22 S. C. 139, 53 A. R. 706, holding sealed note payable one day after date with interest at rate of 2% per month, carrier stipulated rate of interest after maturity; *Sharpe v. Lee*, 14 S. C. 341, holding note payable one day after date with interest from date at 12% per annum payable annually, draws 12% interest after maturity; *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. 1, holding bond providing for payment of sum certain date and interest, bears interest at contract rate until paid.

Cited in reference notes in 76 A. D. 602, on determination of amount, where interest is allowed as damages; 21 A. S. R. 557, as to whether interest after maturity is controlled by statute or terms of contract; 75 A. S. R. 940; 79 A. S. R. 140,—on interest on judgments.

Cited in notes in 53 A. R. 845; 34 A. R. 255,—on interest after maturity; 47 A. R. 70, 73, on rate of interest after maturity of obligation bearing interest at special rate; 33 A. S. R. 634; 75 A. S. R. 940; 26 L. ed. U. S. 532,—on rate of interest after maturity.

30 AM. REP. 50, SUSONG v. VAIDEN, 10 S. C. 247.

Liability of representatives of deceased surety or partner.

Cited in *Portland Trust Co. v. Havely*, 36 Or. 234, 61 Pac. 346, holding judgment recoverable against representatives of deceased surety on bond for stay of execution; *Wiesenfeld, S. & Co. v. Byrd*, 17 S. C. 106, holding representatives of deceased partner may be joined with surviving partner in action upon partnership debt.

Cited in reference notes in 21 A. S. R. 509, on rights and liabilities of representatives of deceased partner; 22 A. S. R. 194, on liability of surety's estate; 63 A. S. R. 63, on liability of estate of deceased surety on official bond.

Ground for new trial.

Cited in *McLaurin v. Wilson*, 16 S. C. 402, holding court will not grant new trial for error in excluding testimony taken before clerk, where it related to wholly immaterial matter; *State ex rel. Detheridge v. Gilreath*, 16 S. C. 100, holding same as to evidence of party to prove fact is not as own witnesses testified; *State v. Pinckney*, 22 S. C. 484, holding admission in evidence of inadmissible records which were not considered by judge in making up judgment, need not be considered by appellate court.

30 AM. REP. 58, MOORE v. BYRUM, 10 S. C. 452.

Chattel mortgage on property to be acquired.

Cited in reference notes in 42 A. S. R. 696, on mortgages on chattels not acquired; 81 A. S. R. 42, on mortgages of property not in existence.

Cited in notes in 46 A. D. 712, on mortgage of after-acquired property and of property having only potential existence; 46 A. D. 716, on ratification by new act of mortgagor of after-acquired property; 76 A. D. 725, on right to mortgage thing in which mortgagor has potential interest; 81 A. S. R. 44, on sale or mortgage of crops growing or to be grown; 23 L.R.A. 453, 454, on necessity and effect of possession on sale or mortgage of future crops; 23 L.R.A. 457, on equitable doctrine as to sale or mortgage of future crops; 23 L.R.A. 467, on sale or mortgage of future crops to secure crop advances; 54 A. S. R. 139; 22 L. ed. U. S. 183,—on mortgage on crops to be planted; 5 E. R. C. 137, as to what personal property may be mortgaged.

— Validity.

Cited in *Creech v. Long*, 72 S. C. 25, 51 S. E. 614, holding equitable mortgage may be created by parol agreement on crops to be raised; *Hirshland v. Israel*, 18 S. C. 157, on chattel mortgage on stock of goods covering subsequently purchased goods; *Perkins v. Loan & Exch. Bank*, 43 S. C. 39, 20 S. E. 759, to the point that mortgagee may obtain lien upon after-acquired property.

Cited in reference notes in 31 A. R. 652, on validity of chattel mortgage on crops to be planted; 35 A. R. 564, on validity of mortgage on growing crop; 19 A. S. R. 30, on validity and effect of mortgages upon chattels not yet acquired.

Cited in notes in 109 A. S. R. 522, on lack of potential existence as fatal to validity of mortgage on unplanted crop; 10 E. R. C. 477, on validity of sale or mortgage of property to be subsequently acquired.

— Necessity for provision in mortgage as to.

Cited in *Armour v. Ross*, 75 S. C. 201, 55 S. E. 315, holding mortgage containing nothing to show that it was intention of parties to cover subsequently acquired goods, not lien on such goods.

— Title of mortgagee.

Cited in *Mayer v. Taylor*, 69 Ala. 403, 44 A. R. 522, holding mortgage of unplanted crop conveys merely equitable interest therein.

— Rights of parties under.

Cited in *Cameron v. Marvin*, 26 Kan. 612, holding chattel mortgages of property valid from time mortgagee takes possession, as against subsequent attaching creditor; *Hickman v. Dill*, 39 Mo. App. 246, holding after acquired title of mortgagor in crop enures to mortgagee, where mortgagor's title failed; *Davis v. Childers*, 45 S. C. 133, 55 A. S. R. 757, 22 S. E. 784, holding mortgagee of equitable chattel mortgage which does not contain words of alienation, must enforce rights in equity.

Cited in reference note in 31 A. R. 180, on retention by mortgagor of mortgaged chattel as fraudulent.

Cited in note in 109 A. S. R. 517, on effect of taking possession of subsequently acquired property covered by mortgage.

Distinguished in *Hankinson v. Hankinson*, 61 S. C. 193, 39 S. E. 385, holding senior lienee, who permits third person to take enough of crops covered by liens to pay such person's debt, without notice to junior lienee, cannot sue junior lienee for crops seized under his lien.

30 AM. REP. 69, ADKINSON v. STATE, 5 BAXT. 569.**What constitutes burglary.**

Cited in *Sorenson v. United States*, 94 C. C. A. 181, 168 Fed. 785, holding that entering building without breaking and then breaking out does not constitute burglary.

Cited in 2 A. S. R. 387, on effect of breaking out after entry without breaking in burglary.

30 AM. REP. 72, STOKES v. STATE, 5 BAXT. 619.**Compelling accused to testify against himself.**

Cited in *People v. Escarius*, 124 Mich. 616, 83 N. W. 628, on requiring prisoner on cross-examination to put bar, with which it was alleged murder was committed, into his pocket to show it might have been concealed, as error.

Cited in note in 75 A. S. R. 328, on what is testifying against one's self with-
in rule as to privilege of witness.

—By making foot prints.

Cited in *Cooper v. State*, 86 Ala. 610, 11 A. S. R. 84, 4 L.R.A. 766, 6 So. 110, holding refusal of accused to make tracks cannot be proved as circumstances against him; *State v. Atkinson*, 40 S. C. 363, 42 A. S. R. 877, 18 S. E. 1021, holding admission of testimony of tracks which is stricken out when it appeared that prisoner was directed by officer to make tracks, not error; *Thornton v. State*, 117 Wis. 338, 98 A. S. R. 924, 93 N. W. 1107, holding accused may be required to surrender his shoe for purpose of comparison with tracks near place of crime; *United States v. Price*, 163 Fed. 904, to the point that Constitution was violated by compelling prisoner to make foot-track before jury.

Cited in reference note in 30 A. R. 782, on prisoner's "making tracks" in court.

Cited in notes in 94 A. S. R. 343, on making of footprints by accused for purpose of comparison; 49 A. R. 191; 53 A. S. R. 379; 136 Am. St. R. 146; 28 L.R.A. 699,—on right to compel accused to make foot prints.

—By compulsory physical examination.

Cited in *State v. Height*, 117 Iowa, 650, 94 A. S. R. 323, 59 L.R.A. 437, 91 N. W. 935, holding compulsory physical examination of person accused of rape, violates constitutional rights; *Blackwell v. State*, 67 Ga. 76, 44 A. R. 717, holding that in case place at which prisoner's leg was amputated being material point, it was error to require him to make profert of himself so that witness violated by compelling prisoner to make foot-track before jury.

Cited in note in 68 A. S. R. 252, on physical examination of parties in criminal cases.

Distinguished in *O'Brien v. State*, 125 Ind. 38, 9 L.R.A. 323, 25 N. E. 137, holding party making compulsory examination of prisoner for certain marks of identification, may testify as to same.

30 AM. REP. 75, MOORE v. FAYETTEVILLE, 80 N. C. 154.

Right of municipality to tax property of nonresidents.

Cited in *Hall v. Fayetteville*, 115 N. C. 281, 20 S. E. 373, holding charter authorizing taxation of property on nonresident does not subject to taxation money held by nonresident administrator of decedent who died in town; *Winston v. Taylor*, 99 N. C. 210, 6 S. E. 114, holding nonresident who buys leaf tobacco in town to be manufactured without, liable to tax upon leaf tobacco business in such town.

Place of taxation of national bank stock.

Cited in notes in 56 A. D. 530, on where national bank stock taxed; 45 L.R.A. 761, as to where tax on national bank stock is to be assessed.

30 AM. REP. 77, RIGGAN v. GREEN, 80 N. C. 236.

Validity of contract of incompetent persons.

Cited in *Hosler v. Beard*, 54 Ohio St. 398, 56 A. S. R. 720, 35 L.R.A. 161, 43 N. E. 1040, holding promissory note of idiot, invalid in hands of bona fide holder for value, where payee knew of such incapacity; *Cundall v. Haswell*, 23 R. I. 508, 51 Atl. 426, holding executory contract made with lunatic, voidable at election of his guardian; *Beeson v. Smith*, 149 N. C. 142, 62 S. E. 888, to point that deed of insane person is voidable only, if he is not adjudged lunatic; *West v. Seaboard Air Line R. Co.* 151 N. C. 231, 65 S. E. 979, holding that con-

tract made with person not judicially declared insane is voidable but not void.

Cited in notes in 10 A. S. R. 744; 19 L.R.A. 489,—on validity of a deed made by an insane person.

—Deed or mortgage.

Cited in *Riley v. Carter*, 76 Md. 581, 35 A. S. R. 443, 19 L.R.A. 489, 25 Atl. 667, holding deed of lunatic in trust for benefit of creditors, voidable only; *McAnaw v. Tiffin*, 143 Mo. 667, 45 S. W. 656, holding insane person's deed, made before inquest, voidable only; *Wolcott v. Connecticut General L. Ins. Co.* 137 Mich. 309, 100 N. W. 569; *Robinson v. Kind*, 25 Nev. 261, 62 Pac. 705,—holding conveyance executed by person non compos mentis, who has no guardian, voidable only; *Ellington v. Ellington*, 103 N. C. 454, 9 S. E. 208, holding deed of lunatic is color of title, and possession thereunder for seven years ripens into title against those not under disability; *Odom v. Riddick*, 104 N. C. 515, 17 A. S. R. 686, 7 L.R.A. 118, 10 S. E. 609, holding conveyance from lunatic for valuable consideration with notice of incapacity but without fraud will not be set aside as against bona fide vendor of purchaser; *Creekmore v. Baxter*, 121 N. C. 31, 27 S. E. 994, holding land sold under foreclosure of mortgage made by lunatic may be recovered, where mortgagee knew of incapacity; *Greeno v. Ellas*, 1 Tenn. Ch. App. 165, holding deed of non compos mentis will not be set aside, where conveyor received benefit and conveyee was unaware of such incapacity; *Reid v. Singer Mfg. Co.* 128 Ky. 650, 107 S. W. 310, holding wife who joined with husband in deed estopped from claiming land as devisee of husband on ground that he did not have mental capacity to make deed.

Distinguished in *Fitzgerald v. Shelton*, 95 N. C. 519, holding party in action to recover land, may show that deed offered by other in support of title is void for incapacity of grantor.

Necessity of return of consideration on setting aside deed of incompetent.

Cited in *Elder v. Schumacher*, 18 Colo. 433, 33 Pac. 175, holding that grantee of deed from insane person, who was cognizant of such incapacity, cannot require refunding of consideration as condition to setting aside of deed; *Coburn v. Raymond*, 76 Conn. 484, 100 A. S. R. 1000, 57 Atl. 116, holding that incompetent suing to avoid conveyance made without guardian to vendee without knowledge of incompetency, must return consideration; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249, holding deed of insane person before office found, to innocent party, voidable only on return of consideration, in absence of fraud.

Cited in note in 19 L.R.A. 491, on necessity of restoration of consideration in order to disaffirm deed because of grantor's insanity.

Rights of parties non compos mentis.

Cited in *Brittain v. Mull*, 99 N. C. 483, 6 S. E. 382, holding judgment of court having jurisdiction cannot be collaterally attacked by party who was insane when judgment was rendered.

30 AM. REP. 80, MAUNEY v. COIT, 80 N. C. 300.

Necessity for presentment and notice of dishonor.

Cited in *Hawley v. Jette*, 10 Or. 31, 45 A. R. 129, holding neglect to present for payment to acceptor of bill and give notice of dishonor, not excused by insolvency of drawer.

Cited in notes in 68 L.R.A. 491, on waiver of demand or notice of default of

paper held as collateral or conditional payment; 4 E. R. C. 530, on duty of creditor, taking bill of exchange as collateral security, to present it for payment and to give notice of dishonor.

Acceptance of draft as payment.

Cited in *Virginia-Carolina Chemical Co. v. McNair*, 139 N. C. 326, 51 S. E. 949, holding acceptance of draft from debtor will not operate as payment unless expressly agreed; *Mauney v. Coit*, 86 N. C. 463, holding draft received for goods sold and delivered, does not discharge debt.

Rights and liabilities of liquidating partner.

Cited in note in 40 A. S. R. 572, on powers, rights, and liabilities of liquidating partner.

30 AM. REP. 84, TEW v. TEW, 80 N. C. 316.

Grounds for divorce.

Cited in *Steele v. Steele*, 104 N. C. 631, 10 S. E. 707, holding unknown illicit intercourse, even though incestuous, prior to marriage, no ground for divorce.

Cited in reference note in 83 A. S. R. 668, on adultery as ground for divorce.

Defenses to action for divorce.

Cited in *House v. House*, 131 N. C. 140, 42 S. E. 546, holding adultery by husband on but two occasions, no defense to his action for divorce from wife on proof of adultery; *Sprinkle v. Spainhour*, 149 N. C. 323, 25 L.R.A.(N.S.) 167, 62 S. E. 910, holding that abandonment as defense to divorce action must be pleaded.

Cited in note in 86 A. S. R. 338, on adultery of plaintiff after desertion as defense in divorce proceeding.

30 AM. REP. 86, STATE v. DAVIS, 80 N. C. 351.

Rights of owner of fee in highway.

Cited in *State v. Hewell*, 90 N. C. 705, holding minor carrying concealed weapon in public road which ran over his father's land, on his own premises; *Tate v. Greensboro*, 114 N. C. 372, 24 L.R.A. 671, 19 S. E. 767, holding committee delegated to improve streets within city's power, not answerable for damage resulting from their acts.

Cited in notes in 101 A. S. R. 111, on right of abutting owners as to nuisances and offensive conduct by others in highway; 101 A. S. R. 118, on remedies of persons for whose land a public highway runs.

Right to forcibly resist trespass.

Cited in *State v. Taylor*, 82 N. C. 554, holding occupant of tenement may resort to physical force to resist entrance of trespasser who defiantly stands his ground armed with razor; *Crawford v. State*, 112 Ala. 1, 21 So. 214, on right of guest lawfully in house to use force to eject strangers unlawfully there.

30 AM. REP. 88, STATE v. PETTIE, 80 N. C. 367.

What constitutes cruel and unusual punishment.

Cited in *State v. Reid*, 106 N. C. 714, 11 S. E. 315, holding twelve months imprisonment with fine of \$500 not excessive or cruel punishment for outrageous assault and battery upon paramour; *State v. Haynie*, 118 N. C. 1265, 24 S. E. 536, holding sentence of imprisonment for two years with leave to be worked on public roads, not excessive punishment for aggravated assault;

Huntsman Bros. v. Linville River Lumber Co. 121 N. C. 584, 29 S. E. 838, holding two years imprisonment to be worked on roads not cruel and unusual punishment for outrageous assault and robbery; **State v. Hamby**, 126 N. C. 1066, 35 S. E. 614, holding sentence that prisoner be confined in common jail and assigned to work on public roads of another county, not cruel and unusual punishment for carrying concealed weapon.

Cited in reference note in 58 A. S. R. 637, on constitutional provision against cruel and unusual punishment.

Cited in note in 35 L.R.A. 569, on cruel and unusual punishment.

Jurisdiction of assault and battery case.

Cited in **State v. Huntley**, 91 N. C. 617, holding justice of peace has not jurisdiction of assault and battery case wherein serious damage was done.

Discretion of court as to severity of punishment.

Cited in note in 35 L.R.A. 563, on discretion of court as to severity of punishment.

30 AM. REP. 90, STATE McGIMSEY 80, N. C. 377.

Discharge of jury as discharge of prisoner.

Cited in **State v. Tyson**, 138 N. C. 627, 50 S. E. 456, holding plea of former jeopardy properly overruled, where jury was discharged on account of drunken condition of juror; **Ex parte Tice**, 32 Or. 179, 49 Pac. 1038, holding discharge of jury on Sunday for failure to agree, discharges prisoner; **State v. Davis**, 31 W. Va. 390, 7 S. E. 24, holding prisoner cannot be discharged on ground that juror was discharged, another substituted, and trial proceeded *de novo*.

Cited in reference note in 25 A. S. R. 527, on prisoner not deemed to have been in jeopardy where jury disagreed.

Expiration of term as ground for discharging jury before verdict.

Cited in **Whitten v. State**, 61 Miss. 717, holding judge not authorized to discharge jury before verdict on ground that time for closing term had arrived.

Right to hold court on Sunday or holiday.

Cited in **Henderson v. Reynolds**, 84 Ga. 159, 7 L.R.A. 327, 10 S. E. 734, holding judge may receive verdict on Sunday; **State v. Moore**, 104 N. C. 743, 10 S. E. 183, holding verdict rendered on holiday, valid; **State v. Penley**, 107 N. C. 808, 12 S. E. 455, holding verdict rendered on Sunday, valid; **Taylor v. Ervin**, 119 N. C. 274, 25 S. E. 875, holding verdict entered on Sunday of week set for duration of court, legally entered; **State v. Howard**, 82 N. C. 623, on right to hold court on Sunday.

Validity of Sunday contract.

Cited in **Ex parte Smith**, 134 N. C. 495, 47 S. E. 16, holding contract for conveyance of land entered into on Sunday, valid.

Necessity for judge granting mistrial finding facts therefor.

Cited in **State v. Locke**, 86 N. C. 647; **State v. Carland**, 90 N. C. 668,—on necessity of judge granting mistrial setting facts out in record; **State v. Dry**, 152 N. C. 813, 67 S. E. 1000, to point that finding of fact by court that jury could not agree was sufficient "necessity" to justify order for mistrial.

Distinguished in **State v. Bass**, 82 N. C. 570, holding presiding judge may discharge jury before verdict in noncapital felony case, without finding facts constituting necessity therefor.

Conclusiveness of judgment of trial court in ordering mistrial.

Cited in *State v. Bell*, 81 N. C. 591, holding conclusions of law from facts found by trial court in ordering mistrial because juror had been tampered with, reviewable.

Certiorari as proper remedy to carry up case.

Cited in *State v. Twiggs*, 90 N. C. 685, on certiorari being proper remedy to carry up case, where there is error in ruling of court in discharging jury; *Hovey v. Sheffner*, 16 Wyo. 254, 125 A. S. R. 1037, 15 L.R.A.(N.S.) 227, 93 Pac. 305, 15 A. & E. Ann. Cas. 318, to point that certiorari was proper remedy in criminal case to review errors of court below in exercise of its jurisdiction.

Right of state to appeal in criminal prosecution.

Cited in *State v. Savery*, 126 N. C. 1083, 49 L.R.A. 585, 36 S. E. 22, holding state has no right of appeal in criminal prosecution, where there is plea and general verdict of not guilty.

30 AM. REP. 94, STATE v. CHADBURN, 80 N. C. 479.

Followed without discussion in *State v. Barbee*, 126 N. C. 1150.

Application of revenue statutes to particular trades.

Cited in *Johnson v. Armour*, 31 Fla. 413, 12 So. 842, holding parties who raise or buy and kill animals in another state and sell meat here, dealers in dressed meats here; *State v. Yearby*, 82 N. C. 561, 33 A. R. 694, holding party who carries on business of butcher is not "dealer" within revenue act; *State v. Barnes*, 126 N. C. 1063, 35 S. E. 605, holding term "lumber dealer" in Revenue Act does not apply to party, engaged in general merchandise, who takes lumber in payment of debt or in exchange; *State v. Carter*, 129 N. C. 560, 40 S. E. 11, holding statute imposing tax on business of buying and selling fresh meat, applies to persons buying and butchering cattle and selling meat.

30 AM. REP. 98, HOUSTON & T. C. R. CO. v. MOORE, 49 TEX. 31.**Person riding on train against rules of company.**

Cited in *Whitehead v. St. Louis, I. M. & S. R. Co.* 22 Mo. App. 60, holding mother putting child upon freight in violation of known rules of company, cannot recover for injuries caused by negligence of employees who took child; *Florida S. R. Co. v. Hirst*, 30 Fla. 1, 32 A. S. R. 17, 16 L.R.A. 631, 11 So. 506, on liability of railroad company to passenger riding in express car against known rules of company.

—Trespasser or passenger.

Cited in *St. Louis S. R. Co. v. Mayfield*, 35 Tex. Civ. App. 82, 79 S. W. 365, holding party riding on freight train against company's rules, is trespasser.

Cited in reference note in 35 A. R. 458, on railway mail agent as passenger.

Cited in notes in 82 A. D. 293, as to who is a passenger; 61 A. S. R. 92, on who are passengers on freight trains; 2 L.R.A. 167, as to whether persons riding free are entitled to protection as passengers.

—Liability for injury to.

Cited in *Crawleigh v. Galveston*, 28 Tex. Civ. App. 260, 67 S. W. 140, holding railroad company not liable for death of trespasser on freight, though occasioned by collision resulting from gross negligence of employees.

Cited in reference notes in 50 A. R. 12, on right of recovery of passenger

for injury occurring before payment of fare; 1 A. S. R. 712, on right of passenger on freight train to recover for injury; 2 A. S. R. 40, on liability to passengers on freight trains against rules.

Distinguished in *Prince v. International & G. N. R. Co.* 64 Tex. 144, holding railway company liable for injury to party travelling on hand-car by permission free of charge, not against rules of company; *Rebostelli v. New York, N. H. & H. R. Co.* 33 Fed. 796, holding railroad company liable for injury to passenger who has paid his fare with non-transferable commutation ticket issued to another.

—Effect on company's liability of abrogation of rules by agent.

Cited in *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L.R.A. 768, 9 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370, holding assent of conductor of train to violation by brakeman of rule of company requiring him to be on top of car to give signals, does not alter company's nonliability for such violation; *Spence v. Chicago, R. I. & P. R. Co.* 117 Iowa, 1, 90 N. W. 346, holding party riding on construction train without knowledge of violation of company's rules by conductor in accepting him as passenger, entitled to recover for injuries received; *Louisville & N. R. Co. v. Harley*, 94 Tenn. 383, 27 L.R.A. 549, 29 S. W. 367, holding railroad company not liable to passenger on freight with conductor's permission, in violation of known rules of company; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19, holding party boarding freight on permission of trainman after refusal of passage by conductor, cannot recover for injuries received; *Texas & P. R. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331, holding charge making railroad company liable for injury to party riding on freight with consent of conductor against rules of company known to him, unsound; *Houston, E. & W. T. R. Co. v. Stell*, 28 Tex. Civ. App. 280, 67 S. W. 537, holding party, ejected from freight by conductor because he did not have ticket agent's permit as required by rules, cannot recover therefor, although agent told him he could get permit of conductor; *Wagner v. Missouri P. R. Co.* 124 Mo. 223, 25 S. W. 229, on liability of railroad company to persons riding on freight with consent of conductor against rules of company; *Texas & P. R. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086, on liability of railroad company for injury received by passenger riding in engine on invitation of engineer, against rules of company;

Cited in notes in 40 A. R. 226; 54 A. S. R. 83; 17 E. R. C. 276,—on liability to person riding on freight train against rules with conductor's consent.

—Burden of proving that he is a passenger.

Cited in *Hobbs v. Texas & P. R. Co.* 49 Ark. 357, 5 S. W. 586, holding party, found on freight train, claiming he is passenger, must show case that will rebut presumption that he is not; *Smith v. Louisville, E. & St. L. R. Co.* 124 Ind. 394, 24 N. E. 753, holding complaint which fails to aver facts showing party to be passenger insufficient to recover for assault of employee while riding on freight; *Burke v. Missouri P. R. Co.* 51 Mo. App. 491, holding burden is on person, entering freight forbidden to take passengers though habitually accustomed to do so, to show such custom; *Texas & P. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118, on burden resting upon party taking passage upon freight to show company's permission for passengers to use freight trains to such extent as to authorize belief that rule against it had been abrogated.

—Necessity for single action for death.

Cited in *Southern P. Co. v. Tomlinson*, 163 U. S. 369, 41 L. ed. 193, holding

one suit only can be brought by kindred of deceased to recover for his death; *Galveston, H. & S. A. R. Co. v. La Gierse*, 51 Tex. 189, holding allowing judgment in favor of widow for damages for death of husband, error, where record shows minor children were not represented in suit; *East Line & R. River R. Co. v. Culberson*, 68 Tex. 664, 5 S. W. 820, holding all surviving kindred of party killed by negligence of railroad company, must unite in one suit for damages; *Missouri P. R. Co. v. Henry*, 75 Tex. 220, 12 S. W. 828, holding mother can sue for herself and for benefit of husband for damages for negligently killing son; *San Antonio & A. P. R. Co. v. Mertink*, 101 Tex. 165, 105 S. W. 485, holding that action for wrongful death must be brought by or on behalf of all parties interested.

Cited in notes in 2 L.R.A. 520, on single action for damages for negligence causing death; 34 L.R.A. 796, 797, on multiplicity of actions for death.

Necessity that judgment for death apportion damages among persons interested.

Cited in *Galveston, H. & S. A. R. Co. v. La Gierse*, 51 Tex. 189, holding amount recovered in suit for causing death of person, must be apportioned by jury among those entitled to judgment; *Texas & P. R. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388, holding failure to apportion judgment between children not material error, where same is apportioned to widow and children together; *Dallas & W. R. Co. v. Spiker*, 59 Tex. 435, on failure of judgment to divide damages assessed by jury among parties as directed by statute, being error.

30 AM. REP. 101, DE LEON v. TREVINO, 49 TEX. 88.

Validity of contract growing out of illegal contract.

Cited in *Hubbard v. Mulligan*, 13 Colo. App. 116, 57 Pac. 738, holding mortgage on public land executed by presumptor prior to acquiring title, to pay for betterments thereon, valid, though mortgagor originally entered upon land under illegal agreement with mortgagee; *Stewart v. Miller*, 3 Tex. App. Civ. Cas. (Willson) 356, holding party loaning money to another on draft to pay gambling debt may recover therefor; *Columbia Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120, 47 S. W. 288, holding notes executed for articles purchased under and in pursuance of terms of illegal contract, void; *Overholt v. Burbridge*, 28 Utah, 408, 79 Pac. 561, holding bucket shop accepting margin to protect short sale of stock, cannot assert illegality of transaction between vendor and vendee, in action by vendor for his profit; *Smith v. Booty*, 49 Tex. Civ. App. 628, 109 S. W. 979, holding that obligation given in settlement of profits of illegal contract is enforceable.

Cited in reference notes in 31 A. R. 229, on validity of note given in settlement of profits of illegal business; 32 A. R. 731, on when stranger cannot allege illegality of contract; 16 A. S. R. 403, on validity of contracts whose considerations are other contracts based on violation of law; 35 A. S. R. 806, on contracts in contravention of statute; 36 A. S. R. 251, on invalidity of contract contravening policy of statute; 51 A. S. R. 484, on validity of negotiable instruments when consideration void.

Cited in notes in 30 A. R. 520; 41 A. S. R. 900,—on enforcement of illegal contracts in equity.

Distinguished in *Willis v. Morris*, 63 Tex. 458, 51 A. R. 655, holding note given by debtor to creditor for balance of original debt under secret agreement

after agreement with all creditors to settle on certain per cent, void; *Wegner Bros. v. Biering*, 65 Tex. 506, holding note in substitution of one based on illegal consideration, invalid.

—Right of accounting between partners in illegal business.

Cited in *Hatch v. Hanson*, 46 Mo. App. 323, holding party receiving money as prize in lottery must account to another whose money he used for that purpose; *Pfeffer v. Maltby*, 54 Tex. 454, 38 A. R. 631, holding partner cannot refuse to divide after illegal partnership has been carried out; *Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S. W. 154, holding woman who marries man holding void divorce, entitled to partnership interest in property jointly acquired by them, as against lawful wife; *Patty v. City Bank*, 15 Tex. Civ. App. 475, 41 S. W. 173, holding partner cannot after completion of illegal partnership appropriate assets of firm to exclusion of creditors, because of such illegality; *Crutchfield v. Rambo*, 38 Tex. Civ. App. 579, 86 S. W. 950, holding one of two parties who agree to divide receipts on purchasing lottery tickets, cannot enforce such agreement against other; *McDonald v. Lund*, 13 Wash. 412, 43 Pac. 348, holding action lies by one partner against another to recover portion of proceeds of gambling business; *Lee v. Boyd*, 86 Ala. 283, 5 So. 489, on right to recover money pledged as collateral security for illegal purpose; *Crescent Ins. Co. v. Bear*, 23 Fla. 50, 11 A. S. R. 331, 1 So. 318, on right of accounting between partner in illegal venture; *Lewis v. Alexander*, 51 Tex. 578, on right of partner in possession of proceeds from illegal partnership to refuse division with others; *Crutchfield v. Rambo*, 38 Tex. Civ. App. 579, 86 S. W. 950, to the point that if contract is illegal, it does not follow that it is illegal for parties after its completion to fairly settle profits between them.

Cited in notes in 99 A. S. R. 328, on illegality of partnership as defense to accounting; 23 L.R.A.(N.S.) 482, 483, on accounting between members of illegal or void partnership, or one engaged in illegal business.

Distinguished in *Read v. Smith*, 60 Tex. 379, holding settlement will not be enforced between parties who have entered into illegal contract, as to proceeds thereof; *Wiggins v. Bisso*, 92 Tex. 219, 71 A. S. R. 837, 47 S. W. 637, holding one partner cannot recover of other alleged profits of illegal business.

30 AM. REP. 112, CRUTCHFIELD v. DONATHON, 49 TEX. 691.

Statute of frauds as to sale of lands.

Cited in *Johnson v. Portwood*, 89 Tex. 235, 34 S. W. 596, holding parol contract that land, purchased with money advanced by third person under agreement between vendor and vendee, should stand security to such third party, will be enforced, where vendee is insolvent.

—Necessity that both parties sign memorandum for sale.

Cited in *Watson v. Baker*, 71 Tex. 739, 9 S. W. 867, on necessity of both parties signing memorandum in writing; *Morris v. Gaines*, 82 Tex. 255, 17 S. W. 538, on necessity of vendor, seeking to enforce exemptory contract for sale of land, proving promise in writing signed by vendee.

Cited in notes in 47 A. R. 532, on sufficiency of memorandum of sale of land, signed in agent's name; 28 L.R.A.(N.S.) 604, as to who must sign memorandum of executory sale contract within statute of frauds.

Distinguished in *Moore v. Powell*, 6 Tex. Civ. App. 43, 25 S. W. 472, holding contract for purchase of land signed by vendor only enforceable.

—Necessity of written acceptance of written offer to sell.

Distinguished in *Foster v. New York & T. Land Co.* 2 Tex. Civ. App. 505, 22 S. W. 280, holding acceptance of written offer to sell land must be in writing.

—Necessity that vendor by oral contract be ready to convey.

Cited in *Scherman v. Beckett*, 88 Ind. 52, holding vendor, showing himself ready to perform may recover on note given under parol contract to convey land; *Washington Glass Co. v. Mosbaugh*, 19 Ind. App. 105, 49 N. E. 178, holding statute of frauds will not apply in action by vendor for price of lot sold under conditional verbal contract, where vendee has selected lot and taken possession; *Bufford v. Ashcroft*, 72 Tex. 104, 10 S. W. 346, holding party promising to pay certain sum for mill cannot defeat vendor's right to enforce same, after entering into possession, on ground that deed, which had been tendered, was not delivered.

Effect of parol sale of land on note given therefor.

Cited in *Busby v. Bush*, 79 Tex. 656, 15 S. W. 638, holding maker of note for land cannot plead want of consideration because sale was by parol.

Cited in note in 18 L.R.A. 142, on validity of promissory note given as forfeit or as collateral to an invalid oral agreement which is within statute of frauds.

—Necessity for court's interposing statute as defense.

Cited in *League v. Davis*, 53 Tex. 9, holding court not required to interpose defense of statute, which is not interposed or called to his attention.

30 AM. REP. 116, HOUSTON & T. C. R. CO. v. ADAMS, 49 TEX. 748.

Liability of common carrier for delivery of goods.

Cited in *Little Rock, M. R. & T. R. Co. v. Glidewell*, 39 Ark. 487, holding railroad company liable for misdelivery of goods by mistake; *Cleveland, C. C. & St. L. R. Co. v. Pots*, 33 Ind. App. 564, 71 N. E. 685, holding delivery of goods at wrong place by carrier, constitutes conversion; *Texas & P. R. Co. v. Martin*, 2 Tex. App. Civ. Cas. (Willson) 295, holding carrier cannot compel owner to take box containing only portion of goods, and those damaged; *G. C. & S. F. R. Co. v. Clark*, 2 Tex. App. Civ. Cas. (Willson) 459, holding railroad company bound to deliver goods at place where it undertook to deliver them; *Trice v. Miller*, 3 Tex. App. Civ. Cas. (Willson) 532, holding carrier bound to deliver baggage to owner in person or to one holding her transfer check; *G. C. & S. F. R. Co. v. Freeman*, 4 Tex. App. Civ. Cas. (Willson) 419, 16 S. W. 109, holding carrier not bound to accept security to indemnify itself for loss for improper delivery of freight; *Gulf, C. & S. F. R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 34 S. W. 661, holding railroad company not liable for refusal to deliver horse to owner not named as consignee; *Clegg v. Southern R. Co.* 135 N. C. 148, 65 L.R.A. 717, 47 S. E. 667 (dissenting opinion), on right of common carrier to demand bill of lading before turning over freight; *Gulf, C. & S. F. R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 23 S. W. 556, on necessity of showing conversion by carrier to maintain suit therefor.

Cited in reference notes in 35 A. R. 107, on carrier's liability for money delivered to wrong person; 4 A. S. R. 628, on carrier's duty as to delivery and liability for misdelivery.

Cited in notes in 9 A. S. R. 514, on nature and extent of carrier's liability for delivery to wrong person; 61 A. S. R. 375, on fraud, imposition or mistake as excuse for delivery of package by express company to wrong person; 17 L.R.A.

696, on time when liability of railway carrying goods ceases to be that of carrier; 37 L.R.A. 180, on imposition on carrier by impostor to whom goods are delivered.

—As distinguished from warehouseman.

Cited in *Houston & T. C. R. Co. v. Hogg*, 2 Posey Unrep. Cas. (Tex.) 544, on railroad company being liable as carrier for goods held at destination several days by agent.

Cited in note in 61 A. S. R. 379, on liability of express company as warehouseman.

When limitations begin to run in favor of carrier.

Cited in *Gulf, C. & S. F. R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 23 S. W. 556, holding statute of limitations begins to run in action against carrier for conversion from time it had notice or was chargeable therewith.

Cited in reference notes in 2 A. S. R. 238, on beginning of statute of limitations against client for money collected by attorney; 9 A. S. R. 479, on bar by limitation of action for conversion; 34 A. S. R. 556, on effect of ignorance on running of limitations.

Cited in notes in 16 E. R. C. 215, on when statute of limitations runs against cause of action for conversion; 16 E. R. C. 262, on when statute of limitations runs against cause of action for fraud.

30 AM. REP. 122, LACOSTE v. DUFFY, 49 TEX. 767.

Appeal in suit to try title to office after expiration of term of office.

Cited in *State ex rel. Case v. Lyons*, 143 Ala. 649, 39 So. 214, holding appeal from order denying writ of mandamus to compel petitioner's restoration to office, dismissed, where petitioner was legally removed pending appeal; *McWhorter v. Northcut*, 94 Tex. 86, 58 S. W. 720, holding case will be dismissed on appeal in suit to determine title to office, where term of office has expired; *McWhorter v. Northcut*, 24 Tex. Civ. App. 22, 57 S. W. 904, holding case on appeal in action of mandamus to compel reinstatement into office dismissed after expiration of term; *Watkins v. Huff*, 94 Tex. 631, 64 S. W. 682, holding court will dismiss case on appeal in action to compel school superintendent to approve teacher's contract with trustees, where term of service has expired.

Cited in note in 89 A. D. 731, on issuance of mandamus to compel calling of new election after officers have completed duties of office.

Distinguished in *Eberstadt v. State*, 20 Tex. Civ. App. 164, 49 S. W. 654, holding appeal lies from judgment removing county commissioners from office after expiration of term, where bond was given to pay costs and damages if cause of removal was insufficient.

Right to decision on appeal to determine mere right to costs.

Cited in *Byrom v. Finley*, 88 Tex. 515, 32 S. W. 524, holding appellate court will not determine status of law at filing of suit for purpose of determining matter of costs, where new law has been passed pending trial; *Davis v. San Antonio & G. S. R. Co.* 92 Tex. 642, 51 S. W. 324, holding appellate court will not entertain jurisdiction for purpose of adjusting costs, where subject matter of litigation has ceased to exist; *Bolton v. San Antonio*, 4 Tex. Civ. App. 174, 23 S. W. 279, holding court will not decide appeal where decision has become useless, to ascertain who is liable for costs; *Schiffer v. Fort*, 1 Posey Unrep. Cas. (Tex.) 198, on costs being subject to discretion of court in equity.

— After expiration of term of office.

Cited in *Robinson v. State*, 87 Tex. 562, 29 S. W. 649, holding appeal in suit to remove officer after term has expired will not be entertained to determine question of costs.

30 AM. REP. 124, WARRINER v. STATE, 3 TEX. APP. 104.

Former conviction as bar to criminal action.

Cited in *Watson v. State*, 5 Tex. App. 271, holding justice's judgment of conviction of assault without affidavit or warrant of arrest, or examination of witnesses, no bar to prosecution for aggravated assault for same offense.

Cited in note in 21 L. ed. U. S. 874, on what constitutes former jeopardy.

30 AM. REP. 126, HUNT v. STATE, 3 TEX. APP. 116.

What constitutes disturbing public worship.

Cited in *Friedlander v. State*, 7 Tex. App. 204, holding groaning, laughing and talking during service sufficient to sustain conviction for disturbing public worship.

30 AM. REP. 126, SPEIDEN v. STATE, 3 TEX. APP. 156.

Consent to or assistance in crime as defense.

Cited in *Johnson v. United States*, 85 C. C. A. 399, 14 A. & E. Ann. Cas. 153, 158 Fed. 69, holding indictment will not lie for conspiracy in effecting concealment by bankrupt of property from trustee, where trustee is one of conspirators; *Conner v. State*, 24 Tex. App. 245, 6 S. W. 138, holding hopping horse with expectation and intent that defendant would take him, will not excuse defendant from theft; *Bird v. State*, 49 Tex. Crim. Rep. 96, 122 A. S. R. 803, 90 S. W. 651, holding defendant not guilty of burglary where owner of house entered into scheme with others that defendant should go into said house; *State v. Douglass*, 44 Kan. 618, 26 Pac. 476, on person consenting to commission of public offense being guilty thereof; *State v. Waghalter*, 177 Mo. 676, 76 S. W. 1028, holding that consent of owner to taking goods, though for purpose of entrapping intending thief, prevents taking from being larceny; *Buntain v. State*, 15 Tex. App. 485, holding that act is not burglary when committed with consent of owner of property.

Cited in reference notes in 32 A. R. 599, on rule as to weight of testimony of feigned accomplice; 2 A. S. R. 843, on who is an accomplice; 24 A. S. R. 366, on burglary—setting decoys; 36 A. S. R. 302, on effect of decoying into crime; 53 A. S. R. 702, on consent to crime of larceny or burglary by owner; 77 A. S. R. 524, on effect of owner's assent to burglary.

Cited in notes in 91 A. D. 482, 483, on entry with owner's consent as burglary; 2 A. S. R. 381, on effect of consent or knowledge of owner on crime of burglary; 72 A. S. R. 705, on effect of consent to crime by persons injured thereby; 88 A. S. R. 599, on consent of owner to larceny for purpose of entrapping thief; 135 Am. St. R. 490, on consent of owner as defense to robbery; 25 L.R.A. 342, 343, on instigation or consent to crime for purpose of detecting criminal as defense to prosecution.

Distinguished in *Robinson v. State*, 34 Tex. Crim. Rep. 71, 53 A. S. R. 701, 29 S. W. 40, holding that owner's consent to taking is not given where criminal act of taking was designed and executed by defendant, though joined in by detective employed by owner; *State v. Chappell*, 179 Mo. 324, 78 S. W.

Am. Rep. Vol. XVII.—10.

585, holding solicitation by another to commit crime, no defense, where party actually perpetrates crime.

—By officer of law, generally.

Cited in *Tones v. State*, 48 Tex. Crim. Rep. 363, 122 A. S. R. 759, 1 L.R.A. (N.S.) 1024, 88 S. W. 217, 13 A. & E. Ann. Cas. 455, holding defendant guilty of robbery, although prosecutor was supplied with marked money by officer of law in anticipation of robbery.

—By detective.

Cited in *Dalton v. State*, 113 Ga. 1037, 39 S. E. 468, holding party who has formed intention and performed acts to wreck train guilty, although detective aided and encouraged commission; *Love v. People*, 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710, holding burglary not committed by one assisting detective in employ of owner in entering building and robbing safe; *State v. Waghalter*, 177 Mo. 676, 76 S. W. 1028, holding party cannot be convicted of receiving stolen goods, where goods were taken from railroad company by disguised detective in its employ; *Com. v. Seybert*, 4 Pa. Co. Ct. 152, holding party who proposed to and directed detective in reference to plundering house, may be convicted of burglary, although act of breaking was done by detective; *Roberts v. Territory*, 8 Okla. 326, 57 Pac. 840, on liability of party burglarizing saloon, where occupant hired detective to assist in act.

Distinguished in *Johnson v. State*, 3 Tex. App. 590, holding subsequent consent of merchant and co-operation of detective will not affect guilt of defendants in entering into conspiracy to rob store.

Organization of petit jury.

Followed in *Harkins v. State*, 6 Tex. App. 452, on organization of petit jury.

Especially approved in *West v. State*, 7 Tex. App. 150, holding trial court correctly required accused to pass upon jurors in panel before filling panel by summons of qualified persons, where there was no residuum from which to supply places of regular jurors challenged for cause.

Cited in *Burfey v. State*, 3 Tex. App. 519, on court erring in ordering two to be summoned as talesman to supply deficiency, where box is exhausted; *Logan v. State*, 55 Tex. Crim. Rep. 180, 115 S. W. 1192, holding that court might proceed with selection of jurors in trial for violation of local option law without full panel.

What is an expert witness.

Cited in *Heacock v. State*, 13 Tex. App. 97, holding witness who testifies that he is not experienced in comparison of handwriting, and is not expert in that respect, not qualified to testify thereto as expert; *Caldwell v. State*, 28 Tex. App. 566, 14 S. W. 122, holding that evidence of experts as to similarity of handwriting in criminal case is admissible; *Mahon v. State*, 46 Tex. Crim. Rep. 234, 79 S. W. 28, holding that genuine signature of defendant may be used as standard of comparison by introducing expert evidence thereon.

Cited in notes in 66 A. D. 241, on who are deemed experts as to genuineness of writings and the like; 63 L.R.A. 941, on competency of bank officers as expert witnesses for comparison in handwriting.

30 AM. REP. 131, FRASHER v. STATE, 3 TEX. APP. 263.

Constitutionality of miscegenation statutes.

Especially approved in *Francois v. State*, 9 Tex. App. 144, holding provision of code making it felony for white to intermarry with negro, constitutional.

Cited in *Ex parte Francois*, 3 Woods, 367, Fed. Cas. No. 5,047, holding statute prohibiting white from marrying negro under penalty, constitutional; *Pace v. State*, 60 Ala. 231, holding statute fixing punishment for adultery committed by white and negro different from that for adultery of those of same blood, constitutional; *Dodson v. State*, 61 Ark. 57, 31 S. W. 977, holding statute making marriages between white and negroes or mulattos, illegal and void, constitutional; *Oldham v. McIver*, 49 Tex. 556, holding marriage will not be presumed from cohabitation as man and wife of white man and mulatto; *Colwell's Succession*, 34 La. Ann. 265, on Federal legislation being incompetent to control as to marriage between black and white, where local law on subject exists.

Cited in reference note in 32 A. R. 549, on white man and colored wife as subject to indictment for living together as husband and wife.

Cited in notes in 79 A. S. R. 383, on validity of marriages between white persons and colored persons of African descent; 2 L.R.A.(N.S.) 535, on legislative power to forbid miscegenation; 50 A. R. 499; 27 L. ed. U. S. 836,—on constitutionality of statute making intermarriage of black and white persons felony.

Equal privileges to citizens of all states.

Cited in *Ham v. State*, 4 Tex. App. 645, on right to try prisoner for different offense than that for which he was extradited under constitution.

Construction of constitution.

Cited in *Ex parte Anderson*, 46 Tex. Crim. Rep. 372, 81 S. W. 973, on right to earlier constitutions in aid of construction of existing constitution.

Civil rights of colored citizens.

Cited in note in 1 L.R.A. 294, on civil rights of colored citizens.

30 AM. REP. 142, COLLINS v. STATE, 3 TEX. APP. 323.

Change of course of stream as change of boundary.

Cited in *State v. Muncie Pulp Co.* 119 Tenn. 47, 104 S. W. 437, holding boundary between Tennessee and Arkansas not changed by avulsion changing bed of Mississippi river; *Cooley v. Golden*, 52 Mo. App. 229, holding same as to Missouri and Nebraska and Missouri river.

Cited in note in 65 L.R.A. 969, on effect of change of channel on jurisdiction over boundary rivers.

30 AM. REP. 144, FOX v. STATE, 3 TEX. APP. 329.

Followed without special discussion in *Rutter v. State*, 4 Tex. App. 57.

Necessity of charging guilty intent to commit crime.

Cited in *United States v. Bayaud*, 21 Blatchf. 287, 16 Fed. 376, holding indictment need not charge intent to use stamp again in prosecution for removing stamps from cask of distilled spirits without destroying same.

Ignorance of facts constituting crime as defense.

Cited in *People v. Roby*, 52 Mich. 577, 50 A. R. 270, 18 N. W. 365, to the point that one may be criminally liable for adultery with woman he did not know to be married.

Cited in reference note in 35 A. R. 258, on void divorce as defense to indictment for adultery by second marriage contracted in reliance on validity of divorce.

Cited in notes in 30 A. R. 618, on ignorance of facts constituting crime as defense; 18 L.R.A.(N.S.) 528, on ignorance of defendant, in prosecution for adultery, that other party was married, as a defense.

Distinguished in *State v. Audette*, 81 Vt. 400, 130 A. S. R. 1061, 18 L.R.A. (N.S.) 527, 70 Atl. 833, holding person not guilty of adultery because of intercourse with woman whom he supposed to be his legal wife.

What constitutes adultery.

Cited in note in 18 L.R.A.(N.S.) 581, on effect of fact that but one of the parties is married on offense of "adultery" within penal statute.

30 AM. REP. 146, BURTON v. STATE, 3 TEX. APP. 408.

Sufficiency of indictment for assault.

Cited in *Peterson v. State*, 41 Fla. 285, 26 So. 709, holding indictment charging assault with pistol may be supported by evidence of manner in which it was used; *Hines v. State*, 3 Tex. App. 483, holding indictment for assault with intent to murder need not allege weapon used by accused.

Cited in reference note in 33 A. S. R. 581, on sufficiency of indictment for assault with deadly weapon.

Cited in note in 15 L.R.A.(N.S.) 1273, on pointing unloaded firearms as assault.

Burden of proving nonliability criminally.

Cited in *Myers v. Clearman*, 125 Iowa, 461, 101 N. W. 193, holding burden of proving that revolver was not loaded is on accused in prosecution for assault with intent to inflict great bodily harm; *Ake v. State*, 6 Tex. App. 398, 32 A. R. 586, holding burden of proving nonage in rape action, on accused.

30 AM. REP. 148, DEMPSEY v. STATE, 3 TEX. APP. 429.

Privilege of counsel to read law to jury.

Cited in *Lott v. State*, 18 Tex. App. 627, holding refusal to permit counsel to read to jury extracts from books on certain branches of law, error; *Smith v. State* 21 Tex. App. 277, 17 S. W. 471, holding refusal to permit counsel to read to jury certain rules of law with regard to circumstantial evidence, no error; *Guest v. State*, 24 Tex. App. 530, 7 S. W. 242, holding refusal to allow counsel to read to court and jury opinion of appellate court rendered on former appeal, no error; *Hudson v. State*, 6 Tex. App. 565, 32 A. R. 593, holding trial court may restrict reading of authority in argument to jury to so much thereof as illustrates question in dispute.

Cited in reference note in 33 A. S. R. 88, on right to read law books to jury in criminal trials.

Cited in note in 40 L.R.A. 574, on scientific books and treatises relating to law as evidence.

— Reviewability of trial court's decision as to.

Cited in *Hines v. State*, 3 Tex. App. 483; *Harrison v. State*, 8 Tex. App. 183; *Foster v. State*, 8 Tex. App. 248,—holding decision of trial court as to allowing counsel to read law to jury will not be considered on appeal.

Necessity of defendant's plea appearing in record.

Cited in *Cannon v. State*, 5 Tex. App. 34, on necessity of defendant's plea appearing on transcript to sustain judgment of conviction.

30 AM. REP. 152, EX PARTE COOPER, 3 TEX. APP. 489.**Constitutionality of licensing statute or ordinance.**

Cited in *Logan v. State*, 5 Tex. App. 306, holding legislature empowered to pass laws prescribing qualifications of practitioners of medicine; *State v. United States & C. Exp. Co.* 60 N. H. 219, holding act providing for taxation or licensing of express companies, unconstitutional.

—For taxing and regulating dogs.

Cited in *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, holding statute regulating amount to be recovered in action for value of dog according to assessed value, within police power; *Gibson v. Harrison*, 69 Ark. 385, 54 L.R.A. 268, 63 S. W. 999; *Griggs v. Macon*, 103 Ga. 602, 68 A. S. R. 134, 30 S. E. 561,—holding city ordinance for licensing dogs within police power; *VanHorn v. People*, 46 Mich. 183, 41 A. R. 159, 9 N. W. 246, holding act taxing dogs and appropriating fund to payment of damage done by dogs to sheep, within police power; *Fox v. Mohawk & H. River Humane Soc.* 165 N. Y. 517, 80 A. S. R. 767, 51 L.R.A. 681, 59 N. E. 353, holding act providing for tax dogs and destroying those without license, constitutional; *Holst v. Roe*, 39 Ohio St. 340, 48 A. R. 459, holding statute authorizing per capita tax on dogs, constitutional; *Ex parte Mabry*, 5 Tex. App. 93, holding act providing for levying and collection of tax on privilege of harboring dogs, constitutional; *Carthage v. Rhodes*, 101 Mo. 175, 9 L.R.A. 352, 14 S. W. 181; *State ex rel. Curtis v. Topeka*, 36 Kan. 76, 59 A. R. 529, 12 Pac. 310,—holding municipal ordinance regulating, restricting and taxing dogs, constitutional; *Faribault v. Wilson*, 34 Minn. 254, 25 N. W. 449, holding municipal ordinance regulating keeping of dogs, within public power; *Kidd v. Reynolds*, 20 Tex. Civ. App. 355, 50 S. W. 600, holding municipal ordinance exacting license tax from dog owners, constitutional; *McGlone v. Womack*, 129 Ky. 274, 17 L.R.A. (N.S.) 855, 111 S. W. 688, holding that tax on dogs is within police power of state.

Cited in notes in 10 L.R.A. 43, on constitutionality of taxes on dogs; 38 L.R.A. 334, on municipal power over nuisances relating to keeping of animals; 39 L.R.A. 677, on municipal power over animals running at large as nuisances; 40 L.R.A. 522, on license and tax laws as to dogs.

Dogs as property.

Cited in *Hurley v. State*, 30 Tex. App. 333, 28 A. S. R. 916, 17 S. W. 455, holding that under statutes dogs are "property" and subject of theft.

Cited in notes in 31 A. R. 517; 40 A. R. 83,—on dogs as subjects of larceny; 67 A. S. R. 290, on property in dogs and remedies for its enforcement; 67 A. S. R. 297, on larceny of dogs; 37 L.R.A. 659, on liability of railroad for killing dogs; 40 L.R.A. 504, 506, on property rights in dogs.

Denial of habeas corpus when statute constitutional.

Cited in note in 39 L.R.A. 456, on denial of writ of habeas corpus, sought on constitutional grounds, because statute or ordinance is valid.

30 AM. REP. 157, HARBERGER v. STATE, 4 TEX. APP. 26.**What constitutes theft of articles attached to realty.**

Cited in *Alvia v. State*, 42 Tex. Crim. App. 424, 60 S. W. 551, holding severance of doors and sash from house without owner's consent and appropriating same, constitutes theft.

Criminal jurisdiction over misdemeanor.

Cited in *McLean v. State*, 23 Fla. 281, 2 So. 5, holding circuit court has jurisdiction of indictment for larceny of property valued at twenty-five dollars although jury found same to be larceny of property valued at ten; *Nance v. State*, 21 Tex. App. 457, 1 S. W. 448, holding district court has jurisdiction to try indictment which charges felony that includes misdemeanor.

Cited in reference note in 4 A. S. R. 645, on definition of larceny.

Cited in notes in 57 A. D. 272, on caption and asportation as elements of larceny; 88 A. S. R. 590, on larceny of property annexed to freehold or savoring of realty.

30 AM. REP. 160, KING v. STATE, 4 TEX. APP. 54.**Mutual combat.**

Cited in *Bingham v. State*, 6 Tex. App. 169, on necessity of showing that mutual contest was waged upon equal terms without advantage sought or taken to reduce crime; *Dunlap v. State*, 9 Tex. App. 179, on law on subject of mutual combat; *Willis v. State*, 10 Tex. App. 493, on use by one party of deadly weapon in mutual combat; *Spearman v. State*, 23 Tex. App. 224, 4 S. W. 586, holding that assault with intent to murder will not be reduced to aggravated assault, under statute, in mutual combat; *Habel v. State*, 28 Tex. App. 588, 13 S. W. 1001, holding that in case of mutual combat entered into where death might ensue, rule of self-defense does not apply.

Cited in note in 45 L.R.A. 704, on reliance on selfdefense in case of mutual combat.

Effect of consent to crime.

Cited in *Hardin v. State*, 39 Tex. Crim. Rep. 426, 46 S. W. 803 (dissenting opinion), on party raping girl with her consent being guilty of assault with intent to rape.

Cited in reference note in 48 A. R. 540, on fighting by consent.

Cited in note in 15 L.R.A. 854, on consent as justification for assault.

30 AM. REP. 162, BRISCO v. STATE, 4 TEX. APP. 219.**Distinction between animals.**

Cited in *Johnson v. State*, 16 Tex. App. 402, holding that horse does not include gelding under statute as to theft.

—Effect of variance as to.

Cited in *Martinez v. Territory*, 5 Ariz. 55, 44 Pac. 1089, holding proof that stolen animal was cow fatal to indictment for stealing steer; *State v. McDonald*, 10 Mont. 21, 24 A. S. R. 25, 24 Pac. 628, holding that proof that stolen animal is horse or colt will not support indictment for stealing gelding.

Cited in reference notes in 64 A. S. R. 516, on variance between indictment for larceny and proof; 24 A. S. R. 27, on variance in trial for larceny.

30 AM. REP. 165, PLUMMER v. STATE, 4 TEX. APP. 310.**Liability for accidental injury.**

Cited in *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 A. R. 790, 19 N. W. 744, holding party upon whom injury, resulting from pure accident, has chanced to fall must bear it.

—**Accidentally killing wrong person.**

Cited in *Pinder v. State*, 27 Fla. 370, 26 A. S. R. 75, 8 So. 837, holding unintended killing of bystander, justifiable, where killing of party intended would have been justifiable; *Clark v. State*, 19 Tex. App. 495, holding charge that if accused assaulted A under circumstances which would amount to manslaughter if A was killed, and accidentally killed another, he is guilty of manslaughter, correct; *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981, holding crime for accidentally killing another, same as it would have been had accused killed intended party; *Powell v. State*, 32 Tex. Crim. Rep. 230, 22 S. W. 677, holding that if person acting in selfdefense unintentionally kill bystander, he is guilty of no offense.

Cited in reference note 26 A. S. R. 85, on accidental killing of one person while attacking another as homicide.

Cited in note in 90 A. S. R. 577, on unintentional homicide in course of assaults and combats.

30 AM. REP. 166, DAVIDSON v. STATE, 4 TEX. APP. 545.

What acts within police power of state.

Cited in *McDonald v. State*, 81 Ala. 279, 60 A. R. 158, 2 So. 829, holding act requiring examination and licensing of railroad engineers, within police regulation of state; *Logan v. State*, 5 Tex. App. 306, holding power to pass act regulating practice of medicine within police power of legislature.

—**Stopping of trains at stations.**

Cited in *Illinois C. R. Co. v. People*, 143 Ill. 434, 19 L.R.A. 119, 33 N. E. 173, holding act requiring passenger trains to stop sufficient length of time at county seats to receive and let off passengers, constitutional; *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189, on constitutionality of act requiring passenger conductors to stop train five minutes at each station.

Cited in note in 17 L.R.A.(N.S.) 823, on power to require stoppage of trains at stations.

30 AM. REP. 169, BATTLE v. STATE, 4 TEX. APP. 595.

Sufficiency of allegation of sex in indictment for sexual crime.

Cited in *Holland v. State*, 14 Tex. App. 182, holding indictment for adultery describing parties as male and female, sufficient; *Gibson v. State*, 17 Tex. App. 574, holding allegation in indictment that party raped was female, sufficient; *Waggoner v. State*, 35 Tex. Crim. Rep. 199, 32 S. W. 896, holding further allegation that person was female unnecessary in indictment for incest alleging that accused was father of such person of whom he had carnal knowledge.

30 AM. REP. 172, BOWEN v. SULLIVAN, 62 IND. 281.

Rights of finder of lost property.

Cited in *Burns v. Clark*, 133 Cal. 634, 85 A. S. R. 233, 66 Pac. 12; *Burns v. Schoenfeld*, 1 Cal. App. 121, 81 Pac. 713,—holding party finding gold on public domain while in employ of others in grading land for mill site, entitled thereto as against employer; *Williams v. State*, 165 Ind. 472, 2 L.R.A.(N.S.) 248, 75 N. E. 875, holding party taking property from finder on false claim of ownership guilty of larceny; *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. 335, 94 A. S. R. 740, 70 S. W. 878, holding finder of purse on

ground at amusement resort entitled thereto as against proprietor of resort; *Frank v. Symons*, 35 Mont. 56, 88 Pac. 561, holding party finding astray may make valid gift thereof as against everyone save true owner; *Danielson v. Roberts*, 44 Or. 108, 102 A. S. R. 627, 65 L.R.A. 526, 74 Pac. 913, holding parties unearthing money while working on another's premises entitled thereto as against said owner of premises.

Cited in reference notes in 30 A. R. 214; 35 A. R. 664; 8 A. S. R. 300,—on rights of finder of lost property; 87 A. D. 735, on right to possession of property accidentally laid down at store or house and uncalled for; 33 A. R. 526, on conversion of lost property as larceny; 6 A. S. R. 815, on what constitutes lost property; 85 A. S. R. 237, on servant's ownership of property found by him in course of his employment.

Cited in notes in 129 A. S. R. 404, 406, 409, on lost property and its finder and owner; 37 L.R.A. 118, on place of finding property as affecting rights and liabilities of finder.

—As against owner.

Cited in *Kuykendall v. Fisher*, 61 W. Va. 87, 8 L.R.A.(N.S.) 94, 56 S. E. 48, 11 A. & E. Ann. Cas. 700, holding party finding bag of money in old stove not entitle thereto as against administrator of owner who sold stove to one on whose premises it was at time of finding; *Weeks v. Hackett*, 104 Me. 264, 129 A. S. R. 390, 19 L.R.A.(N.S.) 1201, 71 Atl. 858, 15 A. & E. Ann. Cas. 1156, holding that title to property found is in finder except as against owner.

Effect of mistake as to subject or consideration of contract.

Cited in *Parrish v. Thurston*, 87 Ind. 437, holding party taking note from another made by one of two parties having same name, may rescind contract on discovering that he was mistaken as to which one it was and said other party knew it.

Cited in note in 6 E. R. C. 200, on latent ambiguity as avoiding contract.

30 AM. REP. 182, *KENT v. KENTLAND*, 62 IND. 291.

Validity of tax for education.

Cited in *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698, holding statute empowering school trustees of cities to levy tax for tuition purposes, constitutional; *Kerr v. Perry School Twp.* 162 Ind. 310, 70 N. E. 246, holding act regulating transfer of children from one school to another, and fixing price of tuition, constitutional; *Gardner v. Haney*, 86 Ind. 17, holding town bonds, sold to procure means for erecting school, not void because school is located without corporate limits.

30 AM. REP. 185, *PENNSYLVANIA CO. v. SINCLAIR*, 62 IND. 301.

Degrees of negligence.

Cited in *Lake Erie & W. R. Co. v. Ford*, 167 Ind. 205, 78 N. E. 969, on degree of care in negligence case in setting fires from locomotive.

Cited in note in 69 L.R.A. 611, on recovery on allegation of ordinary negligence on proof of wilful or gross negligence.

Contributory negligence.

Cited in *Indianapolis & M. Rapid Transit Co. v. Edwards*, 36 Ind. App. 202, 74 N. E. 533, holding charge that plaintiff may recover for negligence of defendant unless she contributed thereto "materially" by negligence on her part, correct.

Cited in reference notes in 31 A. R. 750, on defendant's ability to avoid the injury as affecting defense of contributory negligence; 36 A. R. 178, on right of plaintiff to recover notwithstanding contributory negligence when defendant is negligent after knowing plaintiff's danger; 40 A. S. R. 817, as to when contributory negligence is no bar to recovery; 54 A. S. R. 216, as to when contributory negligence does not prevent relief.

Cited in notes in 55 A. D. 667, on general principals of law of contributory negligence; 55 A. D. 669, on necessity that contributory negligence be proximate cause of injury to prevent recovery; 30 A. R. 418, on violation of Sunday law as contributory negligence; 12 L.R.A. 284, on defendant's negligence as proximate cause of injury.

— What constitutes.

Cited in *Citizens' Street R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55, holding acceptance of implied invitation to ride on street car, not contributory negligence relieving company from liability for defective track; *Krenzer v. Pittsburgh, C. C. & St. L. R. Co.* 151 Ind. 587, 68 A. S. R. 252, 52 N. E. 220, holding child knowing that if he remained on track he was liable to be run over, guilty of contributory negligence in going to sleep on track.

— As defense.

Cited in *Bruker v. Covington*, 69 Ind. 33, 35 A. R. 202, holding contributory negligence good defense to action by party who falls in open cellarway in sidewalk at night with knowledge of its existence; *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, 22 A. S. R. 902, 12 S. E. 77, on liability of railroad company for killing man lying on track who was seen by another when train passed him nearly mile from said body.

Cited in reference note in 50 A. S. R. 506, on contributory negligence as defense.

— Effect on of wilful or intentional injury.

Cited in *Central R. & Bkg. Co. v. Denson*, 84 Ga. 774, 11 S. E. 1039, holding railroad company liable for failure of engineer to sound whistle or bell until within few feet of party walking on its track; *Carter v. Louisville, N. A. & C. R. Co.* 98 Ind. 552, 49 A. R. 780, holding railroad company liable for reckless manner of employee in removing trespasser from engine; *Beem v. Chestnut*, 120 Ind. 390, 22 N. E. 303, holding wife does not have to aver freedom from contributory negligence in action against party selling husband liquor while intoxicated for damages from act of husband while in that condition; *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551, holding contributory negligence no defense to careless and wilful act of engineer in sounding whistle and blowing off steam which frightens horse; *Citizens' Street R. Co. v. Willooby*, 134 Ind. 563, 33 N. E. 627, holding railroad company liable for wilful act of conductor in forcing boy, who had boarded car for purpose of becoming passenger, off same while running fast; *Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655, 43 N. E. 882, holding railroad company liable for killing deaf mute where engineer failed to sound signal or slaken speed until within forty feet of him; *Chicago, B. & Q. R. Co. v. Flint*, 22 Ill. App. 502, on right of party to recover for injury regardless of contributory negligence, where defendant was guilty of act equivalent to intentional mischief; *Willey v. Boston & M. R. Co.* 72 Vt. 120, 47 Atl. 398, on liability of railroad company to one guilty of negligence in being on its track, where it did not do everything it could to prevent disaster.

Cited in notes in 11 L.R.A. 386; 30 A. R. 372,—on effect of contributory negligence where negligence is wilful; 55 L.R.A. 435, on contributory negligence as bar to recovery unless injury is wanton or wilful.

—Necessity of defendant's negligence being wilful to avoid defense of.

Cited in *Lary v. Cleveland*, C. C. & I. R. Co. 78 Ind. 323, 41 A. R. 572, holding party injured while intruder upon uninclosed premises by falling of portion of abandoned freight house, cannot recover therefor; *Palmer v. Chicago*, St. L. & P. R. Co. 112 Ind. 250, 14 N. E. 70, holding railroad company not liable for killing deaf mute walking on its track, where engineer failed to see another trying to signal mute; *Brannen v. Kokomo*, G. & J. Gravel Road Co. 115 Ind. 115, 7 A. S. R. 411, 17 N. E. 202, holding turnpike company not liable for act of tollgate keeper in lowering gate to prevent travelers from passing without paying toll whereby traveler is injured; *Cleveland, C. C. & St. L. R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445, holding failure of fireman to sound warning on seeing traveler in buggy on highway which train was approaching until within ninety feet thereof, will not make company liable for wilful killing of traveler; *Manlove v. Cleveland*, C. C. & St. L. R. Co. 29 Ind. App. 694, 65 N. E. 212, holding failure of engineer to give signal will not effect decedant's contributory negligence, where he was killed on portion of track used as public footway; *Darwin v. Charlotte*, C. & A. R. Co. 23 S. C. 531, 55 A. R. 32, holding failure of engineer to warn off party whom he knew was in place of danger, will not effect contributory negligence of such person; *Bolin v. Chicago*, St. P. M. & O. R. Co. 108 Wis. 333, 81 A. S. R. 911, 84 N. W. 446, holding railroad company not liable to trespasser for injury received in jumping from moving train on command of trainman; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 12 C. C. A. 618, 24 U. S. App. 489, 64 Fed. 823, on necessity of party injured while walking on track, showing that same was caused wilfully to entitle him to recover therefor.

Necessity of alleging wilful or intentional injury to recover therefor.

Cited in *Salem v. Goller*, 76 Ind. 291, holding instruction that if negligence of defendant is so gross as to imply disregard for consequences, plaintiff may recover, error, where complaint does not charge wilful injury; *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286, 48 A. R. 719, holding contributory negligence on part of plaintiff, good defense to suit for injury resulting from gross negligence, recklessness or wantonness; *Pennsylvania Co. v. Smith*, 98 Ind. 42, holding averment that injury was caused by recklessness and gross negligence of defendant, not equivalent to charge that injury was inflicted purposely or wilfully; *Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801, holding complaint charging that acts in management of train which killed party were purposely and wilfully done, charges killing through negligence; *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807, holding complaint alleging injury was caused by reckless, negligent and wilful conduct of railroad's employees, does not charge wilful injury; *Miller v. Miller*, 17 Ind. App. 605, 47 N. E. 338, holding complaint alleging that defendant "purposely, wrongfully and negligently set fire to straw," proceeds on theory of negligence; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013, holding complaint charging negligence of railroad employees, and that killing was wilful and careless, charges negligent killing; *O'Brien v. Loomis*, 43 Mo. App. 29, holding party alleging that shooting occurred through recklessness and want of discretion, cannot recover for intentional shooting.

**30 AM. REP. 197, CATLETT v. METHODIST EPISCOPAL CHURCH,
62 IND. 365.**

Validity of Sunday contract.

Cited in *Gilbert v. Vachon*, 69 Ind. 372, holding promissory note executed on Sunday by surety and delivered on week day by principal, void; *Rogers v. Western U. Teleg. Co.* 78 Ind. 169, 41 A. R. 558, holding contract for transmitting telegraphic despatch, made on Sunday, void; *Western U. Teleg. So. v. Eskridge*, 7 Ind. App. 208, 33 N. E. 238, on validity of contract to deliver message on Sunday.

Cited in reference notes in 87 A. D. 381; 95 A. D. 709,—on validity of contracts made on Sunday; 8 A. S. R. 449, on what are works of charity or necessity within Sunday laws.

—Church subscription.

Cited in notes in 32 A. R. 560, on validity of promise made on Sunday to contribute toward purchase of house of worship; 38 A. R. 166, on subscription for church expenses on Sunday as violating the Sunday law; 14 L.R.A. 194, on procuring subscriptions or making will as within Sunday law.

Distinguished in *Allen v. Duffie*, 43 Mich. 1, 38 A. R. 159, 4 N. W. 427, holding subscriptions taken in church on Sunday to pay off church debt, valid.

Disapproved in *Dale v. Knepp*, 98 Pa. 389, 42 A. R. 624, 11 W. N. C. 12, 38 Phila. Leg. Int. 430, holding agreement to subscribe for erection of church made on Sunday may be enforced.

Overruled in *Bryan v. Watson*, 127 Ind. 42, 11 L.R.A. 63, 26 N. E. 666, holding subscription made on Sunday to liquidate church debt, valid.

—Effect of subsequent ratification.

Cited in *Williamson v. Brandenburg*, 6 Ind. App. 97, 32 N. E. 1022, holding sale made on Sunday, ratified on secular day by retention of property by vendee with promise to pay therefor, valid contract.

Distinguished in *Cook v. McNaughton*, 128 Ind. 410, 24 N. E. 361, holding note executed as part of private subscription of certain sum to secure extension of railroad, valid, where maker agrees that note shall be used to make up smaller subscriptions on finding it impossible to raise first sum.

What constitutes ratification of contract.

Cited in *Parker v. Pitts*, 73 Ind. 597, 38 A. R. 155, holding surety's notifying payee in surety note made on Sunday that principal had property he might apply thereon, not ratification validating said note, where consideration was not received by surety; *Emerson v. Opp*, 9 Ind. App. 581, 34 N. E. 840, holding express promise of maker to holder to pay note with knowledge of alteration by additional signatures, constitutes ratification thereof.

Cited in note in 59 A. S. R. 644, on ratification of Sunday contracts.

Promise to pay another's debt within statute of frauds.

Cited in *Southern Indiana Loan & Sav. Inst. v. Roberts*, 42 Ind. App. 653, 86 N. E. 490, holding that contract to pay another's debt must be in writing and founded upon consideration.

Cited in note in 15 L.R.A.(N.S.) 216, on collateral promise of one person to pay where benefit inures to another as promise to answer for default of another within statute of frauds.

30 AM. REP. 199, HAUSMAN v. NYE, 62 IND. 485.

Sufficiency of delivery of goods — to satisfy statute of frauds.

Cited in *Keiwert v. Meyer*, 62 Ind. 587, 30 A. R. 206, holding delivery of goods in vendor's state for transportation to vendee's, insufficient to satisfy statute.

— **To pass title.**

Cited in *Robinson v. Pogue*, 86 Ala. 257, 5 So. 685, holding title passes to consignee at once on sale of goods forwarded by railroad consigned to purchaser.

Cited in notes in 49 A. D. 327, on necessity for delivery, receipt, and acceptance to take verbal sales of goods out of statute of frauds; 49 A. D. 329, on necessity for passing of both title and possession to validity of verbal sale of goods under statute of frauds.

Sufficiency of acceptance of goods to satisfy statute of frauds.

Cited in *Sprankle v. Trulove*, 22 Ind. App. 577, 54 N. E. 461, holding inspection of machinery upon its arrival, and assistance by vendee in setting up same, not sufficient acceptance to comply with statute.

Cited in notes in 96 A. S. R. 228, on effect of rejection of goods on statute of frauds; 22 L.R.A. 427, on effect of passing of title to property with receipt by carrier to satisfy statute of frauds; 96 A. S. R. 221, on delivery to carrier as satisfaction of statute of frauds; 21 L. ed. U. S. 308, on delivery and acceptance necessary under statute of frauds; 23 E. R. C. 229, as to whether a common carrier is an agent to accept or receive goods for the buyer within meaning of statute of frauds.

Duty of vendee to accept less quantity of goods than ordered.

Cited in *Coates v. Huffline*, 13 Ind. App. 182, 41 N. E. 465, on vendee being bound to accept less quantity of goods than that ordered.

Applicability of statute of frauds to contracts made beyond state.

Cited in note in 93 A. D. 777, on applicability of statute of frauds to contracts made beyond the state.

30 AM. REP. 203, STATE EX REL. CAVINS v. SANDERS, 62 IND. 562.

Cited without special discussion in *Cogswell v. State*, 65 Ind. 1.

Duty of guardian or trustee.

Cited in *State ex rel. Dunham v. Roche*, 91 Ind. 406, holding guardian has no claim against ward's estate for board and education of ward, unless he has no parent able or willing to provide same; *Rowley v. Fair*, 104 Ind. 189, 3 N. E. 860, on duty to township trustee to hold money in suitable way to be conveniently delivered to successor; *Cowan v. Henika*, 19 Ind. App. 40, 48 N. E. 809, on duty of trustee to invest trust fund to safely yield reasonable interest.

Cited in reference note in 3 A. S. R. 331, on guardian's liability for loss resulting from investment of ward's money.

What constitutes conversion of trust funds.

Cited in *Covey v. Neff*, 63 Ind. 391, holding commingling of ward's estate with his own, by which identity of ward's money is destroyed, conversion thereof by guardian; *Gilbert v. Welch*, 75 Ind. 557, holding administrator liable for loss of portion of trust fund resulting from depreciation in value of stock purchased in own name with legacy; *Asher v. State*, 88 Ind. 215, holding failure of guardian in making report to charge himself with money received

by him belonging to ward's estate, amounts to conversion thereof; *Hogshead v. State*, 120 Ind. 327, 22 N. E. 330, holding action lies on guardians bond for conversion, where guardian purchases land on his own account and holds mortgage thereon to secure loan of ward's money, and agrees to pay debt due to ward from vendor.

Liability of sureties on guardian's or trustee's bonds.

Cited in *Loury v. State*, 64 Ind. 421; *Williams v. State*, 89 Ind. 570,—holding sureties on guardians second bond, not liable for conversion before execution of said bond; *Howe v. White*, 162 Ind. 74, 69 N. E. 684, holding sureties on guardian's bonds, not liable for defalcations of guardian occurring before execution of bonds signed by them; *Ormes v. Brown*, 22 Ind. App. 569, 52 N. E. 1005, holding action for misappropriation of funds of estate by administrator must be brought on official bond; *Eichelberger v. Gross*, 42 Ohio St. 549, holding surety on bond of guardian liable thereon for money embezzled by guardian, although subsequently discharged on acceptance of new bond and surety.

Cited in reference notes in 30 A. R. 72, on liability of surety for investment of ward's money in guardian's business; 56 A. S. R. 542, on liability of sureties for misappropriation of funds by guardian; 80 A. S. R. 650, on liability on guardian's bond.

30 AM. REP. 206, KEIWERT v. MEYER, 62 IND. 587.

Law of place as governing contracts.

Cited in *Cochran v. Ward*, 5 Ind. App. 89, 51 A. S. R. 229, 29 N. E. 795, holding parol agreement to lease real estate which is void under laws of state where made, will not be enforced here, though such agreement is not in conflict with laws of this state; *Hausman v. Nye*, 62 Ind. 485, 30 A. R. 199, holding contract by agent of person doing business in another state, made with merchants here, controlled by our laws.

Cited in notes in 93 A. D. 778, on applicability of statute of frauds to contracts made beyond the state; 61 L.R.A. 422, on conflict of laws as to where executed contract for sale of intoxicating liquor is consummated; 64 L.R.A. 122, on conflict of laws as to statute of frauds as between law of forum and substantive law of contract.

Sufficiency of delivery and acceptance to satisfy statute of frauds.

Cited in *Goodwine v. Cadwallader*, 158 Ind. 202, 61 N. E. 939, holding averment of delivery of part of goods insufficient to satisfy statute without further allegation that same was received; *Sprankle v. Trulove*, 22 Ind. App. 577, 54 N. E. 461, holding inspection of machinery upon its arrival, and assistance by vendee in setting it up, not sufficient acceptance; *Simmons Hardware Co. v. Mullen*, 33 Minn. 195, 22 N. W. 294, holding delivery to carrier for transportation of goods sold under contract void by statute of frauds, insufficient delivery; *Tinkelpaugh-Kimmel Hardware Co. v. Minneapolis Threshing Mach. Co.* 20 Okla. 187, 95 Pac. 427, to the point that delivery by seller to carrier selected by him is not acceptance taking case out of statute of frauds.

Cited in notes in 49 A. D. 339, on sufficiency of delivery to and acceptance by agent of goods sold on verbal contract within statute of frauds; 30 A. R. 199; 96 A. S. R. 221,—on delivery to carrier as satisfaction of statute of frauds; 2 L.R.A.(N.S.) 385; 5 L.R.A.(N.S.) 631,—on effect of delivery to carrier of liquors shipped C. O. D; 22 L.R.A. 427, on effect of passing of title to property

with receipt by carrier to satisfy statute of frauds; 21 L. ed. U. S. 308, on delivery and acceptance necessary under statute of frauds; 23 E. R. C. 229, as to whether a common carrier is an agent to accept or receive goods for the buyer within meaning of statute of frauds.

Place of contract.

Cited in reference note in 33 A. R. 340, on place of contract for goods shipped subject to inspection by purchaser.

30 AM. REP. 211, CALLAHAN v. STATE, 63 IND. 198.

Seduction under promise of marriage.

Cited in *Phillips v. State*, 108 Ind. 406, 9 N. E. 345, holding prosecution must show that intercourse took place subsequent to promise of marriage and that such promise was induced to same, to convict for seduction under promise of marriage.

Cited in reference notes in 25 A. S. R. 742; 69 A. S. R. 58,—on seduction under promise of marriage.

Cited in notes in 44 A. D. 164, on what constitutes seduction; 87 A. D. 408, 409, on promise of marriage as element of crime of seduction; 76 A. S. R. 673, 675, 677, on seduction under promise of marriage as a criminal offense.

—Necessity that promise be valid.

Cited in *People v. Kehoe*, 123 Cal. 224, 69 A. S. R. 52, 55 Pac. 911, holding legality of promise of marriage made to procure carnal knowledge of woman, not requisite; *State v. Adams*, 25 Or. 172, 42 A. S. R. 790, 22 L.R.A. 840, 35 Pac. 36, on necessity of promise of marriage to induce seduction, being valid.

Cited in reference note in 84 A. D. 182, on requisites of promise of marriage within statute making seduction crime.

—Sufficiency of indictment for.

Cited in *Hinkle v. State*, 157 Ind. 237, 61 N. E. 196, holding indictment for seduction stating all of elements of crime defined in statute, sufficient; *Norton v. State*, 72 Miss. 128, 48 A. S. R. 538, 16 So. 264, holding indictment alleging that defendant obtained carnal knowledge of woman "by virtue of false promise of marriage," defective for failing to allege that promise was made to her.

Cited in reference note in 87 A. D. 411, on essentials of indictment for seduction.

30 AM. REP. 214, STARCK v. STATE, 63 IND. 285.

What constitutes larceny.

Cited in *State v. Wingo*, 89 Ind. 204, holding servant feloniously selling master's goods with which he was entrusted, not guilty of larceny; *Robinson v. State*, 113 Ind. 510, 16 N. E. 184, holding party secretly and clandestinely taking pony and saddle, guilt of larceny, although he was about returning same when arrested; *Stillwell v. State*, 155 Ind. 552, 58 N. E. 709, holding party engaging horse and buggy to drive to country for day not guilty of larceny for keeping horse several days where he wrote owner that he was compelled to stay; *State v. Stevens*, 2 Penn. (Del.) 486, 49 Atl. 174, on fraudulent conversion of pocket-book to finder's use, constituting conversion, where finder could easily ascertain owner.

Cited in reference note in 31 A. R. 143, on larceny of lost goods.

Cited in note in 57 A. D. 283, on larceny by finders of lost goods or estrays.

—Necessity of intention to steal at time of taking.

Cited in *People v. Morino*, 85 Cal. 515, 24 Pac. 892, holding instruction that jury must acquit if they believe defendant had no felonious intent to steal property at time he took same; *Pence v. State*, 110 Ind. 95, 10 N. E. 919, holding burning of another's carriage with intent to remove and maliciously destroy same, insufficient to constitute intent to steal; *Lamb v. State*, 40 Neb. 312, 58 N. W. 963, holding party taking astray into his possession with felonious intent to misappropriate same, guilty of larceny.

Cited in notes in 57 A. D. 275, on intent as element of larceny; 88 A. S. R. 603, 604, on intent as element of larceny in case of finding lost property.

30 AM. REP. 217, HARTMAN v. AVELINE, 63 IND. 344.

Necessity for prisoner's presence in demanding state at time of commission of crime.

Cited in *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456 (affirming 172 N. Y. 176, 92 A. S. R. 706, 60 L.R.A. 774, 64 N. E. 825), holding presence of prisoner in demanding state for one day eight days after alleged commission of crime, will not render him fugitive from justice on leaving state; *Re Mitchell*, 4 N. Y. Crim. Rep. 596, holding presence of accused in demanding state at time of commission of crime must be proved when extradition is demanded; *O'Malley v. Quigg*, 172 Ind. 350, 88 N. E. 611, holding that alleged fugitive from justice, held upon requisition, is entitled, under statute, to show that he was not in demanding state at time offense was committed.

Cited in notes in 28 L.R.A. 289; 47 L. ed. U. S. 657,—on necessity for extradition purposes of actual presence of accused in demanding state.

Conclusiveness of governor's warrant or finding in extradition proceeding.

Cited in *United States v. Fowkes*, 49 Fed. 50, holding court must be satisfied that there is evidence on which jury could convict to hold prisoner on habeas corpus when arrested under extradition warrant; *Re Mohr*, 73 Ala. 503, 49 A. R. 63, holding prisoner may show on habeas corpus that he is not fugitive from justice, although governor found that he is fugitive; *Singleton v. State*, 144 Ala. 104, 42 So. 23, holding recitals in warrant of governor of jurisdictional facts, prima facie sufficient to show that all necessary prerequisites have been complied with, in absence of requisition of governor of sister state on return writ; *Tullis v. Fleming*, 69 Ind. 15, holding judge before whom fugitive from another state has sued out writ of habeas corpus on being arrested upon governor's warrant, cannot pass upon sufficiency of affidavit charging crime under laws of another state; *State ex rel. Munsey v. Clough*, 71 N. H. 594, 67 C. C. A. 946, 53 Atl. 1086, holding determination by governor that person demanded upon requisition from another state is fugitive from justice, not conclusive upon court in habeas corpus proceedings; *United States v. Fowkes*, 1 Pa. Dist. R. 99, holding court will go behind indictment and discharge prisoner, unless prima facie evidence of commission of crime is produced; *Poor v. Cudikee*, 37 Wash. 609, 79 Pac. 1105, holding prisoner held under extradition warrant entitled to discharge, where it appears that he is not fugitive from justice; *Re Waterman*, 29 Nev. 288, 11 L.R.A. (N.S.) 424, 89 Pac. 291, 13 A. & E. Ann. Cas. 926, holding that on habeas corpus for discharge of alleged fugitive from justice, court may examine as to sufficiency of papers.

Cited in notes in 57 A. D. 394, on jurisdiction of courts to inquire into cause

of detention of fugitives from justice in another state; 68 A. S. R. 134, as to when refusal by one state to surrender persons demanded by authorities of another is proper; 112 A. S. R. 117, on necessity and sufficiency of authentication of requisition papers; 112 A. S. R. 121, on necessity for showing on part of state demanding extradition, that accused is fugitive; 28 L.R.A. 803, on requisition for fugitive from another state; 21 L.R.A.(N.S.) 941, on right, in reviewing extradition proceedings, to be heard upon merits of charge.

Necessity and sufficiency of assignment of error.

Cited in *Nading v. Elliott*, 137 Ind. 261, 36 N. E. 695, holding assignment of error that judgment of court is contrary to law presents no question concerning correctness of conclusions of law; *North British Mercantile Ins. Co. v. Koontz*, 17 Ind. App. 625, 47 N. E. 233, holding assignment of error that court erred in conclusions of law, necessary, to present question to appellate court as to correctness of conclusions.

Effect of exception to conclusions of law on special finding or verdict.

Cited in *Fulp v. Beaver*, 136 Ind. 319, 36 N. E. 250; *Racer v. Wingate*, 138 Ind. 114, 36 N. E. 538,—holding exceptions to conclusions of law admits that facts have been correctly found; *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343, holding exception to conclusion of law on special verdict, admits that facts have been fully and correctly found therein.

Distinguished in *Bertelson v. Bower*, 81 Ind. 512, holding party excepting to conclusions of law does not lose right to move for new trial.

30 AM. REP. 224, LAGRANGE COLLEGIATE INSTITUTE v. ANDERSON, 63 IND. 367.

Validity of infant's executory contract.

Cited in *Rice v. Boyer*, 108 Ind. 472, 58 A. R. 53, 9 N. E. 420, holding infant's contract for purchase of buggy and harness, voidable.

Cited in notes in 18 A. S. R. 608, on infant's bills and notes; 18 A. S. R. 695, on who may take advantage of infancy.

30 AM. REP. 226, HAYES v. MATTHEWS, 63 IND. 412.

What constitutes material alteration of name in instrument.

Cited in *Hodge v. Farmers' Bank* 7 Ind. App. 94, 34 N. E. 123, holding addition of word "cashier" to payee in note, material alteration releasing surety.

Cited in note in 86 A. S. R. 89, on erasure of descriptio personæ as material alteration of written instrument.

Liability of agent signing instrument in individual name followed by title of office.

Cited in *Williams v. Second Nat. Bank*, 83 Ind. 237; *McClellan v. Robe*, 93 Ind. 298,—holding parties signing note and adding "Trustees of bank" individually liable thereon; *Hunt v. Listenberger*, 14 Ind. App. 320, 42 N. E. 240, holding indorsement on back of warrant of name of specified person, "agent," followed by name of payee, presumed to be respective indorsements of both; *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 531, 60 A. S. R. 178, 47 N. E. 227, holding parties signing note as president and manager of blank Co., individually liable thereon; *Roger Williams Nat. Bank v. Groton Mfg. Co.* 16 R. I. 504, 17 Atl. 170, holding parties indorsing notes by signing individual names and adding, trustees estate of blank, personally liable; *Wilson v. Fridenberg*, 22 Fla. 114, on husband signing bond with wife who

signs as executrix of will of her first husband, deceased, being personally liable thereon; *Ray v. McGinnis*, 81 Ind. 451, on note signed by individual as guardian of another binding ward's estate.

Cited in note in 19 L.R.A. 681, on personal liability of officers on note made for corporation.

Distinguished in *Second Baptist Church v. Furber*, 109 Ind. 492, 10 N. E. 118, holding church liable on note and mortgage executed by several persons, where complaint alleges that church applied to plaintiff through such persons as trustees, and loan was made to church.

— **Effect of inserting principal's name in instrument.**

Cited in *Armstrong v. Kirkpatrick*, 79 Ind. 527, holding note given by "blank Asso. who executed by her directors" and signed by individuals "Directors of blank Asso.," is association note.

What words are descriptio personae.

Cited in *Jackson School Twp. v. Farlow*, 75 Ind. 118, holding words "licensed teacher" in contract between blank, licensed teacher and another, merely descriptio personae; *Wolke v. Kuhne*, 109 Ind. 313, 10 N. E. 116, holding words "Attorney General" added to name of payee are merely descriptive of person.

Admissibility of parol evidence to explain signature to instrument.

Cited in *Hayes v. Brukaker*, 65 Ind. 27; *Williams v. Second Nat. Bank*, 83 Ind. 237,—holding parol evidence inadmissible to show that parties who individually signed note, intended and supposed it to be note of organization of which they were trustees; *Aurora Nat. Bank v. Dils*, 18 Ind. App. 319, 48 N. E. 19, on effect of indorsement by agent to whom check was made payable.

Distinguished in *Swarts v. Cohen*, 11 Ind. App. 20, 38 N. E. 536, holding parol evience admissible to clear up ambiguity in note signed by designated company, "M. S. President."

Liability of principal on note executed by agent.

Cited in note in 21 L.R.A.(N.S.) 1054, on liability of principal on negotiable paper executed by agent.

30 AM. REP. 229, JENKINS v. JENKINS, 63 IND. 415.

Sufficiency of demand for rent.

Cited in *Taylor v. Brice*, 7 Ind. App. 551, 34 N. E. 833, holding allegation that plaintiff, just before sunset, duly demanded payment of rent, sufficient to show demand; *Ripley v. Lemcke*, 43 Ind. App. 336, 87 N. E. 237, to the point that demand of rent is necessary to work forfeiture of lease for nonpayment of rent.

Cited in note in 120 A. S. R. 48, on how, when, and on whom notice to quit must be served.

Construction of statutes as to actions against tenant.

Cited in *Dakota Hot Springs v. Young*, 9 S. D. 577, 70 N. W. 842, holding clause of re-entry unnecessary in lease to authorize action under statute providing for same on lessee's failure to pay rent three days after becoming due; *Sullivan v. O'Hara*, 1 Ind. App. 259, 27 N. E. 590, holding general judgment in favor of landlord in action against tenant for possession because of waste, does not forfeit tenant's right to crops growing on leased premises.

Am. Rep. Vol. XVII.—11.

30 AM. REP. 234, GOSHEN v. KERN, 63 IND. 468.**Who is auctioneer.**

Cited in note in 131 Am. St. Rep. 480, on who is auctioneer within ordinance requiring license.

Sufficiency of complaint for violation of ordinance.

Cited in Lippman v. South Bend, 84 Ind. 276, holding reference in complaint to section by number, with date of adoption, sufficient, in action for violation of ordinance; Beincke v. Wurgler, 77 Ind. 468, holding that complaint in justice's court is sufficient if it inform defendant of nature of action and be so explicit that judgment thereon will bar another suit.

Power to license.

Cited in Carbondale v. Vail, 2 Del. Co. Rep. 387, holding that authority to make laws necessary for government of city, does not authorize license-tax on skating rinks.

Cited in reference note in 34 A. D. 638, on licensing and regulation of trade, occupations, employments, and amusements by the municipalities.

Cited in note in 129 Am. St. Rep. 280, on constitutional limitations on power to impose license or occupation taxes.

30 AM. REP. 238, FRY v. STATE, 63 IND. 552.

Followed without discussion in Steadman v. State, 64 Ind. 597.

Construction of statutes.

Cited in State ex rel. Hamilton v. Forkner, 70 Ind. 241, on construction of statute requiring liquor license fees to be paid into school fund of county.

Constitutionality of statutes.

Cited in McComas v. Krug, 81 Ind. 327, 42 A. R. 135, holding act providing for removal from office of public officer, voluntarily intoxicated during office hours, constitutional.

—Regulating and prohibitory statutes, generally.

Cited in Johns v. State, 78 Ind. 332, 41 A. R. 577, holding act declaring it misdemeanor to engage in common labor on Sunday, constitutional; Campbell v. Diggins, 83 Ind. 473, holding act providing for repairs of ditches or drains by township trustees, unconstitutional; Warren v. Britton, 84 Ind. 14, holding provision relating to fees of county treasurer for collecting delinquent taxes, constitutional; Hockett v. State, 105 Ind. 250, 55 A. R. 201, 5 N. E. 178, holding act limiting rental price of telephones, and amount to be collected for conversations between cities and villages, constitutional; Wilkins v. State, 113 Ind. 514, 16 N. E. 102, holding act prescribing qualifications required to be dentist, constitutional; State v. Lewis, 134 Ind. 250, 20 L.R.A. 52, 33 N. E. 1024, holding act making it misdemeanor for person to have gill net or seine in his possession, constitutional; State ex rel. Smith v. McClelland, 138 Ind. 395, 37 N. E. 799, holding act providing for return to county treasurer of unexpended balance of school revenue in hands of school corporation under penalty, constitutional; Levy v. State, 161 Ind. 251, 68 N. E. 172, holding act prohibiting transaction of business by transient merchant without license, constitutional; Baker v. State, 54 Wis. 368, 12 N. W. 12, holding statute providing for punishment of banker or broker receiving money on deposit or for safe keeping with knowledge of his insolvency, constitutional; State ex rel. Duensing v. Roby, 142 Ind. 168, 51 A. S. R. 174, 33 L.R.A. 213, 41 N. E. 145, holding statute

prohibiting horse races during winter, and regulating frequency and extension of meets during other months, legitimate exercise of police power.

—Regulating sale of imitation butter.

Cited in *Powell v. Com.* 114 Pa. 265, 60 A. R. 350, 7 Atl. 913, 19 W. N. C. 24, holding act prohibiting manufacture and sale of oleomargarin, constitutional as within police power of state.

Cited in *Com. v. Powell*, 1 Pa. Co. Ct. 94, holding act prohibiting manufacture and sale of oleaginous substances not produced from pure milk or cream, constitutional.

—Regulating sale of liquors.

Cited in *Hedderich v. State*, 101 Ind. 564, 51 A. R. 768, holding act prohibiting sale of intoxicating liquor between hours of eleven p. m. and five a. m., constitutional.

—Regulating sale of transportation tickets.

Cited in *Burdick v. People*, 149 Ill. 600, 41 A. S. R. 329, 24 L.R.A. 152, 36 N. E. 948; *State v. Corbett*, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *State v. Thompson*, 47 Or. 492, 47 L.R.A.(N.S.) 480, 84 Pac. 476, 8 A. & E. Ann. Cas. 646; *Jannin v. State*, 42 Tex. Crim. Rep. 631, 96 A. S. R. 821, 53 L.R.A. 349, 51 S. W. 1126,—holding act making it penal offense for any other person than transportation company's agent to sell passenger tickets, constitutional; *Allardt v. People*, 197 Ill. 501, 64 N. E. 533, holding act against selling passes, unconstitutional; *Com. v. Keary*, 14 Pa. Super. Ct. 583, holding act to prevent fraud on travelers by ticket scalpers, constitutional; *Samuelson v. State*, 116 Tenn. 470, 115 A. S. R. 805, 95 S. W. 1012, holding act making traffic in nontransferrable signature tickets, misdemeanor, constitutional; *Re O'Neill*, 41 Wash. 174, 3 L.R.A.(N.S.) 558, 83 Pac. 104, 6 A. & E. Ann. Cas. 869, holding statute providing that none but duly authorized agents of railroad company shall be permitted to sell transportation, valid exercise of police power; *People v. Pease*, 3 Ill. C. C. 65, holding statute prohibiting sale of railroad tickets by brokers unconstitutional.

Cited in notes in 78 A. S. R. 266, on power of legislature to make ticket brokerage or "scalping" criminal; 96 A. S. R. 829, on power of state to control sale and use of passenger tickets as exercise of police power; 96 A. S. R. 830, 831, on control by state of sale and use of passenger tickets as interference with interstate commerce; 96 A. S. R. 832, on state control over sale and use of passenger tickets as violation of constitutional provisions as to due process and equal protection of law; 96 A. S. R. 833, on state control over sale and use of passenger tickets as class legislation; 24 L.R.A. 152, on statutes against ticket brokerage or "scalping;" 3 L.R.A.(N.S.) 558, on constitutionality of anti-scalping legislation.

—Regulating sale of patent rights.

Cited in *Castle v. Hutchinson*, 25 Fed. 394, holding act requiring party taking obligation for patent right, to insert in body thereof "given for patent right," unconstitutional; *Toledo Agri. Works v. Work*, 70 Ind. 253; *Brechbill v. Randall*, 102 Ind. 528, 52 A. R. 695, 1 N. E. 362; *New v. Walker*, 108 Ind. 345, 58 A. R. 40, 9 N. E. 386; *Hankey v. Downey*, 116 Ind. 118, 1 L.R.A. 447, 18 N. E. 271; *Pape v. Wright*, 116 Ind. 502, 19 N. E. 459,—holding statute regulating sale of patented rights, valid.

Cited in notes in 29 L.R.A. 788, on power of state to regulate sales of patent

rights; 29 L.R.A. 791, on power of state to restrict and regulate sales of patented articles.

30 AM. REP. 250, GILCHRIST v. GOUGH, 63 IND. 576.

Validity of instrument given to secure pre-existing debt.

Cited in *McLaughlin v. Ward*, 77 Ind. 383, holding mortgage given to secure valid subsisting debt, intended to replace another security, valid; *Louthain v. Miller*, 85 Ind. 161, holding chattel mortgage to secure pre-existing debt, valid as against one not holding prior equity; *Davis v. Newcomb*, 72 Ind. 413, on mortgagee taking mortgage to secure pre-existing debt, being bona fide purchaser; *Second Nat. Bank v. Brady*, 96 Ind. 498, on necessity of surrounding evidences of indebtedness in taking notes to render bank bona fide holder.

Cited in reference notes in 29 A. S. R. 483, on validity of chattel mortgage to secure pre-existing debt; 87 A. S. R. 244, on pre-existing debt as consideration for mortgage.

Cited in notes in 33 L.R.A. 307, on pre-existing debt as consideration for mortgage as against prior claims; 33 L.R.A. 310, on pre-existing debt as consideration for mortgage as against other creditors or equities where there was an extension of time or new consideration; 27 L.R.A.(N.S.) 622, on discharge of antecedent debt as consideration entitling bona fide purchaser or encumbrancer to protection of recording acts.

—As between parties thereto.

Cited in *Evans v. Pence*, 78 Ind. 439, holding mortgage given to secure payment of existing indebtedness, valid as between mortgagor's heirs and mortgagee.

—As between mortgagee or vendee and mortgagor or vendor.

Cited in *Wert v. Naylor*, 93 Ind. 431, holding party taking conveyance of land in payment of existing debt, without notice of vendor's lien, bona fide purchaser; *Harrison v. Wright*, 100 Ind. 512, 50 A. R. 805, holding wife as grantee of land from husband for precedent debt, not bona fide purchaser as against husband's unpaid grantor; *Adam, M. & A. Co. v. Stewart*, 157 Ind. 678, 87 A. S. R. 240, 61 N. E. 1002, holding mortgage executed by fraudulent vendee to secure antecedent creditors, valid, where creditors extended time of payment by new notes; *Steffian v. Milmo Nat. Bank*, 69 Tex. 513, 6 S. W. 823, holding creditor of vendee taking mortgage on property to secure debt, not bona fide purchaser as against vendor, where property was not fully paid for; *Belleville Pump & Skein Works v. Samuelson*, 16 Utah, 234, 52 Pac. 282, holding rights of mortgagee of property from fraudulent vendee inferior to those of fraudulent vendor, where mortgage was given as security for antecedent debt.

—As between mortgagee or vendee and others.

Cited in *Fargason v. Edrington*, 49 Ark. 207, 4 S. W. 763, holding creditor taking deed of trust and note to cover pre-existing debt and advances, is bona fide purchaser; *Boling v. Howell*, 93 Ind. 329, holding assignee of purchase money notes entitled to vendor's lien against party purchasing at sheriff's sale under execution by creditors of vendor, although consideration was pre-existing debt against vendor; *Farmers' Bank v. Butterfield*, 100 Ind. 229, holding extension of time granted by bank in consideration of execution of mortgage makes bank purchaser for value; *Morgan v. Worden*, 145 Ind. 600, 32 N. E. 783, holding mortgage executed to secure existing debt, valid as to other creditors; *Adams v. Vanderbeck*, 148 Ind. 92, 62 A. S. R. 497, 45 N. E. 645, holding mortgage taken

to secure precedent debt does not constitute mortgagee bona fide purchaser; *Farmers' & M. Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439, holding bank taking new notes and mortgage in place of old notes, bona fide purchaser as to mortgaged premises; *Durham v. Craig*, 79 Ind. 117, on mortgagee of mortgage given to secure pre-existing debt, being purchaser for value; *First Nat. Bank v. Farmers' & M. Nat. Bank*, 171 Ind. 323, 86 N. E. 417, holding that advancement of new consideration upon receiving mortgage in part as security for overdue paper makes mortgagee bona fide encumbrancer.

Cited in reference note in 62 A. S. R. 503, on holder of mortgage for precedent debt as a purchaser for value.

Extension of time of payment as consideration for contract.

Cited in *Frank Sav. Bank v. Taylor*, 4 C. C. A. 55, 9 U. S. App. 406, 53 Fed. 854, holding creditor releasing security extending payment and taking new mortgage mortgagee for value; *Walter A. Wood Mowing & Reaping Mach. Co. v. Lee*, 9 S. D. 69, 68 N. W. 170, holding surrender of note payable on demand in exchange for time note, sufficient consideration for mortgage; *Wester v. Hulman*, 65 Ind. 100, holding agreement to extend time of payment on note sufficient consideration to sustain contract to pay note of another; *Mayer v. Grottendick*, 68 Ind. 1, holding renewal of subsisting note constitutes sufficient consideration for mortgage.

Mortgage as a conveyance.

Cited in *Herff v. Griggs*, 121 Ind. 471, 23 N. E. 279, holding mortgagees for valuable consideration occupy position of bona fide purchasers; *United States Sav. Fund & Invest. Co. v. Harris*, 142 Ind. 226, 40 N. E. 1072, holding term "conveyance of real estate" used in statute, comprehends mortgages.

Conclusiveness of record of instrument.

Cited in *Leedy v. Nash*, 67 Ind. 311, holding party suing on note and foreclosing mortgage, entitled to reformation of note to show agreed rate of interest as expressed in recorded mortgage; *Lowry v. Smith*, 97 Ind. 466, holding vendor of land, sold subject to mortgage for certain sum, can enforce vendor's lien against subsequent grantee for sum mentioned in record of deed as sum assumed; *Osborn v. Hocker*, 160 Ind. 1, 66 N. E. 42; *Osborn v. Hall*, 160 Ind. 153, 66 N. E. 457,—holding mortgage lien on land for amount named in record as against vendee subject to mortgage; *Interstate Bldg. & L. Asso. v. McCartha*, 43 S. C. 72, 20 S. E. 807, holding record of mortgage setting forth portion of bond and referring to it as "part thereof," not notice of provision in bond as to attorney's fees; *George v. Butler*, 26 Wash. 456, 90 A. S. R. 756, 57 L.R.A. 396, 67 Pac. 263, holding mortgagee entitled to rate of interest specified in mortgage as recorded as against subsequent grantee.

Cited in reference notes in 52 A. R. 475, on index as essential to registration of deed; 9 A. S. R. 503, on object of recording deeds and instruments.

Cited in note in 12 L.R.A. 386, as to when instrument is deemed to be recorded under recording acts; 14 L.R.A. 396, on sufficiency of index of record.

Distinguished in *Hollenbeck v. Woodford*, 13 Ind. App. 113, 41 N. E. 348, holding record of chattel mortgage reciting that it is given to secure payment of promissory notes, notice to put persons upon inquiry as to amount.

Effect of record of instrument.

Cited in *Johnson v. Hess*, 126 Ind. 298, 9 L.R.A. 471, 25 N. E. 445, holding record of judgment against William Blank, not constructive notice to bona fide purchaser that judgment is against H. W. Blank; *Northwestern Loan & In-*

vest. *Asso. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130, holding failure of recorder to record lien in proper record will not defeat priority thereof as against holder of intervening mortgage, where notice of lien is filed.

Cited in reference note in 83 A. D. 436, on effect of entries in recorder's entry book.

Cited in notes in 91 A. D. 108, on effect of defects in registration of conveyances; 96 A. S. R. 398, on effect on rights of third persons of defective record of legal instruments; 27 L. ed. U. S. 643, on record of deed and its necessity and effect.

As notice of contents.

Cited in *Smith v. Lowry*, 118 Ind. 37, 15 N. E. 17, holding purchaser of mortgaged real estate at public sale, charged with constructive notice of facts shown by record of deed; *Brower v. Witmeyer*, 121 Ind. 83, 22 N. E. 975, holding purchase-money mortgage superior to one recorded before but assigned after its record, in hands of assignee; *Burns v. Harris*, 66 Ind. 536, on record of mortgage being notice of existence of mortgage and of contents of record.

Cited in reference note in 38 A. R. 235, on constructive notice of record in entry book which clerk is required to keep.

Cited in note in 58 A. D. 528, on record of deed being only notice of what appears on its face.

Duty and liability of recorder.

Cited in *State ex rel. Lowry v. Davis*, 96 Ind. 539, holding recorder recording deed showing assumption of mortgage for less sum than stated in deed, liable therefor; *Reeder v. State*, 98 Ind. 114, on duty of recorder; *Mechanics' Bldg. Asso. v. Whitacre*, 92 Ind. 547, holding that entry made by recorder of mortgages does not make him liable to person misled thereby if entry was not required to be made.

30 AM. REP. 260, MIX v. ANDES INS. CO. 74 N. Y. 53.

Removal of causes.

Cited in *Deford v. Mehaffy*, 13 Fed. 481, on removal of cause from state to Federal court.

Cited in note in 11 L.R.A. 568, on right of corporation to remove cause for diverse citizenship.

—Duty of state court as to.

Cited in *Dunn v. Burlington, C. R. & N. R. Co.* 35 Minn. 73, 27 N. W. 448 (dissenting opinion), on duty of state court to remove cause to Federal court on filing of petition and bond in due form; *Johnson v. Brewers' F. Ins. Co.* 51 Wis. 570, 9 N. W. 657 (dissenting opinion), on effect of erroneous denial by state court of motion to remove cause to Federal court.

—Duty of state court to receive removal bond.

Cited in *Grow v. Winan*, 3 N. Y. S. R. 281, holding state court cannot arbitrarily refuse to receive bond to remove cause on technical objection without giving opportunity to correct error.

—Presumption as to sufficiency of removal bond.

Cited in *Stix v. Keith*, 90 Ala. 121, 7 So. 423, holding appellate court will presume that bond for removal is sufficient, where no objection appears to have been taken thereto.

Cited in note in 5 L.R.A. 476, on form of bonds for removal of cause.

Affidavit by, or examination of corporate officer.

Cited in *Parkhurst v. Citizen's Nat. Bank*, 61 Md. 254, holding cashier of bank proper officer to make affidavit stating amount due bank.

Distinguished in *People v. Mutual Gaslight Co.* 74 N. Y. 434, holding director of corporation defendant cannot be compelled to submit to examination before trial by adverse party.

Objections to sufficiency of moving papers.

Cited in *Societe Anonyme Glaces Nationales Belges v. Kahn*, 126 App. Div. 834, 110 N. Y. Supp. 980, holding that order granting inspection of books should recite preliminary objections as to sufficiency of moving papers.

30 AM. REP. 264, WILKINSON v. GILL, 74 N. Y. 63.

What constitutes lottery or gambling.

Cited in *People v. Noelke*, 94 N. Y. 137, 46 A. R. 123, 1 N. Y. Crim. Rep. 495, (affirming 29 Hun, 461, 1 N. Y. Crim. Rep. 252), on word "lottery" having no technical meaning and being hazard in which sums are ventured for chance of obtaining greater value; *Yellow-Stone Kit v. State*, 88 Ala. 196, 16 A. S. R. 38, 7 L.R.A. 599, 7 So. 338, holding public distribution of prizes to holders of largest number of tickets given away at show, not lottery; *State v. Stripling*, 113 Ala. 120, 36 L.R.A. 81, 21 So. 409, holding selling of ticket by which purchaser might win or lose money upon horse race, gambling; *Cross v. People*, 18 Colo. 321, 36 A. S. R. 292, 32 Pac. 821, holding advertising scheme whereby numbered tickets are given away to customers and others for nothing, winner of prize to be decided by holders, not lottery; *Chancy Park Land Co. v. Hart*, 104 Iowa, 592, 73 N. W. 1059, holding subscribing for certain lots to be apportioned by lot among subscribers, not lottery; *Almy v. McKinney*, 5 N. Y. S. R. 267; *State ex rel. Kellogg v. Kansas Mercantile Asso.* 45 Kan. 351, 23 A. S. R. 727, 11 L.R.A. 430, 25 Pac. 984,—holding game called "playing policy" whereby tickets are sold entitling holder to nothing or something of trifling value, and to choose number, which entitles person to money prize if drawn in game, lottery; *Com. v. Wright*, 137 Mass. 250, 50 A. R. 306, holding game wherein certain sum is paid for number, and if number is on hidden slip, chooser receives multiple of sum paid, or nothing if not, lottery; *People v. Elliott*, 74 Mich. 264, 16 A. S. R. 640, 3 L.R.A. 403, 41 N. W. 916, holding game called "policy" whereby numbers are selected for certain sum winner to receive greater sum and losers nothing, lottery; *Irving v. Britton*, 8 Misc. 201, 28 N. Y. Supp. 529, holding pool or book-making on horse race, is lottery; *People ex rel. Ellison v. Lavin*, 93 App. Div. 292, 87 N. Y. Supp. 776, holding advertising scheme whereby money and cigars are distributed among those guessing nearest to number of cigars on which certain revenue is paid, holder of certain number of cigar bands being entitled to vote, not lottery; *Quatsoe v. Eggleston*, 42 Or. 315, 71 Pac. 66, holding contract between advertiser and merchant by which latter is furnished with number of tickets to distribute to customers to vote for persons, and one receiving largest vote to get piano, not lottery; *Reilly v. United States*, 46 C. C. A. 25, 106 Fed. 896, on game called policy whereby tickets are sold on chance of winning prize, being lottery; *State ex rel. Lederer v. Inter-National Invest. Co.* 88 Wis. 512, 43 A. S. R. 920, 60 N. W. 796, on corporation whose object is to obtain money from its members being within statutes against lotteries,

Cited in reference notes in 28 A. R. 441, on "gift enterprises" as lotteries; 39 A. R. 532, on distribution of prizes by lot as lottery.

Cited in notes in 34 A. R. 22; 16 A. S. R. 46,—on what is lottery; 7 L.R.A. 599, on definition of "lottery;" 10 L.R.A. 60, on lotteries and lottery tickets; 12 L.R.A. 89, on lotteries and gift enterprises.

Nature of action to recover twice sum paid for lottery chance.

Cited in *Staub v. Henry*, 18 Misc. 99, 41 N. Y. Supp. 831, holding action to recover twice sum paid for share in lottery, one for a penalty.

Cited in note in 7 L.R.A. 603, on action for recovery back of money paid into lottery and for penalty.

Secondary evidence of document.

Cited in *Daniels v. Smith*, 5 Silv. Sup. Ct. 117, 8 N. Y. Supp. 128, holding that court may receive proof of contents of order given twelve years before without proof of loss.

30 AM. REP. 268, PARKINSON v. SHERMAN, 74 N. Y. 88.

Assumption clause in deed as binding grantee.

Cited in *Central Nat. Bank v. Hazard*, 30 Fed. 484, holding vendee of property taken from referee subject to payment of interest and principal on certificates, cannot assert that certificates are not lien for whole amount due; *Re Standard Laundry Co.* 53 C. C. A. 644, 116 Fed. 476, holding trustee of purchaser of land taken subject to mortgage, estopped from questioning validity of mortgage; *Scanlan v. Grimmer*, 71 Minn. 351, 70 A. S. R. 326, 74 N. W. 146, holding vendee assuming payment of mortgage, estopped from asserting that obligation secured thereby is usurious; *American Nat. Bank v. Klock*, 58 Mo. App. 335, holding vendee liable as vendor on clause in deed assuming payment of purchase money notes; *Cottle v. Erie County*, 57 App. Div. 443, 67 N. Y. Supp. 996, holding purchaser under judgment directing sale of real property subject to all taxes and assessments, cannot dispute their validity; *Styles v. Price*, 64 How. Pr. 227, holding vendee accepting deed subject to all liens and encumbrances of record, cannot contest validity of recorded mortgage; *Gifford v. Father Matthew T. A. B. Soc. No. 1*, 104 N. Y. 139, 10 N. E. 39, holding purchaser of land assuming mortgage thereon, cannot while in possession defend foreclosure on ground that deed is invalid; *McConihe v. Fales*, 107 N. Y. 404, 14 N. E. 285, holding purchaser in possession of mortgaged premises cannot resist foreclosure on ground of defeat in title, in absence of fraud; *Old Colony Trust Co. v. Allentown & B. Rapid Transit Co.* 192 Pa. 596, 44 Atl. 319, holding railway company purchasing franchises, properties, etc. of another railway company assuming mortgage thereon, cannot deny liability on mortgage on ground of want of consideration; *Urquhart v. Brayton*, 12 R. I. 169, holding assumpsit lies against purchaser of mortgaged premises who assumes mortgages for amount of third mortgage after property is sold under first; *Kellogg v. Dennis*, 38 Misc. 82, 77 N. Y. Supp. 172, on recitals in deed estopping grantee to deny same; *Curry v. Lafon*, 133 Mo. App. 163, 113 S. W. 246; *Gifford v. McCloskey*, 38 Hun, 350,—holding that where grantee's possession under deed is undisturbed he cannot resist enforcement of covenant to assume mortgage debt; *H. Remington & Son Pulp & Paper Co. v. Caswell*, 126 App. Div. 142, 110 N. Y. Supp. 556, to the point that grantee cannot impeach validity of mortgage, payment of which he assumed.

Cited in reference note in 65 A. S. R. 40, on assumption of mortgage by purchaser.

Cited in notes in 47 A. R. 475, on effect of grantee's acceptance of deed con-

ditioned to be subject to mortgage; 27 L. ed. U. S. 679, on effect of assumption of mortgage by purchaser of premises.

Eviction as prerequisite to right to set up defense of failure of title.

Cited in *Soule v. Dixon*, 17 N. Y. S. R. 360, 1 N. Y. Supp. 697, holding purchaser from assignee in bankruptcy on promise of release of judgment by judgment creditor, cannot set up breach of such promise in foreclosure action for purchase price while in undisturbed possession; *Shire v. Plimpton*, 50 App. Div. 117, 63 N. Y. Supp. 568, holding vendee remaining in undisturbed possession of premises cannot defend foreclosure of purchase money mortgage on ground of defect in title; *Mason v. Lenderoth*, 88 App. Div. 38, 84 N. Y. Supp. 740, holding tenant of mortgaged premises defending action for rent by counterclaim of breach of covenant of quiet enjoyment must show eviction, where mortgage has been foreclosed against premises; *Kirtz v. Peck*, 113 N. Y. 222, 21 N. E. 130, holding purchaser of land remaining in possession has no defense to action for purchase-price; *Seidman v. Geib*, 16 Daly, 434, 11 N. Y. Supp. 705, 19 N. Y. Civ. Proc. Rep. 359, holding vendee in possession cannot defend action to foreclose purchase money mortgage on ground of outstanding title, where defendant has not been evicted; *Hyslip v. French*, 52 Wis. 513, 9 N. W. 605, holding vendee in possession cannot sue to recover money paid therefor because heir refused to convey, where land was purchased from administrator of estate which has not been settled; *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764, holding grantee can only recover nominal damages in action for breach of seisin, without showing eviction; *Young v. Guy*, 23 Hun, 1 (dissenting opinion), on necessity of vendee defending suit for purchase-price on ground of outstanding mortgage, showing eviction.

Cited in notes in 5 L.R.A. 47, on relief in equity under covenants, in absence of eviction by paramount title; 12 L.R.A. 243; 21 L.R.A.(N.S.) 379,—on right of grantee in possession to question right of grantor to collect purchase money.

Estoppel by recitals in deed.

Cited in notes in 10 L.R.A. 459; 78 A. D. 87,—on estoppel of grantee to contest validity of mortgage; 11 E. R. C. 72, on estoppel by recitals in deed.

30 AM. REP. 271, CURTIS v. DELAWARE, L. & W. R. CO. 74 N. Y. 116.

Law governing contracts.

Cited in *Wilson v. Lewiston Mill Co.* 150 N. Y. 314, 55 A. S. R. 680, 44 N. E. 959, holding validity of contract of sale negotiated by broker in foreign state, where goods are to be delivered, determined by law of that state; *Thomas v. Western U. Teleg. Co.* 25 Tex. Civ. App. 398, 61 S. W. 501, denying right to damages for mental suffering from nondelivery of telegram, when not allowed by laws of state where entire transaction occurred; *Interstate S. B. Co. v. First Nat. Bank*, 87 Hun, 93, 33 N. Y. Supp. 966, holding title to articles held for manufacture determined by law of place where contract to be performed; *Southern Exp. Co. v. Gibbs*, 155 Ala. 303, 130 A. S. R. 24, 18 L.R.A.(N.S.) 874, 46 So. 465, holding that contract made in another state to carry goods here, is, so far as delivery is concerned, to be performed here, and is governed by law of this state.

Distinguished in *Valk v. Erie R. Co.* 130 App. Div. 446, 114 N. Y. Supp. 964, holding that entire contract for shipment of goods from another state to this state made in such other state is governed by law of other state.

—As to carrier's liability, generally.

Cited in *Williams v. Central R. Co.* 93 App. Div. 582, 88 N. Y. Supp. 434, holding railroad's liability for loss of baggage at receiving station, governed by laws of foreign state where same is to be delivered.

Cited in notes in 99 A. S. R. 387, on conflict of laws as to liability of carrier for baggage; 63 L.R.A. 516, on conflict of laws as to presumed intention of parties to carrier's contract when transportation is within two or more states or countries; 18 L.R.A.(N.S.) 882, on conflict of laws as to carrier's contracts; 5 E. R. C. 890, on what law governs contract of affreightment.

Distinguished in *Faulkner v. Hart*, 82 N. Y. 413, 37 A. R. 574, holding railroad liable as carrier at place of contract, for loss of freight after deposit in warehouse in foreign state.

—Contracts limiting carrier's liability.

Cited in *Southern Exp. Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944, holding that stipulations limiting carrier's liability, in contract for shipment of goods from another state will be enforced here.

Cited in note in 63 L.R.A. 529, on conflict of laws as to contract limiting amount of carrier's liability.

Distinguished in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana)* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *The Brantford City*, 29 Fed. 373,—holding stipulation exempting carrier from liability for negligence, contrary to law of place where made, invalid, though valid at place of delivery.

Liability of carrier for loss of baggage, etc.

Cited in *Pullman Palace Car Co. v. Gavin*, 93 Tenn. 53, 42 A. S. R. 902, 21 L.R.A. 298, 23 S. W. 70, holding that passenger who is custodian of money for another's trip expenses may recover of sleeping-car company for theft of same by porter; *Trimble v. New York C. & H. R. Co.* 39 App. Div. 403, 57 N. Y. Supp. 437, holding railroad company liable as bailee for hire for non-delivery upon demand, of sample trunk on which excess charge was paid; *Simpson v. New York, N. H. & H. R. Co.* 16 Misc. 613, 38 N. Y. Supp. 743, sustaining railroad company's liability for passenger's baggage, upon failure to deliver same upon demand; *Golden v. Romer*, 20 Hun. 438, holding complaint sufficient to charge defendant as common carrier or warehouseman, where demand, and refusal to deliver, property received for transportation is alleged; *Battle v. Columbia, N. & L. R. Co.* 70 S. C. 329, 49 S. E. 849, holding carrier accepting baggage delivered to it by one intending to become passenger, liable therefor.

Distinguished in *Wheeler v. Oceanic Steam Nav. Co.* 52 Hun. 75, 5 N. Y. Supp. 101, holding steamship company not chargeable as warehouseman, under complaint alleging liability as common carrier for loss of baggage.

—Effect of baggage going on different train than owner.

Cited in *Moffat v. Long Island R. Co.* 123 App. Div. 719, 107 N. Y. Supp. 1113, holding railroad company's liability for loss of baggage not affected by fact that it did not go by same train as owner.

Cited in notes in 36 L.R.A. 787, on liability of common carrier as warehouseman for baggage after reaching destination; 55 L.R.A. 653, on liability of carrier for baggage not accompanied by passenger.

Husband's title to wife's paraphernalia.

Cited in *Mains v. Webber*, 131 Mich. 213, 91 N. W. 172, sustaining husband's ownership as against wife's administrator, of diamonds purchased by him for

her use, where gift not proven; *Smith v. Abair*, 87 Mich. 62, 49 N. W. 509, sustaining husband's right to maintain replevin for wife's wearing apparel, purchased with his money, when seized for tax against her separate property; *Hay v. Lehigh Valley R. Co.* 17 Pa. Dist. R. 942, 11 North. Co. Rep. 201, holding that husband could recover for wife's baggage lost together with his own while husband and wife were traveling together.

Cited in reference note in 32 A. R. 510, on apparel given wife by husband as part of her separate estate.

Cited in notes in 1 L.R.A.(N.S.) 354; 99 A. S. R. 389, 390,—on suit by husband for loss of or injury to wife's or child's baggage.

Distinguished in *Whiton v. Snyder*, 88 N. Y. 299, sustaining title of wife's administrator to paraphernalia used by her though purchased by husband, unless gift is disproved.

30 AM. REP. 277, BALDWIN v. LIVERPOOL & G. W. S. S. CO. 74 N. Y. 125.

Right to recover back money paid.

Cited in *Loneragan v. Buford*, 148 U. S. 581, 37 L. ed. 569, 13 Sup. Ct. Rep. 684 (Affirming 6 Utah, 301; 22 Pac. 164), holding payment of full contract price by vendee to obtain steers part of which he did not receive, not voluntary; *Kilpatrick v. Germania L. Ins. Co.* 183 N. Y. 163, 111 A. S. R. 722, 2 L.R.A. (N.S.) 574, 75 N. E. 1124, holding bonus paid in order to obtain discharge of mortgage may be recovered back as involuntary; *Gates v. Dundon*, 42 N. Y. S. R. 660, 18 N. Y. Supp. 149, holding money paid under threat of filing lien in excess of amount creditor was entitled to may be recovered; *Secor v. Clark*, 22 Jones & S. 494, holding parties assigning interest in certain sum of money to holder thereof on receipt of less sum under threat of protracted litigation, entitled to recover full amount; *Clancy v. Dutton*, 129 App. Div. 23, 113 N. Y. Supp. 124, holding that money paid because of refusal of captain of vessel to deliver goods on arrival unless excessive freight is paid, may be recovered back.

Validity of stipulation limiting carrier's liability.

Cited in *Calderon v. Atlas S. S. Co.* 64 Fed. 874, holding stipulation limiting carrier's liability for loss of goods to certain sum unless value is expressed in agreement, valid.

Cited in note in 24 A. D. 137, on requisites of notice to limit liability of common carrier.

Liability of carrier for full value of property lost.

Cited in *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444, holding railroad company liable for depreciation in market value of heifers in consequence of abortions caused by its negligence, where no stipulation was made as to their value; *Trimble v. New York C. & H. R. R. Co.* 39 App. Div. 403, 57 N. Y. Supp. 437, holding owner may recover value of contents of trunk, where he did not deceive company, in absence of stipulation limiting liability.

Liability of carrier for freight.

Cited in note in 5 E. R. C. 284, on lien of carrier for freight.

30 AM. REP. 263, DUNLOP v. PATTERSON F. INS. CO. 74 N. Y. 145.

What property is subject to levy or garnishment.

Cited in *Ball v. Peper Cotton Press Co.* 141 Mo. App. 26, 121 S. W. 798, hold-

ing that interest of pledgeor in certificate of deposit pledged with surety company to secure indemnity bond is not subject to garnishment.

Cited in note in 59 L.R.A. 369, on garnishment of unliquidated claims to surplus on deposit.

— **Property belonging to litigant.**

Cited in *Bridges v. Wade*, 113 App. Div. 350, 99 N. Y. Supp. 126, holding foreign plaintiff suing foreign defendant cannot attach debt due defendant from foreign corporation; *National Shoe & Leather Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467, holding attachment cannot issue out of state court against insolvent national bank; *Plympton v. Bigelow*, 93 N. Y. 592, 66 How. Pr. 131, 4 N. Y. Civ. Proc. Rep. 189, 13 Abb. N. C. 173, holding debtor's shares of stock of foreign corporation not attachable under Code, section 647; *Hardon v. Dixon*, 91 App. Div. 109, 86 N. Y. Supp. 346, on form of levy upon interest of debtor in promissory note in custody of third person having lien thereon.

Property in custodia legis.

Cited in *Re Chisholm*, 4 Fed. 526, holding money in hands of assignee in bankruptcy not attachable; *Shelton v. Wolthausen*, 80 Conn. 599, 125 A. S. R. 131, 69 Atl. 1030, holding creditor of owner of equitable interest in fund cannot garnish same because court order directed payment to another who had no title; *Trotter v. Lehigh Zinc & Iron Co.* 42 N. J. Eq. 456, 11 Atl. 25 (affirming 41 N. J. Eq. 229; 3 Atl. 95), holding interest of party on whose behalf money is paid into court attachable; *India Rubber Co. v. Katz*, 65 App. Div. 349, 72 N. Y. Supp. 658, holding attaching creditor may levy upon money in hands of chamberlain; *Wehle v. Conner*, 83 N. Y. 231, holding money collected on execution by and in hands of sheriff, liable to attachment under process issued in action against judgment creditor; *Pace v. Smith*, 57 Tex. 555, holding proceeds of attached property in hands of clerk not subject to garnishment; *Richardson v. Independent School Dist. No. 1*, 5 Dak. 277, 38 N. W. 553, on school warrant of judgment debtor prior to its receipt being subject to levy on execution; *Parker v. Bradley*, 14 Jones & S. 244, on court compelling sheriff to pay over funds in his hands, where attachment against party entitled thereto has been served on him.

Cited in note in 12 L.R.A. 509, on attachability of property in the custody of the law.

Distinguished in *First Nat. Bank v. Dunn*, 97 N. Y. 149, 49 A. R. 517, holding replevied chattel while in possession of sheriff cannot be levied upon by virtue of execution against defendant in replevy suit; *Fraser v. Ward*, 9 N. Y. Civ. Proc. Rep. 11, 13 Daly, 431 (affirming 2 How. Pr. N. S. 47), holding deposit as security for costs not liable to seizure on other judgments.

Not followed in *Dale v. Brumbly*, 98 Md. 468, 64 L.R.A. 112, 56 Atl. 807, holding proceeds of life insurance policy deposited with clerk of court in proceeding relating to its distribution not attachable.

Court's discretion in permitting receiver to come in as party.

Cited in *Patrick v. Eells*, 30 Kan. 680, 2 Pac. 116, holding application of receiver of corporation property to be allowed to come in and file answer in suit against corporation, addressed to discretion of court; *Hart v. Kohn*, 12 Misc. 648, 33 N. Y. Supp. 272, on trial court having discretion as to letting receiver come in as party.

30 AM. REP. 289, STUART v. PALMER, 74 N. Y. 183.

What constitutes due process of law, generally.

Cited in *Hanson v. Krehbiel*, 68 Kan. 670, 104 A. S. R. 422, 64 L.R.A. 790, 75 Pac. 1041, holding "remedy by due course of law" means reparation for injury, ordered by tribunal having jurisdiction, in due course of procedure and after fair hearing; *State ex rel. Blaisdell v. Billings*, 55 Minn. 407, 43 A. S. R. 524, 57 N. W. 794, holding "due process of law" requires hearing before commitment of persons to hospitals for insane; *Chauvin v. Valiton*, 8 Mont. 451, 3 L.R.A. 194, 20 Pac. 658, holding taking property from owner without some sort of notice of proceeding to be had against property, is taking it without "due process of law;" *McGavock v. Omaha*, 40 Neb. 64, 58 N. W. 543, holding "due process of law" means that "every man is entitled to his day in court;" *Goldie v. Goldie*, 77 App. Div. 12, 79 N. Y. Supp. 268, holding person cannot be punished for contempt in disobeying order, without having notice and hearing; *Riglander v. Star Co.* 98 App. Div. 101, 90 N. Y. Supp. 772, 34 N. Y. Civ. Proc. Rep. 92, holding due process of law requires that party should be allowed sufficient time to prepare his evidence; *Weston v. Watts*, 45 Hun, 219, holding receiver's fees under appointment in action for accounting between partners, cannot be paid from property, where order is reversed; *Martin v. Central Vermont R. Co.* 50 Hun, 347, 3 N. Y. Supp. 82, holding notice must be given to nonresident debtor in attaching his property; *Niagara Falls Cider & Vinegar Co. v. Knell*, 39 N. Y. S. R. 280, 15 N. Y. Supp. 781, holding taking land under power of eminent domain, constitutes due process of law, where notice of hearing is provided for; *People ex rel. Devery v. Martin*, 13 Misc. 21, 33 N. Y. Supp. 1000, holding policeman's conviction in his absence because of illness, contrary to "due process of law" provision of constitution; *People ex rel. McDonald v. Leubischer*, 23 Misc. 495, 51 N. Y. Supp. 735, 27 N. Y. Civ. Proc. Rep. 296, holding witness committed by notary appointed by foreign court for refusal to answer pertinent questions, is deprived of his liberty without "due process of law;" *People v. Golding*, 55 Misc. 425, 106 N. Y. Supp. 821, holding due process of law means that assessors shall give owners of land to be assessed opportunity to be heard; *Light v. Canadian County Bank*, 2 Okla. 543, 37 Pac. 1075, holding "due process of law" is giving to person subjected to it every reasonable opportunity to defend himself of which nature of case will admit; *Re Union Elev. R. Co.* 112 N. Y. 61, 2 L.R.A. 359, 19 N. E. 664, on "due process of law" in taking of private property for railroad; *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 App. Div. 363, 56 N. Y. Supp. 431, on right of party committed by process to notice and hearing to constitute due process of law; *People v. Adirondack R. Co.* 39 App. Div. 34, 56 N. Y. Supp. 869 (dissenting opinion), on necessity of hearing to satisfy "due process of law;" *Douglas v. Phenix Ins. Co.* 63 Hun, 393, 18 N. Y. Supp. 259, on necessity of personal service in attachment proceedings to avoid "due process of law" provision of constitution; *Makof v. Sherman*, 36 Pa. Super. Ct. 624, to point that due process of law requires orderly proceedings in which citizen has opportunity to be heard; *Baker v. State*, 63 Misc. 549, 118 N. Y. Supp. 618, to the point that constitutional provision as to due process of law is not limited to judicial proceedings but extends to every proceeding interfering with rights.

Cited in reference note in 62 A. D. 167, on meaning of "due process of law."

Cited in note in 5 L.R.A. 359, on due process of law.

— Acts depriving of property without due process.

Cited in *Railroad Tax Cases*, 8 Sawy. 238, 13 Fed. 722, holding state Constitution and laws relating to assessment of railroads, conflict with "due process of law" provision in failing to provide notice to owner; *Indianapolis v. Holt*, 153 Ind. 222, 57 N. E. 968, holding statute for street improvement giving property owner right to be heard and right to contest suit for tax constitutional; *Buffalo v. Chadeayne*, 134 N. Y. 163, 31 N. E. 443 (affirming 27 N. Y. S. R. 60; 7 N. Y. Supp. 501), holding resolution of council rescinding its former action in granting permit to erect building after work is in progress, and without hearing, void; *People ex rel. Loughran v. Flynn*, 110 App. Div. 279, 96 N. Y. Supp. 655, holding law authorizing cancellation of liquor tax certificate previously issued without notice, unconstitutional; *Schneider v. Rochester*, 90 Hun, 171, 35 N. Y. Supp. 786, holding refusal to confirm appraiser's report and referring matter to new commissioners, does not deprive property owner of property without due process of law, where charter provides notice which covers future proceedings; *Brooks v. Tayntor*, 17 Misc. 534, 40 N. Y. Supp. 445, holding law giving lien for purchase price on monument and providing for removal on service of notice of lien on superintendent of cemetery who is required to notify owner authorizes taking of property without due process of law; *Re Kenny*, 23 Misc. 9, 49 N. Y. Supp. 1037, holding charter provision which makes prison term dependent upon decision of question as to which accused is given no hearing, unconstitutional; *Re Fuller*, 34 Misc. 750, 70 N. Y. Supp. 1950, holding act designating county treasurer as transfer tax appraiser and allowing him percentage of tax conflicts with "due process of law" provision; *Bramson v. Gee*, 25 Or. 462, 24 L.R.A. 355, 36 Pac. 527, holding acts authorizing supervisors to summarily take materials needed for roads, and providing for application to court by aggrieved party to have damages assessed, constitutional; *State ex rel. Baldwin v. Moore*, 7 Wash. 173, 34 Pac. 461, holding act requiring that certificate of county treasurer that all taxes have been paid accompany deed of property to be recorded, unconstitutional; *Clark v. Kirkland*, 64 Misc. 585, 119 N. Y. Supp. 1117, holding that assessment of property of resident as nonresident property is void, as in violation of provision relating to "due process of law;" *Modern Loan Co. v. Police Ct.* 12 Cal. App. 582, 108 Pac. 56, holding that one in possession of personal property under claim of right cannot be deprived thereof without notice; *Douglas v. Phenix Ins. Co.* 63 Hun, 393, 18 N. Y. Supp. 259, 44 N. Y. S. R. 237, on foreign attachment, without personal service, as taking of property without due process of law.

Necessity of notice and hearing.

Cited in *Great West Min. Co. v. Woodmas of Alston Min. Co.* 12 Colo. 46, 13 A. S. R. 204, 20 Pac. 771, holding judgment by default obtained without proper service, void; *People ex rel. Lodes v. Health Dept.* 117 App. Div. 856, 103 N. Y. Supp. 275, holding health board cannot revoke milk vendor's license without notice and hearing; *Clapp v. McCabe*, 84 Hun, 379, 32 N. Y. Supp. 425, holding judgment rendered upon claim not set out in complaint, void; *People ex rel. Nisbet v. Amsterdam*, 90 Hun, 488, 36 N. Y. Supp. 59, holding proceedings had before committee appointed to investigate claim against city null, where claimant's right to share in investigation is denied; *People ex rel. Copeutt v. Board of Health*, 140 N. Y. 1, 37 A. S. R. 522, 23 L.R.A. 481, 35 N. E. 320, on necessity of party proceeded against by health department for

nuisance, having hearing; *Smith v. State Medical Examiners*, 140 Iowa, 66, 117 N. W. 1116, holding that statute relating to revocation of physician's license is valid because it implies that notice to interested parties must be given; *Railroad Comra. v. Columbia, N. & L. R. Co.* 82 S. C. 418, 64 S. E. 240, holding that statute giving railroad commissioners supervision of railroads is not invalid because it does not expressly provide for notice as such notice is implied.

Cited in reference note in 101 A. S. R. 283, on necessity of notice and opportunity to be heard in proceedings for street improvements.

Cited in notes in 2 L.R.A. 657, as to whether due process of law requires a hearing; 21 L.R.A. 857, on necessity of notice to constitute due process of law.

— To owner of property to be assessed.

Cited in *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921, holding judgment of court sustaining validity of assessment under state statute, contrary to U. S. Constitution as it afforded owners no opportunity to be heard upon assessment; *Pennsylvania Co. v. Cole*, 132 Fed. 668, holding property owner who was not given notice of sewer assessment until after completion of work, may challenge validity of proceedings by suit; *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158, holding legislature may, without notice to property owners, fix amount per foot at which property shall be assessed for sewer; *McEneney v. Sullivan*, 125 Ind. 407, 25 N. E. 540, holding notice prior to conclusive judgment, requisite in order to authorize subjection of property to special lien for local assessment; *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144, holding notice of hearing to owner requisite in order to fix lien upon his property, for sewer construction; *Neal v. Vansickle*, 72 Neb. 105, 100 N. W. 200, holding assessment upon private property to defray cost of local improvements, levied without notice to property owners, void; *People ex rel. Albany & B. Turnp. Road v. Selkirk*, 180 N. Y. 401, 73 N. E. 248, holding proposed taxpayer must have notice of subject of proposed tax; *People ex rel. Bridgeport Sav. Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592, holding assessment will be set aside for irregularity, where assessors failed to comply with law as to giving notice and hearing; *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564, holding assessment for water rates where no notice was given to owner, illegal; *People ex rel. Govers v. New Rochelle*, 17 App. Div. 603, 45 N. Y. Supp. 836, holding notice of opportunity to review tax roll after completion and filing, necessary to make tax levy, legal; *People ex rel. Littman v. Wells*, 91 App. Div. 172, 86 N. Y. Supp. 309, holding increase of assessed valuation without notice, illegal; *Trumbull v. Palmer*, 104 App. Div. 531, 93 N. Y. Supp. 349, holding taxpayer has right to notice and hearing before assessing officers before valid tax can be imposed; *People ex rel. Spencer v. New Rochelle*, 83 Hun, 185, 31 N. Y. Supp. 592, holding assessment for curb made without notice to owner, void; *Dasey v. Skinner*, 33 N. Y. S. R. 15, 11 N. Y. Supp. 821, holding levy of water rents without notice of hearing, unconstitutional; *Greater New York Athletic Club v. Wurster*, 19 Misc. 443, 43 N. Y. Supp. 703, holding mayor cannot revoke theatre license, without hearing; *Hood River Lumbering Co. v. Wasco County*, 35 Or. 498, 57 Pac. 1017, holding act providing for taking of timber along river for construction of improvements, without notice to nonconsenting owner of proceedings for appropriation, void; *Hoesfling v. San Antonio*, 15 Tex. Civ. App. 257, 38 S. W. 1127, holding act of board of revision in raising valuation of property as fixed by assessor, without notice to owners, nullity; *State ex rel. Barber Asphalt Paving Co. v. Seattle*, 42 Wash. 370, 85 Pac. 11, holding

amendment of assessment role by council to include more property without notice thereof, invalid; *Security Trust & S. V. Co. v. Lexington*, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87, on necessity of taxpayer having opportunity to be heard as to validity of special assessment before enforcement; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385, on necessity of notice in proceeding for assessment of property; *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724, on necessity for opportunity for hearing being given to validate assessment; *Scudder v. Jones*, 134 Ind. 547, 32 N. E. 221, on proceedings in which special assessment was made, being void because owner had no notice; *Jones v. Tonawanda*, 158 N. Y. 438, 53 N. E. 280, on necessity of property owner having opportunity to be heard at some stage of proceeding to enforce assessment; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 632, on assessment for grading street being invalid for want of notice on hearing to landowner; *Dyker Meadow Land & Improv. Co. v. Cook*, 3 App. Div. 164, 38 N. Y. Supp. 222, on necessity of parties interested in assessment being afforded opportunity to be heard; *People ex rel. New York & N. J. Teleph. Co. v. Neff*, 15 App. Div. 8, 44 N. Y. Supp. 46, on necessity of notice, on increase of assessment to include additional property, to those property owners; *Re New York*, 22 App. Div. 124, 47 N. Y. Supp. 965, on necessity of notice and hearing to owner whose property is to be assessed; *Schenectady v. Furman*, 61 Hun, 171, 15 N. Y. Supp. 724, on constitutionality of charter provision giving council power to allow account against property owner without notice; *New York C. & H. R. R. Co. v. Rochester*, 129 App. Div. 805, 114 N. Y. Supp. 779, holding that where legislature determines as to improvement, amount to be raised and to be assessed against various classes no notice to persons affected is necessary; *People ex rel. Peabody v. Chanler*, 196 N. Y. 525, 25 L.R.A.(N.S.) 946, 89 N. E. 1109 (dissenting opinion), on necessity of provision as to notice in statute providing for local assessments; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781, holding that before special sewer tax can be legally levied persons affected must have notice and opportunity to be heard; *People ex rel. Moller v. O'Donnel*, 183 N. Y. 9, 75 N. E. 540, to point that notice of assessment is necessary to its validity.

Distinguished in *Carson v. Brockton Sewerage Comrs.* 182 U. S. 398, 45 L. ed. 1151, 21 Sup. Ct. Rep. 860, holding notice to property owners of assessment for sewer, unnecessary, where ordinance fixes charges; *Goodrich v. Detroit*, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397, holding notice to owners of land which may be assessed for local improvement need not be given of proceedings to make improvement, if none of their property is taken for that purpose; *Re McLean*, 3 Silv. Sup. Ct. 314, 6 N. Y. Supp. 230, 25 N. Y. S. R. 537, holding action against corporation for nonpayment of tax cannot be resisted as excessive tax, where notice of assessment was given.

—To owner of property taken for public use.

Cited in *Morgan v. Oliver*, 98 Tex. 218, 82 S. W. 1028, 4 A. & E. Ann. Cas. 900, holding county cannot assess damages for taking property for public road, without notice and hearing to owner; *Vogt v. Bexar County*, 5 Tex. Civ. App. 272, 23 S. W. 1044, holding taking by commissioner's court of citizen's land for road purposes, without notice, not "due process of law;" *Burns v. Multnomah R. Co.* 8 Sawy. 543, 15 Fed. 177, on necessity of giving notice to owner of property to be taken for public; *St. Louis v. Richeson*, 76 Mo. 470, on necessity of notice in assessing damages for taking property for street improvement to cover "due process of law" provision.

—Necessity of tax or assessment law requiring.

Cited in *Scott v. Toledo*, 1 L.R.A. 688, 36 Fed. 385, holding ordinance requiring assessment of property for opening street, without notice or hearing, unconstitutional; *Mulligan v. Smith*, 59 Cal. 206, holding statute providing for street improvement without giving notice to property owners, unconstitutional; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455, holding ordinance in reference to construction of side walk which fails to give notice of hearing, unconstitutional; *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242, holding failure of statute to provide for hearing, immaterial, where property holder has opportunity to show that assessor committed error in apportioning tax; *Evans v. Fall River County*, 9 S. D. 130, 68 N. W. 195, holding act purporting to legalize assessment, unconstitutional in attempting to dispense with notice to taxpayer; *Augusta v. King*, 115 Ga. 454, 41 S. E. 661, holding act empowering collection of assessment for waterworks without notice to property owners, unconstitutional; *Vizzard v. Taylor*, 97 Ind. 90, holding assessment on land void, under proceedings for establishment of ditch under act where name of owner does not appear in notice as required; *Garvin v. Daussman*, 114 Ind. 429, 5 A. S. R. 637, 16 N. E. 826, holding law authorizing assessment against property, unconstitutional for failure to provide notice to owner; *Kuntz v. Sumption*, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474, holding act conferring authority upon board of equalization to change valuation placed on property by taxpayer, without notice, unconstitutional; *Avant v. Flynn*, 2 S. D. 153, 49 N. W. 15, same as to authority to add property to assessment roll; *Gatch v. Des Moines*, 63 Iowa, 718, 18 N. W. 310, holding collection of tax for sewerage purposes under ordinance passed pursuant to statute, enjoined, where neither act nor ordinance provided for notice to owners; *Ferry v. Campbell*, 110 Iowa, 290, 50 L.R.A. 92, 81 N. W. 604, holding act authorizing fixing of appraisement for inheritance tax without notice or hearing, unconstitutional; *Beebe v. Magoun*, 122 Iowa, 94, 101 A. S. R. 259, 97 N. W. 986, holding act providing of estimate of benefits to lands from drain and levy of taxes without notice to owners, unconstitutional; *Ulman v. Baltimore*, 72 Md. 587, 11 L.R.A. 224, 20 Atl. 141, holding acts providing for taxation for street improvements without notice, unconstitutional; *Monticello Distilling Co. v. Baltimore*, 90 Md. 416, 45 Atl. 210, holding statute directing levy of taxes on distillerands without providing for hearing, unconstitutional; *Sears v. Street Comrs.* 173 Mass. 350, 53 N. E. 876, holding sewerage act giving property owners no opportunity to be heard upon their liability to assessment, unconstitutional; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091, holding drain law which fails to provide for notice to those whose lands are within assessment district, but are not traversed by drain, constitutional; *People ex rel. Barnard v. Wemple*, 117 N. Y. 77, 22 N. E. 761 (affirming 53 Hun. 197, 6 N. Y. Supp. 732), holding act authorizing comptroller to relevy tax: where same has been declared void, without giving notice and hearing, unconstitutional; *Terrel v. Wheeler*, 123 N. Y. 76, 25 N. E. 329, holding constitutional rights of property owners are effectually guarded, where ample provision is made in taxing act for notice and hearing; *Seaman v. Dickinson*, 1 App. Div. 19, 36 N. Y. Supp. 748, holding charter unconstitutional in not providing for hearing of owners of property assessed; *Re Embury*, 19 App. Div. 214, 45 N. Y. Supp. 881, holding statute imposing collateral inheritance tax must provide for assessment of property on notice to owner; *Re Lent*, 47 App. Div. 349, 62 N. Y. Supp. 227, holding act relative to drainage which does not re-

Am. Rep. Vol. XVII.—12.

quire notice of assessment to property owners, unconstitutional; *People ex rel. Putman v. Henion*, 64 Hun, 471, 19 N. Y. Supp. 488, holding assessment act for draining swamp, unconstitutional in failing to provide "grievance day"; *Chicago & E. R. Co. v. Keith*, 67 Ohio St. 279, 60 L.R.A. 525, 65 N. E. 1020, holding statute authorizing assessment on real estate without providing for notice to owner, unconstitutional; *Paulson v. Portland*, 16 Or. 450, 1 L.R.A. 673, 19 Pac. 450, holding charter giving common council power to lay sewers and cause assessment to be made therefor, not unconstitutional although it does not provide for notice to owners; *Violett v. Alexandria*, 92 Va. 561, 53 A. S. R. 825, 31 L.R.A. 382, 23 S. E. 909, holding law authorizing local assessments for street improvement, without reasonable notice and hearing to property owner, unconstitutional; *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299, holding provisions in city charter authorizing special assessments for sewers without notice of proceedings to property owners, unconstitutional; *Allman v. District of Columbia*, 3 App. D. C. 8, on necessity of assessment providing for notice to property owner in levying of special improvement taxes against adjoining property; *Ross v. Wright County*, 128 Iowa, 427, 1 L.R.A.(N.S.) 431, 104 N. W. 506, on necessity of statutes providing for notice to property owners who are to be assessed for drain; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104, on necessity of provision for notice to owner in act giving officer of designated district power to distribute local improvement assessment upon property; *Re McPherson*, 104 N. Y. 306, 58 A. R. 502, 10 N. E. 685, on necessity of notice to taxpayer being provided in law taxing gifts, legacies, etc.; *People ex rel. Hatch v. Reardon*, 110 App. Div. 821, 97 N. Y. Supp. 535 (dissenting opinion), on necessity of assessment law containing provision for notice and hearing; *Granger v. Buffalo*, 6 Abb. N. C. 238, on necessity of assessment law providing for hearing; *Lang v. Kiendl*, 27 Hun, 66, on public improvement assessment being unconstitutional for failure to provide notice to land owner; *People ex rel. Pulman v. Henion*, 64 Hun, 471, 19 N. Y. Supp. 488, holding that statute providing for assessment of property is unconstitutional unless "grievance day" is provided for; *Beers v. Glynn*, 211 U. S. 477, 53 L. ed. 293, 29 Sup. Ct. Rep. 186, to point that tax cannot be legally imposed unless statute provides for officer who shall assess property on notice to owner.

Cited in note in 42 A. S. R. 660, on law authorizing assessment without notice as depriving of property without due process of law.

Distinguished in *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, holding law authorizing imposition of tax upon property, constitutional, where owner has opportunity to question its validity in subsequent proceedings for its collection; *Sudberry v. Graves*, 83 Ark. 344, 103 S. W. 728, holding curative act confirming assessment and curing defect of want of notice to landowners, valid; *Speer v. Athens*, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802, holding act conferring power to assess tax to improve sidewalks, which provides that property owner may file affidavit to be tried as issue denying assessment when execution is issued therefor, constitutional; *Baltimore v. John Hopkins Hospital*, 56 Md. 1, holding ordinance imposing assessment upon adjacent property owners for repairing street, not invalid by failing to make provision for notice to owners; *Hennessey v. Volkening*, 30 Abb. N. C. 100, 22 N. Y. Supp. 528, holding act providing that unpaid water rents may be enforced by sale of property liable therefor, without providing notice, valid; *Re New York*, 34 Hun, 441, holding act which requires commissioners to reconsider

and correct report after filing, on written objection thereto, constitutional; *Hatzung v. Syracuse*, 92 Hun, 203, 36 N. Y. Supp. 521, holding curative act legalizing assessment wherein statute provided for notice and hearing, valid; *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230, holding charter authorizing city council whenever street is opened to apportion expense, constitutional, although it contains no provision for appearance of property owners affected.

— **Necessity of condemnation law requiring.**

Cited with special approval in *Jones v. Franklin County*, 130 N. C. 451, 42 S. E. 144 (dissenting opinion), on constitutionality of act providing for assessment of damages for taking land for road purposes.

Cited in *Sterritt v. Young*, 14 Wyo. 146, 116 A. S. R. 994, 4 L.R.A.(N.S.) 169, 82 Pac. 946, holding statute which provides for obtaining right of way by condemnation, unconstitutional in failing to provide for notice to property owner of appraisers' meeting.

Cited in notes in 48 A. D. 278, on validity of acts authorizing taking property by eminent domain without notice; 4 L.R.A.(N.S.) 170, on necessity of providing in statute for notice of hearing on question of damages or compensation in eminent domain proceedings.

Not followed in *Wilson v. Baltimore & P. R. Co.* 5 Del. Ch. 524, holding act providing for taking of private property for railroad, not unconstitutional for failure to provide for notice or hearing.

— **Necessity of laws generally affecting property or person requiring.**

Cited in *Re Lambert*, 134 Cal. 626, 86 A. S. R. 296, 55 L.R.A. 856, 66 Pac. 851, holding act authorizing commitment of persons to insane asylum without giving him prior notice, unconstitutional; *Jenks v. Stump*, 41 Colo. 281, 124 A. S. R. 137, 15 L.R.A.(N.S.) 554, 93 Pac. 17, 14 A. & E. Ann. Cas. 914, holding statute providing that humane society may take charge of abandoned or cruelly treated animals and hold same for expenses, without providing for hearing to determine facts, unconstitutional; *People v. O'Brien*, 111 N. Y. 1, 7 A. S. R. 684, 2 L.R.A. 255, 18 N. E. 692 (reversing 45 Hun, 519), holding reservation in act of power to take away property lawfully acquired, without notice unconstitutional; *Re Grout*, 105 App. Div. 98, 93 N. Y. Supp. 711, 34 N. Y. Civ. Proc. Rep. 231, holding act authorizing judge to commit witness who refuses to answer unconstitutional, in failing to provide for notice; *Re Brooklyn*, 87 Hun, 54, 33 N. Y. Supp. 869, holding act providing for removal of dangerous buildings without notice or hearing, unconstitutional; *People ex rel. Shand v. Tighe*, 9 Misc. 607, 30 N. Y. Supp. 368, holding ordinance authorizing police justice to order owner of dog complained of for attacking person to kill same, without requiring notice, void; *People ex rel. Peabody v. Chanler*, 133 App. Div. 159, 117 N. Y. Supp. 322 (dissenting opinion), on invalidity of statute providing for commitment of insane person without notice; *People ex rel. Joyce v. Strassheim*, 242 Ill. 359, 90 N. E. 118 (dissenting opinion), on necessity of statute requiring due notice before being deprived of life, liberty or property; *Re Allen*, 82 Vt. 365, 26 L.R.A.(N.S.) 232, 73 Atl. 1078, holding that statute providing for commitment of insane person must provide for notice.

Sufficiency of notice and hearing.

Cited in *Re Amsterdam*, 126 N. Y. 158, 27 N. E. 272 (reversing 55 Hun, 270; 8 N. Y. Supp. 234), holding act which requires that report of commissioners be filed, after they have appraised damages, for examination and objection,

constitutional; *Schenectady v. Union College*, 66 Hun, 179, 21 N. Y. Supp. 147, holding charter providing that audit of council as to assessment should be sufficient presumptive evidence, sufficient as to hearing; *Oregon & C. R. Co. v. Lane County*, 23 Or. 386, 31 Pac. 964, holding statute empowering tax collector to add to tax roll without notice to owner property omitted by assessors and collect taxes thereon, constitutional, where there is equalization board which holds public meetings at stated times; *People v. Turner*, 117 N. Y. 227, 15 A. S. R. 498, 22 N. E. 1022, holding that more formal notice should be given in case of assessment for local improvements than is required for annual taxation.

Cited in note in 11 L.R.A. 226, on sufficiency of notice of local assessments.

Distinguished in *Lamb v. Connolly*, 122 N. Y. 531, 25 N. E. 1042, holding notice as prescribed by statute calling attention to lands affected by assessments and calling for objection, sufficient; *Nottage v. Portland*, 35 Or. 539, 76 A. S. R. 513, 58 Pac. 883, holding curative act, designed to validate previous defective street improvement proceedings, which provides for action to recover assessment, not void as authorizing taking of property without notice, where owner originally had notice.

Right of legislature to prescribe kind of notice, and mode of giving.

Cited in *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144, holding power to fix kind of notice to be given owner whose property is to be assessed, lies with legislature; *Lyman v. Plummer*, 75 Iowa, 353, 39 N. W. 527, holding provision of ordinance requiring notice of special assessment to be given by publication, sufficient; *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866, holding notice of sitting of council for purpose of equalizing proposed special assessment, etc., sufficient if it comply substantially with statute; *Re De Peyster*, 80 N. Y. 565, holding failure to give personal notice to owner will not invalidate assessment; *Re Lowden*, 89 N. Y. 548, holding notice by publication sufficient for hearing where it conforms with statute; *People ex rel. Schofield v. Schoonover*, 47 App. Div. 278, 62 N. Y. Supp. 180, holding assessment placed on role without notice, valid, where public notice of completion of roll affords opportunity for hearing; *Re New York*, 95 App. Div. 552, 89 N. Y. Supp. 6 (reversing 34 Misc. 719, 70 N. Y. Supp. 227), holding statute which refers to all provisions of law relating to taking private property as applicable, not unconstitutional in failing to expressly provide for notice to owner of assessment; *Bell v. Yonkers*, 78 Hun, 196, 23 N. Y. Supp. 947, holding notice which contains in substance all that statute required, sufficient; *Hornellsville Electric R. Co. v. New York, L. E. & W. R. Co.* 83 Hun, 407, 31 N. Y. Supp. 745, holding giving of notice annexed to petition which is personally served as prescribed by statute sufficient; *Woolard v. Nashville*, 108 Tenn. 353, 67 S. W. 801, holding statute not void for failure to require notice of condemnation proceedings, where provision therein permits owner to appeal from commissioners award; *Re Oneida Street Opening*, 22 Misc. 235, 49 N. Y. Supp. 828, on sufficiency of provisions in charter for notice to and hearing of parties interested in street opening.

Distinguished in *People v. Turner*, 117 N. Y. 227, 15 A. S. R. 498, 22 N. E. 1022 (affirming 49 Hun, 466; 2 N. Y. Supp. 253), holding act giving person aggrieved right to appeal to board of supervisors at regular meeting, and giving board power to review assessment valid.

Necessity of equalization in apportionment of tax.

Cited as leading case in *Gray v. Stiles*, 6 Okla. 455, 49 Pac. 1083, on equalization in assessment of property.

Cited in *Charles v. Marion*, 100 Fed. 538, holding act providing that cost of street improvement shall be assessed against abutting property, without regard to special benefits, unconstitutional; *Becker v. Baltimore & O. S. W. R. Co.* 17 Ind. App. 324, 46 N. E. 685, holding assessment for street improvement made jointly against two or more separate and distinct tracts of land, voidable; *Baltimore v. Scharf*, 54 Md. 499, holding railway company whose charter obligates company to keep road two feet on each side of track in repair, cannot be assessed for repaving street; *Sears v. Boston*, 173 Mass. 71, 43 L.R.A. 834, 53 N. E. 138, holding act authorizing street sprinkling at expense of abutting owners, constitutional; *Detroit v. Recorder's Ct. Judge*, 112 Mich. 588, 42 L.R.A. 638, 71 N. W. 149, holding act authorizing taking of private property for public use, and requiring portion of amount awarded as compensation to be assessed upon district fixed by common council, unconstitutional; *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662, holding legislature empowered to impose assessment according to frontage; *Re Church*, 92 N. Y. 1, holding resolution of county board imposing upon each owner within assessment district his share of cost in proportion to benefit, valid; *Re Ferris*, 10 N. Y. S. R. 480, holding rule of law in levying local assessments, is that tax must be distributed in proportion to benefits; *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2, holding statute providing that cost of improving street intersections shall be assessed five-ninths to first fifty feet and remainder to next fifty in abutting quarter blocks, not unconstitutional as being unequal apportionment to benefits; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501, on validity of special assessment for street improvement; *Nehasane Park Asso. v. Lloyd*, 167 N. Y. 431, 60 N. E. 741, on validity of statute assessing fixed sum upon property without reference to some system of equitable apportionment; *People v. New York Floating Dry Dock Co.* 11 Abb. N. C. 40, 63 How. Pr. 454, on power of state to tax certain corporations to exemption of others; *Newell v. Cincinnati*, 45 Ohio St. 407, 15 N. E. 196, on foundation of special assessment for sewers, being special benefit derived by property owners.

Cited in note in 28 L.R.A.(N.S.) 1202, on assessments for improvements by front-foot rule.

Constitutionality of assessment or condemnation act.

Cited in *Re Lincoln Park*, 44 Minn. 299, 46 N. W. 355, holding provision for securing compensation for lands taken by condemnation, necessary; *Day v. New Lots*, 36 Hun, 263; *Ross v. Cayuga County*, 38 Hun, 20,—on constitutionality of assessment act; *Allman v. District of Columbia*, 3 App. D. C. 8, holding that no valid assessment for special improvements can be made if there is no special benefit to property assessed.

Unconstitutional assessment, invalid on its face, as cloud on title.

Cited in *Townsend v. New York*, 77 N. Y. 542; *Ensley v. McWilliams*, 145 Ala. 159, 117 A. S. R. 26, 41 So. 296,—holding proceedings by city to enforce taxes and sell land, alleged to be void, on account of unconstitutional act, will not put cloud upon title; *Wells v. Buffalo*, 80 N. Y. 253, holding action cannot be maintained to set aside assessment, as cloud on title, on ground that assessment act is unconstitutional; *Horn v. New Lots*, 83 N. Y. 100, 38 A. R. 402, holding judicial vacating of assessment which appears void on proof necessary

to sustain proceedings under it, unnecessary before maintaining action to recover back moneys collected thereunder; *Alvord v. Syracuse*, 163 N. Y. 158, 57 N. E. 310, holding owner of property assessed may maintain equitable action to set aside assessment as cloud upon title, where invalidity thereof does not appear on face of proceedings to enforce same; *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130, holding action to set aside assessment as cloud upon title not maintainable, where assessment was made under unconstitutional statute; *Phelps v. New York*, 112 N. Y. 216, 2 L.R.A. 626, 19 N. E. 408, holding action not maintainable to recover back moneys paid upon assessment, where ordinance was void on its face; *Bruecher v. Port Chester*, 31 Hun, 550, on necessity of vacating void assessment before suing to recover back amount paid thereunder; *Allter v. St. Johnsville*, 130 App. Div. 297, 114 N. Y. Supp. 355; *Bussing v. Mt. Vernon*, 198 N. Y. 196, 91 N. E. 543,—holding that action to remove assessment as cloud on title cannot be maintained unless it is invalid only because of defect de hors record.

Cited in note in 45 A. S. R. 377, on void assessment and tax certificate as cloud on title.

What may be done under statute as test of its constitutionality.

Cited in *Montana Co. v. St. Louis Min. & Mill. Co.* 152 U. S. 160, 38 L. ed. 398, 14 Sup. Ct. Rep. 506, holding law authorizing court, on petition of person interested in mining claim in possession of another, to order inspections, constitutional; *Albany City Nat. Bank v. Maher*, 20 Blatchf. 341, 9 Fed. 884, holding legislative assessment of tax imposed upon shareholders of bank without equal apportionment or hearing, invalid; *Beresheim v. Arnd*, 117 Iowa, 83, 90 N. W. 506, holding act authorizing assessment not invalid because county treasurer had interest in swelling tax roll to extent of certain allowance for collection; *Beatrice v. Wright County*, 72 Neb. 689, 101 N. W. 1039, holding act providing for sale of property for delinquent taxes which authorizes method of procedure which in its workings results inevitably in release of taxes and assessments justly due, unconstitutional; *Henderson v. Atlantic City*, 64 N. J. Eq. 583, 54 Atl. 533, holding act conferring power on board to make grant of lands under tide-water to certain cities for nominal consideration, unconstitutional; *State Council, J. O. U. A. M. v. National Council, J. O. U. A. M.* 71 N. J. Eq. 433, 64 Atl. 561, holding character of provision of constitution for beneficial association is to be judged of by what may be done under it; *Gilman v. Tucker*, 128 N. Y. 190, 26 A. S. R. 464, 13 L.R.A. 304, 28 N. E. 1040, 21 N. Y. Civ. Proc. Rep. 170, holding act which makes title of grantee at public sale valid after being declared void by court, unconstitutional; *Cole v. State*, 144 N. Y. 396, 39 N. E. 400, holding act conferring right of property in lands and dominion over certain waters, or corporation, unconstitutional; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15, holding act restricting appointment to office to members of certain parties, unconstitutional; *Colon v. Lisk*, 153 N. Y. 188, 60 A. S. R. 609, 47 N. E. 302 (affirming 13 App. Div. 195, 43 N. Y. Supp. 384), holding act which involves unauthorized confiscation of private property for mere protection of private rights, unconstitutional; *People ex rel. Balcom v. Mosher*, 163 N. Y. 32, 79 A. S. R. 552, 57 N. E. 88, holding validity of statute requiring appointment of person highest on list, determined by nature and scope of powers attempted to be conferred; *Rochester v. West*, 164 N. Y. 510, 79 A. S. R. 659, 53 L.R.A. 548, 58 N. E. 673, holding validity of ordinance against six foot bill boards, is not determined by its ef-

fect in particular case; *Rathbone v. Wirth*, 6 App. Div. 277, 40 N. Y. Supp. 535, holding constitutionality of legislation permitting minority of council to appoint one-half of police commissioners, tested by what may be done thereunder; *People ex rel. Eldred v. Palmer*, 21 App. Div. 101, 47 N. Y. Supp. 403, holding grant of power conferred upon legislature by Constitution is to be measured by what may be done under it; *Barry v. Port Jervia*, 64 App. Div. 268, 72 N. Y. Supp. 104, holding constitutionality of charter provision as to suits against village for injuries resulting from negligence, tested by what may be done thereunder; *Riglander v. Star Co.* 98 App. Div. 101, 90 N. Y. Supp. 772, 34 N. Y. Civ. Proc. Rep. 92, holding constitutionality of act relative to requiring parties to proceed with trial on designated day, tested by what may be done under it; *Re Grout*, 105 App. Div. 98, 93 N. Y. Supp. 711, 34 N. Y. Civ. Proc. Rep. 231, holding constitutionality of statute authorizing commitment of witness tested by what may be done thereunder; *MacMullen v. Middletown*, 112 App. Div. 81, 98 N. Y. Supp. 145, holding validity of charter relieving city from liability for injury from snow and ice on sidewalks tested by what may be done under it; *Re South Market Street*, 67 Hun, 594, 22 N. Y. Supp. 432, holding law providing that local special assessment may be imposed upon lands adjoining those taken for public use, unconstitutional; *Cahill v. Hogan*, 44 Misc. 360, 89 N. Y. Supp. 1022, holding validity of law authorizing issuance of bonds for water supply tested by what may by its authority be done; *Re Boyett*, 136 N. C. 415, 103 A. S. R. 944, 67 L.R.A. 972, 48 S. E. 789, 1 A. & E. Ann. Cas. 729, holding act providing that judge may, on acquittal of person indicted for homicide on ground of insanity, commit said person to hospital for dangerous insane, unconstitutional; *Nashville, C. & St. L. R. Co. v. Franklin County*, 12 Lea, 521, holding fact that county suffered no injury in assessment and apportionment actually made, will not affect its constitutionality; *People ex rel. Hatch v. Reardon*, 110 App. Div. 821, 97 N. Y. Supp. 535 (dissenting opinion), on constitutionality of stock transfer tax law being tested by what may be done under it; *Daniels v. Homer*, 139 N. C. 219, 3 L.R.A.(N.S.) 997, 51 S. E. 992 (dissenting opinion), on constitutionality of act making it unlawful to set nets during certain months, being tested by what may be done under it; *Southern R. Co. v. Com.* 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70, holding that constitutional validity of law is to be tested by what may be done under it; *Re Ellard*, 62 Misc. 374, 114 N. Y. Supp. 827; *Hathorn v. Natural Carbonic Gas Co.* 194 N. Y. 326, 128 A. S. R. 555, 23 L.R.A.(N.S.) 436, 87 N. E. 504, 16 A. & E. Ann. Cas. 989,—to point that courts should consider in determining validity of statute, what may be, as well as what is presently being affected under it.

Police powers of legislature.

Cited in *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836, holding act providing that sale of real property in cities of certain class without written authority of owner is misdemeanor, unreasonable exercise of police power of state.

Cited in note in 6 L.R.A. 622, on police power of legislature.

—To conserve public health.

Cited in *Health Dept. v. Trinity Church*, 145 N. Y. 32, 45 A. S. R. 579, 27 L.R.A. 710, 39 N. E. 833 (reversing 43 N. Y. S. R. 142; 17 N. Y. Supp. 510), holding legislature empowered to direct alterations in existing houses at owner's expense to conserve public health, safety and welfare; *Re Jacobs*, 98 N. Y. 98,

50 A. R. 636, 2 N. Y. Crim. Rep. 539, on power of legislature to determine what laws are required to protect and secure public health.

Power of legislature to impose taxes and assessments for public purposes.

Cited in *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, holding enactment that assessments levied for water mains should be at certain rate, conclusive of its benent as against abutting property; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091, holding legislature empowered to impose tax for construction of public drain; *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487, 84 N. W. 1101, holding legislature empowered to create succession tax to be based on valuation of property; *Nugent v. Jackson*, 72 Miss. 1040, 18 So. 493, holding legislature empowered to provide for special assessments and invest local authorities with power to levy and apportion; *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 287, holding collateral inheritance tax which does not impose uniform rate upon all heirs, devisees, legatees and distributees, constitutional; *State v. Kings County*, 125 N. Y. 312, 26 N. E. 272, holding laches cannot bar legislature from exercise of power to levy taxes; *People v. Equitable Trust Co.* 96 N. Y. 387, holding legislature empowered to impose tax upon business of foreign corporation done within this state; *Re McPherson*, 104 N. Y. 306, 58 A. R. 502, 10 N. E. 685, holding legislature may impose tax on gifts, legacies and collateral inheritance; *Re Delaware & H. Canal Co.* 60 Hun, 204, 14 N. Y. Supp. 585 (reversing 8 N. Y. Supp. 352), holding legislature empowered to impose complete assessment, except that it must provide for hearing; *People ex rel. Richmond v. Wilson*, 21 N. Y. S. R. 120, 3 N. Y. Supp. 326, holding legislature empowered to validate assessment on property which is invalid only for insufficiency of petition; *Stevens v. Port Huron*, 149 Mich. 536, 113 N. W. 291, 12 A. & E. Ann. Cas. 603 (dissenting opinion), on power of city to levy special assesment for street sprinkling; *Morse v. Westport*, 136 Mo. 276, 37 S. W. 932, on power of court to declare ordinance void because unreasonable.

Cited in notes in 55 A. D. 285, on power to impose assessments or take property for public purposes; 2 L.R.A. 825, on legislative power to impose taxes; 35 L.R.A. 60, on power to create personal liability for local-improvement assessments.

Distinguished in *Stebbins v. Kay*, 51 Hun, 589, 4 N. Y. Supp. 566, holding legislature empowered to levy tax and apportion it in law creating it; *Re Flower*, 55 Hun, 158, 7 N. Y. Supp. 866, holding legislature empowered to re-levy tax, which was imposed under unconstitutional statute which did not provide for notice.

What constitutes judicial function.

Cited in *Lewis v. Bishop*, 19 Wash. 312, 53 Pac. 165, holding board of equalization in fixing valuation of property for taxation exercises judicial functions.

Jurisdiction to stay operation of judgment of lower court.

Cited in *Taber v. New York Elev. R. Co.* 12 Misc. 460, 34 N. Y. Supp. 29, on jurisdiction of Supreme Court justice to stay operation of judgment of Superior court obtained and outstanding.

30 AM. REP. 298, WOODWORTH v. PAYNE, 74 N. Y. 196.

Construction of conditions in grant.

Cited in *Hunter v. Murfee*, 126 Ala. 123, 128 So. 7, holding conveyance of

land "to have and to hold for use of college," does not convey estate on condition; *Brown v. State*, 5 Colo. 496, holding court will not imply condition in deed of land for public buildings as to time for erecting same; *Abbott v. Curran*, 98 N. Y. 665, holding recital in grant that it is made for commercial purposes only imposes no condition or restriction on title; *Board of Education v. Reilly*, 71 App. Div. 468, 75 N. Y. Supp. 876, holding recital in deed that it is for use of school district upon which to erect school, etc., not condition binding trustees to devote property to school purposes; *De Veaux College v. Highlands Land Co.* 63 App. Div. 461, 71 N. Y. Supp. 857, holding provision in will that two lots should constitute "farm and domain" of institution, not violated by sale of part thereof by institution.

Cited in note in 11 L.R.A. (N.S.) 513, 514, on rules for construction of devise to religious society specifying use to be made of the land.

Distinguished in *Bennett v. Culver*, 27 Hun, 554, holding grantor entitled to possession of land sold for cemetery as against execution creditor of grantee, where grantor reserves use of land until interments are made therein.

What constitutes breach of condition in grant.

Cited in *Conger v. Lowe*, 124 Ind. 368, 9 L.R.A. 165, 24 N. E. 889, holding conveyance on condition that grantee continue to live on farm broken on conveyance by grantee; *Adams v. First Baptist Church*, 148 Mich. 140, 11 L.R.A. (N.S.) 509, 111 N. W. 757, 12 A. & E. Ann. Cas. 224, holding renting of house devised to church not breach of condition that same shall be used as parsonage; *Smith v. Barrie*, 56 Mich. 314, 56 A. R. 391, 22 N. W. 816, holding condition that liquor shall not be sold on premises defeats conveyance on sale of liquor thereon; *Rose v. Hawley*, 141 N. Y. 366, 36 N. E. 335, holding erection of building which encroaches only few inches on land, not breach of condition that no building should be erected thereon; *Schumacher v. Reichardt*, 2 N. Y. City Ct. 341, holding covenant not to build rear house not broken by erection of building facing side street; *Portland v. Terivilliger*, 16 Or. 465, 19 Pac. 90, holding city ordinance prohibiting burial of dead within corporate limits, not breach of conditions in grant of land to be improved and used by city for cemetery.

Cited in notes in 11 L.R.A. (N.S.) 526, as to when condition is broken in devise to religious society, specifying use of real estate; 44 A. D. 754, on breach of condition subsequent as to use of premises.

Rights in church pews.

Cited in reference note in 38 A. D. 618, on nature of property of pew holder.

Cited in notes in 80 A. D. 664, on rights of pew holders; 80 A. D. 663; 22 L.R.A. 209, 210,—on nature of right and title of pew holders; 22 L.R.A. 212, on rights of parish or society in pew; 22 L.R.A. 215, on rights of pew owner in action for disturbance of pew.

30 AM. REP. 302, JOHNSON v. NATIONAL BANK, 74 N. Y. 329, Affirmed in 104 U. S. 271, 26 L. ed. 742.

Construction of national banking act as to rate of interest.

Affirmed in 104 U. S. 271, 26 L. ed. 742, holding national bank liable to penalties imposed by national banking act in discounting business paper at greater rate than seven per cent.

Cited in *Hinds v. Marmolejo*, 60 Cal. 229, holding national bank may contract in writing for any rate of interest agreed upon under state law; *Guild v. First Nat. Bank*, 4 S. D. 566, 57 N. W. 499, same in certain counties under territorial law; *National Bank v. Burr*, 27 Hun, 109, on indorsing of note by national bank for compensation being unlawful.

Cited in reference note in 68 A. S. R. 598, on effect of national banking act as to usury.

Cited in notes in 56 L.R.A. 707, on liability of national bank for double amount of entire interest, or of excess over legal interest; 23 L. ed. U. S. 197, on usury by national banks.

Meaning of words used in statute.

Cited in *Atlantic State Bank v. Savery*, 82 N. Y. 291, on words "purchase" and "discount" being synonymous as used in banking act; 36 A. R. 362, on difference between discount and purchase of note by bank.

30 AM. REP. 304, BIRKBECK v. ACKROYD, 74 N. Y. 356.

Married woman's services — Husband's right to.

Cited in *Klapper v. Metropolitan Street R. Co.* 34 Misc. 528, 69 N. Y. Supp. 955, holding wife's services in washing for third parties belong to husband; *Emerson-Talcott Co. v. Knapp*, 90 Wis. 34, 62 N. W. 945, holding wife not liable on note executed by husband and wife to procure agency for both.

Distinguished in *Coleman v. Burr*, 93 N. Y. 17, 45 A. R. 160, holding wife cannot recover under contract with husband to render services for him in taking care of his mother.

— Husband's right to sue for loss of.

Cited in *Brown v. Third Ave. R. Co.* 19 Misc. 504, 43 N. Y. Supp. 1094, holding request to charge that husband has no absolute legal right or claim to wife's earnings, properly refused in action by husband to recover for loss of wife's services; *Kirkpatrick v. Metropolitan Street R. Co.* 129 Mo. App. 524, 107 S. W. 1025 (dissenting opinion), on right of husband to recover for loss of wife's service as clerk in store.

— Husband's right to recover for.

Cited in *Plummer v. Trost*, 81 Mo. 425, holding husband entitled to recover for services rendered to another by wife; *Holcomb v. Harris*, 42 App. Div. 363, 59 N. Y. Supp. 160, holding husband entitled to recover for services rendered by wife in keeping house for another; *Porter v. Dunn*, 61 Hun, 310, 16 N. Y. Supp. 77, holding husband entitled to recover for services rendered by wife to consumptive whom husband agreed to care for; *Bowers v. Smith*, 5 Silv. Sup. Ct. 107, 28 N. Y. S. R. 346, 8 N. Y. Supp. 226, holding husband cannot recover for wife's services as nurse under agreement between them that she should receive the compensation; *Graf v. Feist*, 9 Misc. 479, 30 N. Y. Supp. 241, holding husband entitled to recover for wife's services, where their joint earnings in working for another are used for support of family; *Hyde v. Houston*, 61 N. Y. S. R. 330, 29 N. Y. Supp. 818, on right of husband to recover for services rendered by wife; *Gorman v. New York, C. & St. L. R. Co.* 128 App. Div. 414, 113 N. Y. Supp. 219, holding that father suing for damages occasioned by injury to infant son may recover for services of his wife.

Distinguished in *Re Providence Voters*, 13 R. I. 637, holding husband alone cannot sue for services performed by husband and wife jointly.

— Wife's right to recover for.

Cited in *Carver v. Wagner*, 51 App. Div. 47, 64 N. Y. Supp. 747, holding wife entitled to counterclaim for services rendered to third person with husband's consent; *Snow v. Cable*, 19 Hun, 280; *Stokes v. Pease*, 79 Hun, 304, 29 N. Y.

Supp. 430,—holding wife may recover for services rendered to third person pursuant to contract, with knowledge of husband; *Re Dailey*, 43 Misc. 552, 89 N. Y. Supp. 538; *Sands v. Sparling*, 82 Hun, 401, 31 N. Y. Supp. 251; *Burley v. Barnhard*, 9 N. Y. S. R. 587; *Lashaw v. Croissant*, 88 Hun, 206, 34 N. Y. Supp. 667,—holding wife entitled to sue for services rendered to third person on agreement with husband that she should receive the compensation; *Rowe v. Comley*, 11 Daly, 317, 1 N. Y. City Ct. 466, holding wife may recover earnings under contract made for her personal services, where payment is to be made to her; *Pursell v. Fry*, 58 How. Pr. 317, 19 Hun, 595, holding wife entitled to recover for services rendered for another, where she is supporting herself separate from husband; *Carver v. Wagner*, 51 App. Div. 47, 64 N. Y. Supp. 747, holding that wife's earnings acquired with husband's consent vests in her.

Distinguished in *Stevens v. Cunningham*, 181 N. Y. 454, 74 N. E. 434 (reversing 75 App. Div. 125, 77 N. Y. Supp. 364), holding wife entitled to recover for services rendered by her as nurse.

Husband's liability for wife's antenuptial debts.

Cited in *Kies v. Young*, 64 Ark. 381, 62 A. S. R. 198, 42 S. W. 669, holding husband's liability for wife's antenuptial debts, not abrogated by married woman's act.

30 AM. REP. 307, McGAFFIN v. COHOES, 74 N. Y. 387.

Necessity for presenting claims for tort against city.

Cited in *Dawes v. Great Falls*, 31 Mont. 9, 77 Pac. 309; *Harrigan v. Brooklyn*, 1 Silv. Sup. Ct. 330, 5 N. Y. Supp. 673, 24 N. Y. S. R. 352; *Cavan v. Brooklyn*, 16 N. Y. S. R. 758, 2 N. Y. Supp. 21; *Taylor v. Cohoes*, 105 N. Y. 54, 11 N. E. 282,—holding action against city for negligence not within law requiring presentation of claim; *Childs v. West Troy*, 23 Hun, 68, holding claimant against city not required to present tort claim for audit.

Distinguished in *Nagel v. Buffalo*, 34 Hun, 1, holding action against city for negligence within act requiring presentation of claim.

Meaning of words in instrument.

Cited in *Re Tilden*, 98 N. Y. 434, holding words "other sufficient cause" in Code provision limiting surrogate's power, mean causes similar to those specified; *Mangam v. Brooklyn*, 98 N. Y. 585, 50 A. R. 705, holding provision of constitution prohibiting decreasing of public officers' fees does not apply to fixed salaries; *Sims v. United States Trust Co.* 103 N. Y. 472, 9 N. E. 605, holding words "or otherwise" in power of attorney limited in meaning by preceding words; *Hurst v. Trow Printing & Bookbinding Co.* 2 Misc. 361, 22 N. Y. Supp. 371, 30 Abb. N. C. 1, holding word "rescind" in contract cannot be construed alone without regard to surrounding circumstances; *People v. Sharp*, 45 Hun, 460, 5 N. Y. Crim. Rep. 388, holding word "investigation" following words trial and hearing in statute, relates to court proceedings; *Suter v. Wenatchee Water Power Co.* 35 Wash. 1, 102 A. S. R. 881, 76 Pac. 298, holding limitation of Code for commencement of action upon contract "or liability" refers only to contractual liabilities; *People ex rel. Nugent v. Oneida County*, 65 Misc. 327, 121 N. Y. Supp. 372, holding that general words of description in statute should be controlled by specific words.

Cited in reference note in 102 A. S. R. 887, on construction of limitation provision in city charter.

30 AM. REP. 311, LEWIS v. SEABURY, 74 N. Y. 409.**Parol evidence of independent collateral agreement.**

Cited in *Welz v. Rhodius*, 87 Ind. 1, 44 A. R. 747, holding parol evidence of contemporaneous parol agreement made in consideration of execution of written lease, admissible; *Van Brunt v. Day*, 81 N. Y. 251, 8 Abb. N. C. 336, holding evidence of parol agreement of mortgagee to keep building insured until mortgage became due, admissible in foreclosure action against guarantor under mortgage; *Van Derhoef v. Hartmann*, 63 App. Div. 419, 71 N. Y. Supp. 552, holding proof, in action for rent on written lease, of concurrent oral agreement to repair, competent; *Stowell v. Greenwich Ins. Co.* 20 App. Div. 188, 46 N. Y. Supp. 802, holding independent collateral oral agreement between insurance company and agent, may be proved although contract of agency is in writing; *Reynolds v. Robinson*, 37 Hun, 561, holding oral testimony as to agreement that sale of lumber should be contingent on satisfactory report of vendee's standing, inadmissible to vary written contract for sale of lumber; *Duparquet v. Knubel*, 24 Hun, 653, holding parol evidence of agreement to pay for range, admissible, although surrender of premises on which range was, was in writing; *Anderson v. Matheny*, 17 S. D. 225, 95 N. W. 911 (dissenting opinion), on right of surety on note to show separate agreement by parol; *Mast v. Pearce*, 58 Iowa, 579, 43 A. R. 125, 8 N. W. 832, holding that parol warranty cannot be shown where there is written contract of sale complete in itself.

Cited in reference notes in 44 A. R. 746, on admissibility of parol evidence to prove a contemporaneous oral agreement; 2 A. S. R. 604, on admissibility of parol evidence to explain or vary instrument in writing.

Cited in notes in 13 L.R.A. 633, on admissibility of parol evidence to show waiver; 17 L.R.A. 271, on reason for rule excluding parol evidence to alter written contract.

Distinguished in *Hutzler v. Richter*, 13 App. Div. 592, 43 N. Y. Supp. 679 (dissenting opinion), on admissibility of parol proof of agreement by mortgagee to have policy transferred.

When oral agreement is merged in written contract.

Cited in *Stearns v. Lichtenstein*, 48 App. Div. 498, 62 N. Y. Supp. 949, holding oral agreement between lessor and lessee as to termination of other tenancies, not merged in written lease executed in reliance thereon; *Barasch v. Kramer*, 62 Misc. 475, 115 N. Y. Supp. 176, holding that distinct and separable provisions of oral agreement are not affected by deed.

30 AM. REP. 315, WHEELER v. RUTHVEN, 74 N. Y. 428.**When legacy due and payable.**

Cited in *Kolyer v. Bennett*, 28 Hun, 506, holding legacy payable six months after testator's death, under direction in will to that effect; *Re Prior*, 32 N. Y. S. R. 712, 10 N. Y. Supp. 861, holding legacy due at end of year from issuing of letters testamentary; *Dixon v. Storm*, 5 Redf. 419, holding legacy given by execution of power of appointment contained in will vests immediately upon appointee's death; *Koon's Appeal*, 113 Pa. 621, 6 Atl. 377, holding that rule that legacies are payable one year after date applies unless there be language or circumstances on face of the will to the contrary.

When interest begins to run on legacy.

Cited in *Bank of Niagara v. Talbot*, 110 App. Div. 519, 96 N. Y. Supp. 976, holding legacies draw interest from six years after testator's death on direction

in will to pay legacies after six years; *Smith v. Lansing*, 24 Misc. 566, 53 N. Y. Supp. 633, holding legacies falling to grandchildren on death of child carry interest from time of child's death; *Re Gibson*, 2 Connolly, 125, 8 N. Y. Supp. 348, 24 Abb. N. C. 45, holding interest begins to run on legacy in one year after testator's death, although not payable until after expiration of year from granting of letters; *Carr v. Bennett*, 3 Dem. 433, holding legacy to daughter for life and then to her children, bears interest from one year after testator's death; *Hermann's Estate*, 220 Pa. 52, 69 Atl. 285, holding interest not allowed on legacies payable by son to other children until he takes estate after life use of testator's wife; *Herman's Estate*, 57 Pittsb. L. J. 322, holding that under devise of land charged with specific legacies and subject to dower, legacies draw interest from widow's death; *Re Hussey*, 67 Misc. 32, 124 N. Y. Supp. 426, holding that legacies payable out of trust estate upon death of life tenant begin to draw interest at termination of life estate; *Re Rutherford*, 133 App. Div. 89, 117 N. Y. Supp. 791, holding that when estate is insufficient to pay all legacies within year but becomes so subsequently interest is payable only from such time, in absence of direction.

Distinguished in *Re Rutherford*, 196 N. Y. 311, 89 N. E. 820, holding that legatee is entitled to interest after one year from granting of letters if there is nothing in will to indicate postponement, where estate was sufficient to pay in part though there was expectant estate; *Koons's Appeal*, 18 W. N. C. 247, holding interest on legacy payable from one year after testator's death, where balance of estate in trust was directed to be applied to other legacies, trust estate to continue until death of last annuitant.

Testator's intention as governing construction of will.

Cited in *Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. 867, holding widow put to her election, where intention of testator in making provision for her is shown from will and circumstances of estate to be that it was in lieu of dower; *Foster v. Wetmore*, 37 N. Y. S. R. 687, 14 N. Y. Supp. 194, holding circumstances of estate are to be consulted to ascertain design of testatrix in giving direction as to payment of legacies.

Surrogate's jurisdiction to construe wills.

Cited in *Riggs v. Cragg*, 89 N. Y. 479, 11 Abb. N. C. 401, holding surrogate has jurisdiction to construe will, where right to legacy depends upon construction which must be determined before distribution can be made.

30 AM. REP. 319, JORDAN v. NATIONAL SHOE & LEATHER BANK, 74 N. Y. 467.

Right of bank to apply deposit to indebtedness.

Cited in *Meyers v. New York County Nat. Bank*, 36 App. Div. 482, 55 N. Y. Supp. 504, sustaining right to apply deposit to payment of matured indebtedness; *State v. Beach*, 147 Ind. 74, 36 L.R.A. 179, 43 N. E. 949; *Pearsall v. Nassau Nat. Bank*, 74 App. Div. 89, 77 N. Y. Supp. 11; *Heidelberg v. National Park Bank*, 87 Hun, 117, 33 N. Y. Supp. 794,—denying right to apply deposit to payment of matured indebtedness.

Cited in notes in 55 A. S. R. 467; 26 L. ed. U. S. 694,—on bankers' lien; 4 A. S. R. 203, to point that no lien exists for debt not yet due.

Denied in *Hodgin v. People's Nat. Bank*, 125 N. C. 503, 38 S. E. 709 (reversed on rehearing 124 N. C. 540, 32 S. E. 887), denying right to apply deposit by sole surviving partner to payment of firm debt created before dissolution.

—Deposit of trust funds.

Cited in *Rock Springs Nat. Bank v. Luman*, 6 Wyo. 123, 42 Pac. 874 (dissenting opinion), majority holding bank liable for trust funds applied to payment of trustee's indebtedness with knowledge of fiduciary nature.

—Effect of insolvency of depositor.

Cited in *Smith v. Eighth Ward Bank*, 31 App. Div. 6, 52 N. Y. Supp. 290, sustaining right to apply proceeds of note deposited for collection in payment of others maturing before depositor's insolvency; *Irish v. Citizens' Trust Co.* 163 Fed. 880, holding that payment of note due by depositor of bank holding note may be recovered by trustee in bankruptcy of depositor, where bankruptcy occurs before note matures.

—Effect of death of depositor.

Cited in *Camden Nat. Bank v. Green*, 45 N. J. Eq. 546, 17 Atl. 689, sustaining right to apply deposit, transferred to sole legatee, in payment of testator's note maturing after death; *Sharp v. Citizens' Bank*, 70 Neb. 758, 98 N. W. 50, holding that bank has no lien on deposit against notes owed by depositor to bank which matured after depositor's death, which is subject of subrogation.

Distinguished in *Dougherty Bros. v. Central Nat. Bank*, 11 Pittsb. L. J. N. S. 22, holding that bank has equitable right over credit it gives borrower, who becomes insolvent, for proceeds of note it discounted for him.

What constitutes a lien.

Cited in *Weisel v. Old Dominion S. S. Co.* 99 App. Div. 568, 91 N. Y. Supp. 140, holding right to prior payment not in itself a lien.

Right of set-off or counterclaim.

Cited in *Stevens v. Orton*, 18 Misc. 538, 43 N. Y. Supp. 792, holding that omission to reply does not waive objection that allegations of answer do not give right to counterclaim as that is a question of law; *Mairs v. Manhattan Real Estate Asso.* 89 N. Y. 498, denying right to counterclaim for rent due from premises other than those on which alleged damage was done; *Ely v. Spiero*, 28 App. Div. 485, 51 N. Y. Supp. 124, holding that privilege of set-off, with exception of mutual accounts of debit and credit, attaches to remedy only; *Coffin v. McLean*, 80 N. Y. 560, denying right to set-off, in action on undertaking, indebtedness due and payable before such cause of action arose; *Emigrant Industrial Sav. Bank v. Clute*, 33 Hun, 82, denying right to set-off, in foreclosure action, claim which matured subsequent to execution and delivery of mortgage; *Taylor v. New York*, 82 N. Y. 10, holding that two matured debts may be mutually set off, though remedy on one is suspended by statute.

Cited in notes in 89 A. D. 485, on allowance of counterclaim under code; 47 A. S. R. 581, on maturity of demand as affecting equitable set-off against insolvent; 11 L.R.A. 259, on equitable rule as to cross demands; 27 L.R.A. (N.S.) 813, on right of bank to set-off unmatured claim against deposit.

Distinguished in *Richards v. La Tourette*, 119 N. Y. 54, 23 N. E. 531 (reversing 53 Hun, 623, 6 N. Y. Supp. 937), sustaining right to set-off debt against mortgage not yet due from insolvent mortgagees; *Bradley v. Thompson Smith's Sons*, 98 Mich. 449, 39 A. S. R. 565, 23 L.R.A. 305, 57 N. W. 576, denying creditor's right to set off assignor's indebtedness at time executory contract was assigned in assignee's action for price.

—Of or against deposits in insolvent bank.

Cited in *Fisher v. Knight*, 9 C. C. A. 582, 17 U. S. App. 502, 61 Fed. 491, 34 W. N. C. 310, denying receiver's right to set-off against deposit, note unmatured

when bank became insolvent; *Stephens v. Schuchmann*, 32 Mo. App. 333, denying indorser's right to set-off deposit in national bank against note maturing after its insolvency; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580, denying right to set-off unmatured certificate of deposit in insolvent bank against note maturing after its indorsement to third party.

Cited in note in 47 A. S. R. 585, on insolvency as affecting set-off in favor of bank.

Distinguished in *Seymour v. Dunham*, 24 Hun, 93, sustaining right to set-off unmatured certificate of deposit with insolvent banker against matured note due such banker; *Yardley v. Clothier*, 49 Fed. 337, 29 W. N. C. 305, 1 Pa. Dist. R. 46, sustaining right of depositor in insolvent national bank to set-off deposit against note maturing after its insolvency.

— By or against insolvent depositor.

Cited in *Stallcup v. National Park Bank*, 6 N. Y. S. R. 512, denying right to set-off against insolvent's deposit claim not existing when assignment made; *Homer v. National Bank*, 140 Mo. 225, 41 S. W. 790, denying right to set-off against insolvent's deposit debt unmatured when assignment was made; *Oatman v. Batavia Bank*, 77 Wis. 501, 20 A. S. R. 136, 46 N. W. 881, denying right to set-off against deposit, assignor's note unmatured when assignment was made.

Cited in note in 15 L.R.A. 711, on right of bank to set-off unmatured claim against deposit account of insolvent debtor.

Distinguished in *Kentucky Flour Co. v. Merchants' Nat. Bank (Fidelity Trust & Safety Vault Co. v. Merchants' Nat. Bank)*, 90 Ky. 225, 9 L.R.A. 108, 13 S. W. 910, sustaining right to set-off against insolvent's deposit debt unmatured when assignment made; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 15 L.R.A. 710, 18 S. W. 822, sustaining right to set-off unmatured debt against insolvent's deposit; *Coates v. Donnell*, 16 Jones & S. 46, sustaining right to set-off amount of acceptance against insolvent's deposit; *Lancaster Nat. Bank v. Huver*, 18 W. N. C. 393 (reversing 2 Del. Co. Rep. 466); *Dougherty Bros. v. Central Nat. Bank*, 93 Pa. 227, 39 A. R. 750, 9 W. N. C. 1, 37 Phila. Leg. Int. 225,—sustaining right of bank to tender back discounted note and refuse payment of proceeds credited, as against insolvent borrower's assignee.

— Against deposit of trust funds.

Cited in *Falkland v. St. Nicholas Nat. Bank*, 84 N. Y. 145, denying right to set-off note against funds deposited by maker in trust for others.

— Against deposit of decedent.

Cited in *Jaeger v. Bowery Bank*, 8 Misc. 150, 29 N. Y. Supp. 303, denying right to set-off against testator's deposit, note maturing after death.

Distinguished in *Ainsworth v. Bank of California*, 119 Cal. 470, 63 A. S. R. 135, 39 L.R.A. 686, 51 Pac. 952, sustaining right to set-off against testator's deposit, not maturing subsequent to death but before executor's action; *Peyman v. Bowery Bank*, 14 App. Div. 432, 43 N. Y. Supp. 826, sustaining right to set-off against intestate's deposit, note maturing after death when discount was obtained by fraud.

— By or against decedent's estate, generally.

Cited in *McCormick v. Sullivan*, 71 Hun, 333, 24 N. Y. Supp. 1117, denying right to set-off against indebtedness to intestate claim against latter not existing or held at death; *Blood v. Kane*, 130 N. Y. 514, 15 L.R.A. 490, 29 N. E. 994; majority sustaining right of executor to set-off claimant's indebtedness to testator against demand for burial expenses; *Armstrong v. McKelvey*, 39 Hun,

213, denying right to set-off alleged indebtedness to testator in statutory action against legatee's for recovery of debt.

Distinguished in *Brooks v. Cannon*, 9 N. Y. S. R. 506, sustaining right to set-off intestate's debt against administrator's claim, when both demands matured subsequent to former's death.

— Of judgments.

Cited in *DeCamp v. Thomson*, 159 N. Y. 444, 70 A. S. R. 570, 54 N. E. 11, denying right to mutually set-off judgments, where appeal from one of them is pending.

— In equity.

Cited in *Johnston v. Humphrey*, 91 Wis. 76, 51 A. S. R. 873, 64 N. W. 317, holding that equity will follow and obey statute expressly giving right of set-off. First objecting to sufficiency of allegation as to counterclaim on appeal.

Cited in *Thornton v. Moore*, 26 Misc. 120, 56 N. Y. Supp. 1100, denying right to first object to sufficiency of allegation of counterclaim on appeal.

Bank discounting note as bona fide purchaser.

Cited in *Mann v. Second Nat. Bank*, 30 Kan. 412, 1 Pac. 579, holding bank discounting note and crediting depositor with proceeds not bona fide holder for value.

Right to follow trust funds.

Cited in *Farmers' & M. Bank v. Farwell*, 7 C. C. A. 391, 19 U. S. App. 250, 58 Fed. 633, holding assignees of insurance policy entitled to proceeds deposited in creditor's bank by mistake of assignor's attorney.

30 AM. REP. 323, BERTHOLF v. O'REILLY, 74 N. Y. 509.

Proper exercise of police power.

Cited in *Horace Walers & Co. v. Gerard*, 189 N. Y. 303, 121 A. S. R. 886, 82 N. E. 143, 12 A. & E. Ann. Cas. 397, holding act giving innkeeper lien on goods of third person in rightful possession of guest, constitutional; *People v. New York Carbonic Acid Gas Co.* 196 N. Y. 421, 90 N. E. 441, holding that it was within police power of state to control use of mineral waters flowing under surface of owner's land; *Rhodes v. Sperry & H. Co.* 193 N. Y. 223, 127 A. S. R. 945, — L.R.A.(N.S.) —, 85 N. E. 1097, holding that right of legislature to define and declare new offenses, except in so far as restricted by constitutional provisions, is unlimited; *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 1, 116 S. W. 902, holding that all property is held subject to power of state to regulate or control its use.

Cited in notes in 51 A. R. 349, 350, on validity of health ordinances; 6 L.R.A. 622, on proper exercise of police power.

Distinguished in *Wilson v. Commercial Telegram Co.* 18 N. Y. S. R. 78, 3 N. Y. Supp. 633, on scope of police power in legislation.

— Regulations of business, generally.

Cited in *People v. Cannon*, 63 Hun, 306, 18 N. Y. Supp. 25, 10 N. Y. Crim. Rep. 160, holding act which is constitutional is not invalid because it seems harsh in regard to innocent purchaser; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468 (affirming 117 N. Y. 1, 45 A. S. R. 460, 5 L.R.A. 559, 22 N. E. 670, 7 N. Y. Crim. Rep. 189, which affirms 50 Hun, 413, 2 N. Y. Supp. 275, 6 N. Y. Crim. Rep. 57), holding statute regulating elevator charges in certain cities, constitutional exercise of police

power; *White v. Farmers' Highline Canal & Reservoir Co.* 22 Colo. 191, 31 L.R.A. 828, 43 Pac. 1028, holding statute regulating powers of ditch-company over water furnished for irrigation, constitutional; *State v. Canal & C. Co.* 50 La. Ann. 1189, 56 L.R.A. 287, 24 So. 265, holding ordinance requiring street railway company to sprinkle street within its tracks, constitutional exercise of police power; *Re Jacobs*, 98 N. Y. 98, 50 A. R. 636, 2 N. Y. Crim. Rep. 539 (affirming 33 Hun, 374, 2 N. Y. Crim. Rep. 346), holding statute prohibiting manufacture of cigars in tenement-houses, unconstitutional; *People v. Havnor*, 149 N. Y. 195, 52 A. S. R. 707, 31 L.R.A. 689, 43 N. E. 541, 12 N. Y. Crim. Rep. 25, holding statute making it a misdemeanor to conduct barbering during certain hours on Sunday, constitutional exercise of police power; *People v. Lochner*, 73 App. Div. 120, 76 N. Y. Supp. 396, 16 N. Y. Crim. Rep. 520, holding law prohibiting working of employees in bakery more than 60 hours in one week valid exercise of police power; *People v. Beattie*, 96 App. Div. 383, 89 N. Y. Supp. 193, holding statute regulating black-smithing unconstitutional exercise of police power; *People v. New York, N. H. & H. R. R. Co.* 55 Hun, 409, 8 N. Y. Supp. 672, holding statute regulating method of heating railroad cars, constitutional exercise of police power; *People v. Cannon*, 63 Hun, 306, 18 N. Y. Supp. 25, 10 N. Y. Crim. Rep. 160, holding statute prohibiting traffic in certain kinds of bottles except with permission of person whose device stamped thereon, constitutional; *People v. Rosenberg*, 67 Hun, 52, 22 N. Y. Supp. 56, holding statute prohibiting fat rendering etc. within limits of city, constitutional exercise of police power; *People v. Webster*, 17 Misc. 410, 45 N. Y. Supp. 1135, 11 N. Y. Crim. Rep. 340, holding statute prohibiting sale of silver marked sterling, if not meeting certain requirements, constitutional exercise of police power; *State v. Moore*, 104 N. C. 714, 17 A. S. R. 696, 10 S. E. 143, holding statute making it criminal to buy or sell seed cotton in certain localities, in quantities less than bale, constitutional exercise of police power; *State v. Moore*, 113 N. C. 697, 28 L.R.A. 472, 18 S. E. 342, holding statute prohibiting "emigrant agents" from hiring laborers to employment outside state, unconstitutional exercise of police power; *Brittain's Application*, 5 Pa. Co. Ct. 318, 22 W. N. C. 35, holding provisions of statute requiring denial of peddler's license to persons physically disabled, unconstitutional not being exercise of police power; *State v. Scougall*, 3 S. D. 55, 44 A. S. R. 756, 15 L.R.A. 477, 51 N. W. 858, holding statute prohibiting individuals from conducting banking business, unconstitutional; *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, holding Texas anti-trust law, 1895, prohibiting combinations restraining trade, constitutional exercise of police power; *Block v. Schwartz*, 27 Utah, 387, 101 A. S. R. 971, 65 L.R.A. 308, 76 Pac. 22, 1 A. & E. Ann. Cas. 550, holding statute requiring inventories of property sold in bulk and making violation, misdemeanor, unconstitutional.

Cited in notes in 1 A. S. R. 644, on power of state to regulate or prohibit sale or manufacture of articles; 27 L.R.A. (N.S.) 600, on power of legislature to regulate business.

—Regulation of sale of foods.

Cited in *Helena v. Dwyer*, 64 Ark. 424, 62 A. S. R. 206, 39 L.R.A. 266, 42 S. W. 1071, holding municipal ordinance prohibiting sale of fresh pork in certain months, unconstitutional exercise of police power; *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315, holding statute prohibiting sale of vinegar not conforming to prescribed standard, constitutional exercise of police power; *Peo-*

ple v. Marx, 99 N. Y. 386, 52 A. R. 34, 2 N. E. 29, 3 N. Y. Crim. Rep. 207, reversing 3 N. Y. Crim. Rep. 13, overruling *People v. McGann*, 34 Hun, 358, 3 N. Y. Crim. Rep. 6, holding statute prohibiting manufacture of substitutes for butter and cheese unconstitutional; *People v. Buffalo Fish Co.* 164 N. Y. 93, 79 A. S. R. 622, 52 L.R.A. 803, 58 N. E. 34, 15 N. Y. Crim. Rep. 93, holding that statute against possession of fish in close season, should not be absurdly construed to apply to fish caught without state; *People v. West*, 106 N. Y. 293, 6 N. Y. Crim. Rep. 382, 12 N. E. 610, holding statute prohibiting bringing to butter or cheese manufactory, milk diluted with water, constitutional, although said acts were lawful before statute was enacted; *Bell v. Gaynor*, 14 Misc. 334, 36 N. Y. Supp. 122, holding statute making it criminal for persons other than owner to use milk cans, unconstitutional; *Com. v. Powell*, 1 Pa. Co. Ct. 94, affirmed in 114 Pa. 265, 19 W. N. C. 24, 60 A. R. 350, 7 Atl. 913, 7 Am. Crim. Rep. 32, holding statute prohibiting manufacture and sale of adulterated butter and cheese, constitutional exercise of police power; *People v. Gillson*, 109 N. Y. 389, 4 A. S. R. 465, 17 N. E. 343, holding statute making it criminal to give something as prize with article of food sold, unconstitutional.

— Regulation of sale of liquor.

Cited in *Hedderich v. State*, 101 Ind. 564, 51 A. R. 768, 1 N. E. 47, holding statute prohibiting sale of liquor between certain hours, constitutional exercise of police power; *Haggart v. Stehlin*, 137 Ind. 43, 22 L.R.A. 577, 35 N. E. 997, holding constitutional, statute regulating licensing of liquor sellers; *Reithmiller v. People*, 44 Mich. 280, 6 N. W. 667, holding statute prohibiting sale of liquor on legal holidays constitutional exercise of police power; *People ex rel. Bassett v. Warden*, 17 Misc. 1, 38 N. Y. Supp. 837, holding statute prohibiting giving away of food to be eaten on premises where liquor sold, constitutional exercise of police power; *Mullen v. Peck*, 49 Ohio St. 447, 31 N. E. 1077, holding statute making owner of property on which lessee sells liquor, liable for damages resulting therefrom, constitutional; *McCullough v. Brown*, 41 S. C. 220, 23 L.R.A. 410, 19 S. E. 458, holding dispensary act, unconstitutional not being exercise of police power, and taking away right to traffic in liquors.

Cited in note in 35 A. D. 331, on how far state may regulate or prohibit sale of intoxicating liquors.

Distinguished in *People v. Lyon*, 27 Hun, 180, holding unconstitutional, provisions making drinking on premises of seller of liquor prima facie evidence that it was sold with intent to be drunk on premises.

Equal protections of the law.

Cited in *People v. King*, 110 N. Y. 418, 6 A. S. R. 389, 1 L.R.A. 293, 18 N. E. 245, holding constitutional statute making it a penal offense to exclude persons from place of amusement by reason of race or color.

Due process of law.

Cited in *Bradley v. New Haven*, 73 Conn. 646, 48 Atl. 960 (dissenting opinion), majority denying power of legislature to authorize court to examine judicially, into law valuations, independent of assessments made by taxing authorities; *Abendroth v. New York Elev. R. Co.* 22 Jones & S. 417, sustaining injunction against railroad company causing smoke, steam etc., to damage adjacent owner's property, from so doing without due process of law; *Womach v. St. Joseph*, 201 Mo. 467, 10 L.R.A. (N.S.) 140, 100 S. W. 443, holding that husband's suit for wife's injuries cannot be taken from him by bar of unsuccessful suit by wife; *People v. Cipperly*, 37 Hun, 319, 3 N. Y. Crim. Rep. 399, holding

unconstitutional, provisions of statute, declaring adulteration of milk conclusively established by failure to conform to certain standard; *Dodge v. Cornelius*, 168 N. Y. 242, 61 N. E. 244 (dissenting opinion), affirming unconstitutionality of statute providing penalty for failure of witnesses to will to insert residences; *Seaman v. Clarke*, 60 App. Div. 416, 69 N. Y. Supp. 1002, holding cause of action such right of property, that to permit defendants to amend answer setting up limitation not possible at commencement of action, would be taking without due process of law; *People ex rel. Kenny v. Folks*, 89 App. Div. 171, 85 N. Y. Supp. 1100, holding constitutional provisions of Civil Service law restricting appointing officers of municipalities from removing veteran firemen.

Cited in notes in 62 A. D. 167; 2 L.R.A. 655; 11 L.R.A. 224,—on what is due process of law; 7 L.R.A. 667, on constitutional guaranty of property rights.

— Regulation of trade or business.

Cited in *Re Grice*, 79 Fed. 627, holding Texas anti-trust statute, making it criminal to combine to increase price of commodities etc. unconstitutional as restricting power to contract; *Ex parte Campbell*, 74 Cal. 20, 5 A. S. R. 418, 15 Pac. 318, as to whether ordinance prohibiting sale of liquor in certain city is unconstitutional as to liquors already owned; *Greater New York Athletic Club v. Wurster*, 19 Misc. 443, 43 N. Y. Supp. 703, denying power of mayor to revoke theater license already granted; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 3 N. Y. Crim. Rep. 200, holding act prohibiting manufacture and sale of oleaginous substance designed to take place of butter or cheese, unconstitutional; *People v. McGann*, 34 Hun, 358, 3 N. Y. Crim. Rep. 1, holding act prohibiting manufacture and sale of oleaginous substances designed to take place of butter or cheese, constitutional.

— As to condemnation of property.

Cited in *People v. Adirondack R. Co.* 160 N. Y. 225, 54 N. E. 689, holding statute authorizing condemnation of land for Adirondack Park, not unconstitutional as dispensing with due process of law; *Roddy v. Brooklyn City & N. R. Co.* 32 App. Div. 311, 52 N. Y. Supp. 1025, denying injunction against lessee railway company compelling it to obtain consents under statute passed since lessor company obtained valid right without consent under former statute; *People ex rel. Oak Hill Cemetery Asso. v. Pratt*, 14 N. Y. Supp. 551, holding constitutional, repeal of ordinance permitting cemetery association to make interments in certain lot purchased after passage of permitting ordinance.

— Allowance of mechanics' lien.

Cited in *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, holding statute giving subcontractors mechanic's liens on lands without regard to amount unpaid to contractor thereon, constitutional; *Gibbs v. Tally*, 133 Cal. 373, 60 L.R.A. 815, 65 Pac. 970, holding statute requiring bond from contractors for benefit of materialmen, and making owners liable in default thereof, unconstitutional; *Wilson v. Whitmore*, 92 Hun, 466, 36 N. Y. Supp. 550, sustaining legislative power to provide for collection by materialmen against bondsmen of contractors with city; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313, holding statute giving mechanic's lien on owner's property to subcontractor, unconstitutional.

— Necessity for notice and hearing.

Cited in *Hunt v. Searcy*, 167 Mo. 158, 67 S. W. 206, holding judgment of insanity invalid if made without notice of proceedings to alleged insane person;

People ex rel Ordway v. St. Saviour's Sanitarium, 34 App. Div. 363, 56 N. Y. Supp. 431, holding it unconstitutional to commit inebriate to sanitarium for treatment and reformation, without notice and hearing; *Jones v. Yore*, 142 Mo. 38, 43 S. W. 384, denying judgment for services valid, when motion for allowance as guardian made without notice to infants interested; *Williams v. Port Chester*, 97 App. Div. 84, 89 N. Y. Supp. 671, on unconstitutionality of statute limiting rights of action for negligence of municipality to claims notice of which filed within unreasonable time; *Conklin v. Cunningham*, 7 N. M. 445 38 Pac. 170 (dissenting opinion), majority holding constitutional, statute giving governor power to remove delinquent sheriff without notice; *People ex rel. Lodes v. Health Dept.* 117 App. Div. 856, holding that board of health cannot revoke milk dealer's license without notice and hearing.

"Civil damage act" — Validity of.

Cited in *Bistline v. Ney Bros.* 134 Iowa, 172, 13 L.R.A.(N.S.) 1158, 111 N. W. 422, 13 A. & E. Ann. Cas. 196, holding legislature empowered to create cause of action against person selling liquor to one in habit of becoming intoxicated; *Zibold v. Reneer*, 73 Kan. 312, 85 Pac. 290, holding legislature empowered to create cause of action against person selling liquor to husband for injury to wife in her means of support; *Volans v. Owen*, 74 N. Y. 526, 30 A. R. 337, holding Civil Damage act constitutional.

Cited in reference note in 30 A. R. 337, on validity of civil-damage act making lessors liable.

Cited in note in 35 A. D. 338, 339, on constitutionality of civil-damage laws.

— Liability under, generally.

Cited in *Dunlap v. Wagner*, 85 Ind. 529, 44 A. R. 42, holding liquor-seller liable for value of horse driven to death by person intoxicated by liquor bought from him; *Horace Waters & Co. v. Gerard*, 189 N. Y. 302, 121 A. S. R. 886, 24 L.R.A.(N.S.) 958, 82 N. E. 143, 12 A. & E. Ann. Cas. 397, to the point that owner of premises leased for sale of intoxicating liquor is liable to person injured in consequence of intoxication of any person obtaining liquor on premises; *Bistline v. Ney Bros.* 134 Iowa, 172, 13 L.R.A.(N.S.) 1158, 111 N. W. 422, 13 A. & E. Ann. Cas. 196, holding proof that husband committed suicide while intoxicated with liquor sold by defendant sufficient in action by wife under statute; *Nelson v. State*, 32 Ind. App. 88, 69 N. E. 298, holding liquor-seller liable to widow for death of husband due to intoxication from liquor purchased from him; *Homire v. Holfman*, 156 Ind. 470, 60 N. E. 154, sustaining recovery under Civil Damage act, by wife against person selling liquor to husband under influence of which he committed murder and was imprisoned; *Neu v. McKechnie*, 95 N. Y. 632, 47 A. R. 89, sustaining recovery under Civil Damage act by infant whose father, becoming intoxicated at defendant's saloon, murdered his wife and committed suicide; *Belles v. Walhizer*, 43 Hun, 254, sustaining recovery against saloon keeper by wife of person sentenced to prison for life for crime committed while intoxicated by liquor sold by him; *Bacon v. Jacobs*, 63 Hun, 51, 17 N. Y. Supp. 323, sustaining recovery under Civil Damage act, notwithstanding assault by intoxicated person might have been committed had he not been intoxicated.

Cited in notes in 48 A. D. 628, on injuries to relative for which an action will lie under civil damage acts; 36 A. S. R. 831, on liability for causing bodily incapacity by supplying intoxicating liquors; 85 A. S. R. 452, on liability of liquor sellers for mismanagement of teams by persons becoming intoxicated.

Distinguished in *Dudley v. Parker*, 132 N. Y. 386, 30 N. E. 737, holding seller

of liquor not liable under civil damage act for damage caused by one to whom purchaser of liquor had given some.

— Liability for exemplary damages under.

Cited in *Reid v. Terwilliger*, 42 Hun, 310, sustaining recovery for exemplary damages under Civil Damage act, against landlord joint defendant with liquor seller.

Presumption of constitutionality of statute.

Cited in *People v. West*, 106 N. Y. 293, 60 A. R. 452, 12 N. E. 610; *People ex rel. Einsfeld v. Murray*, 4 App. Div. 185, 38 N. Y. Supp. 909; *Colon v. Lisk*, 13 App. Div. 195, 43 N. Y. Supp. 364; *People v. McGann*, 34 Hun, 358, 3 N. Y. Crim. Rep. 8 (dissenting opinion); *People v. Ulster County*, 36 Hun, 491; *People v. Cipperly*, 37 Hun, 319 (dissenting opinion); *Herdice v. Roesler*, 39 Hun, 198; *Prentice v. Weston*, 47 Hun, 121; *Spitzer v. Fulton*, 33 Misc. 257, 68 N. Y. Supp. 660; *New York v. Chelsea Jute Mills*, 43 Misc. 266, 88 N. Y. Supp. 1085; *Crafts v. Ray*, 22 R. I. 179, 49 L.R.A. 604, 46 Atl. 1043; *Ah Lim v. Territory*, 1 Wash. 156, 9 L.R.A. 395, 24 Pac. 588,—holding statutes presumed to be constitutional and within legislative power unless against plain restrictions of constitution.

Estoppel to deny validity of statute.

Cited in *State v. Dupaquier*, 46 La. Ann. 577, 49 A. S. R. 334, 26 L.R.A. 162, 15 So. 502; *Com. v. Carter*, 132 Mass. 12, to point that person accepting license, under statute, to sell milk, makes himself liable to allow inspectors to examine as provided by statute; *People ex rel. Warren v. Beck*, 10 Misc. 77, 30 N. Y. Supp. 473, holding contractor bidding for and accepting work from city, bound by provisions of statute against more than eight hours labor.

Violation of Sunday law as defense in action for injuries.

Cited in *Platz v. Cohoes*, 24 Hun, 101, denying defense, in action for negligence in maintaining street, that plaintiff was traveling in violation of Sunday law; *Solarz v. Manhattan R. Co.* 8 Misc. 656, 29 N. Y. Supp. 1123, 31 Abb. N. C. 426, holding that party employed to work in violation of law prohibiting Sunday labor may recover for injuries caused by employer's negligence.

Cited in note in 16 L. ed. U. S. 683, on injuries incurred while traveling on Sunday.

What "injury to life or limb," includes.

Cited in *Iola v. Birnbaum*, 71 Kan. 600, 81 Pac. 198, 6 A. & E. Ann. Cas. 267, holding that statute providing for recovery of damages for injury to life or limb, applies to all bodily injuries.

30 AM. REP. 337, VOLANS v. OWEN, 74 N. Y. 526.

"Civil damage act."

Cited in *Mead v. Stratton*, 87 N. Y. 493, 41 A. R. 386; *Reid v. Terwilliger*, 116 N. Y. 530, 22 N. E. 1091 (reversing 42 Hun, 310); *Bacon v. Jacob*, 63 Hun, 51, 17 N. Y. Supp. 323; *Reinhardt v. Fritzsche*, 69 Hun, 565, 23 N. Y. Supp. 958; *Websterbrook v. Miller*, 98 App. Div. 590, 90 N. Y. Supp. 558,—holding that legislature created cause of action unknown at common law by "Civil Damage Act;" *Streever v. Birch*, 62 Hun, 298, 17 N. Y. Supp. 195, holding no cause of action exists at common law in favor of employer for loss of employee's services due to sale of liquor by another.

Cited in reference note in 25 A. R. 366, on statutes giving person injured by

intoxication of another damages against person causing the intoxication, as giving new remedy unknown at common law.

— Object of.

Cited in *Quinlan v. Welch*, 141 N. Y. 158, 36 N. E. 12, on purpose of civil damage act.

— Right of father to recover for loss of son's services under.

Cited in reference note in 25 A. R. 369, on necessity of proof of damages in action by father for injury to means of support by intoxication of son.

Distinguished in *Reath v. State*, 16 Ind. App. 148, 44 N. E. 808, holding father may recover of saloonkeeper's bondsmen for loss of services of minor son whose earnings contributed to family support, although father's earnings are sufficient to keep family.

— Right of wife to recover for injury to her means of support under.

Followed in *Hill v. Berry*, 75 N. Y. 229, holding action maintainable by wife to recover damages for loss of means of support in consequence of husband's intoxication.

Cited in *Moriarty v. Bartlett*, 34 Hun, 272, on right of wife to recover for injury to her means of support under civil damage act.

Cited in notes in 48 A. D. 628, for what injuries to wife an action will lie under civil damage act; 48 A. D. 629, 630, on action by wife for injury to means of support.

— Extent of wife's recovery.

Cited in *Zibold v. Reneer*, 73 Kan. 312, 85 Pac. 290, holding statute giving wife right of action against person selling husband intoxicating liquors for injury to her means of support, authorizes recovery for both proximate and remote injuries; *Bennett v. Levi*, 46 N. Y. S. R. 754, 19 N. Y. Supp. 226, holding both direct and consequential damages recoverable in action by wife against saloonkeeper for selling husband liquor whereby his supporting ability was impaired.

— Proof necessary to wife's recovery.

Cited in *Bistline v. Ney Bros.* 134 Iowa, 172, 13 L.R.A.(N.S.) 1158, 111 N. W. 422, 13 A. & E. Ann. Cas. 196, holding proof that husband committed suicide while intoxicated with liquor sold by defendant sufficient in action by wife under statute; *Blatz v. Rohrbach*, 116 N. Y. 450, 6 L.R.A. 669, 22 N. E. 1049, on necessity of plaintiff showing that liquor drunk by husband was intoxicating to recover under civil damage act; *Beers v. Walhizer*, 43 Hun, 254, holding that to authorize recovery by wife under Civil Damage Act, loss need not be direct result of intoxication.

Cited in note in 13 L.R.A.(N.S.) 1161, on necessity, in order to support a recovery by wife under civil-damage act, that intoxication be the proximate cause of the injury.

— Necessity for loss of wife's means of support being occasioned wholly by defendant's sale.

Cited in *Nelson v. State*, 32 Ind. App. 88, 69 N. E. 298, holding wife does not have to show that all liquor which produced intoxication was furnished by defendant; *Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154, holding wife may maintain action against saloonkeeper for loss of means of support, for selling liquor to husband while intoxicated; *McCarty v. Wells*, 51 Hun, 171, 4 N. Y. Supp. 672, holding wife in action against saloonkeeper to recover for injury to

her means of support, may recover if husband's intoxication was caused in part by defendant.

—Other means of support as affecting right to recover.

Cited in *Sharpley v. Brown*, 43 Hun, 374, holding evidence that wife, whose husband's death was caused by intoxicating liquors sold by defendant, had remarried, admissible in action to recover for injury to her means of support; *Stevens v. Cheney*, 36 Hun, 1, holding that father in action to recover for injury to means of support by sale to son must show that he is left without means of support.

30 AM. REP. 340, FOSTER'S APPEAL, 87 PA. 67.

Parol evidence as to contents of lost will.

Cited in *Deaves's Estate*, 140 Pa. 242, 21 Atl. 395, 27 W. N. C. 482, 8 Lanc. L. Rev. 309, 48 Phila. Leg. Int. 297, holding contents of lost will may be proved by parol, when it is shown that same was in existence, unrevoked, at time of his death.

Cited in note in 11 E. R. C. 507, on admissibility of parol evidence to prove lost will.

Admissibility of testator's declarations.

Cited in *Re Marsh*, 45 Hun, 107, holding declarations of testator that she had will, admissible to establish lost will; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336, holding declarations of testator, shortly before his death, as to manner of disposing of his property, admissible to show whether lost will was unrevoked at testator's death; *Re Valentein*, 93 Wis. 45, 67 N. W. 12, holding evidence of declarations of deceased that she had destroyed will, admissible.

Presumption as to revocation of will.

Cited in *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698, holding presumption that revoking will, which cannot be found after testator's death was intentionally destroyed by him, not so strong where beneficiaries under former will could have destroyed it; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, holding legal presumption is that will once known to exist was intentionally destroyed by testator, when same cannot be found after his decease.

Cited in notes in 45 A. R. 329; 28 A. S. R. 347,—on presumption from absence of will of revocation by destruction; 110 A. S. R. 448, on presumptions arising from inability to find will which was in testator's possession; 38 L.R.A. 434, on burden of proof as to revocation of missing will.

—Evidence admissible to repel presumption.

Cited in *Gardner's Estate*, 35 W. N. C. 417, holding conduct and interests of those around testator from and after date of will, admissible to repel presumption of revocation of lost will.

Cited in note in 45 A. R. 344, on rebuttal of presumption of revocation of will.

Right to establish lost or destroyed will.

Cited in *Myers's Estate*, 28 Pa. Co. Ct. 127, holding refusal to hear evidence of fact that decedent made will which has been lost or destroyed; *Re McDonald*, 19 Pittsb. L. J. N. S. 324, holding copy of will, deposited in foreign court, can be admitted to probate in domiciliary court upon due proof of execution of original.

Cited in note in 84 A. D. 629, on probate of lost or destroyed wills.

— Evidence necessary.

Cited in *Inlow v. Hughes*, 38 Ind. App. 375, 76 N. E. 763, holding testimony of attorney drafting lost will supported by testimony of principal devisee substantiating part thereof and post-testamentary declarations of testator, insufficient to establish will; *Buchle's Estate*, 14 Pa. Co. Ct. 99, 3 Pa. Dist. R. 16, 33 W. N. C. 393, on right to establish destroyed will on satisfactory proof of its destruction and contents.

Cited in notes in 59 A. R. 399, on proof of lost will; 38 L.R.A. 446, on sufficiency of evidence of contents of lost or destroyed will.

Necessity of proving execution of lost will by two witnesses.

Cited in *Collyer v. Collyer*, 17 Abb. N. C. 328, 4 Dem. 53; *Michell v. Low*, 213 Pa. 526, 63 Atl. 246,—holding execution of destroyed will must be proved by two witnesses before showing contents thereof.

30 AM. REP. 343, *BLETZ v. COLUMBIA NAT. BANK*, 87 PA. 87.

Jurisdiction of state courts of action by or against national bank or its receiver.

Cited in *National Bank v. Eyre*, 52 Iowa, 114, 2 N. W. 995, holding borrower has right to maintain defense of usury, where national bank sues upon contract in state court; *Brinckerhoff v. Bostwick*, 88 N. Y. 52, holding state court has jurisdiction of action brought by receiver of National bank against its directors to recover damages sustained through their gross negligence in suffering corporate funds to be lost.

— To recover penalty for exacting usurious interest.

Cited in *Henderson Nat. Bank v. Alves*, 91 Ky. 142, 15 S. W. 132; *First Nat. Bank v. Overman*, 22 Neb. 116, 34 N. W. 107; *Schuyler Nat. Bank v. Bullong*, 24 Neb. 825, 40 N. W. 413; *Gruber v. First Nat. Bank*, 87 Pa. 465, 8 W. N. C. 113; *Stephens v. Monongahela Nat. Bank*, 88 Pa. 157, 32 A. R. 438; *First Nat. Bank v. Gruber*, 91 Pa. 377, 37 Phila. Leg. Int. 83; *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65, 11 W. N. C. 42, 12 Pittsb. L. J. N. S. 401, 38 Phila. Leg. Int. 365; *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554, 46 A. R. 520,—holding that state court has jurisdiction of action to recover penalty from national bank for exacting usurious interest; *Crocker v. First Nat. Bank*, 4 Dill. 358, Fed. Cas. No. 3,397; *First Nat. Bank v. Gruber*, 91 Pa. 377, 8 W. N. C. 121,—holding that state courts have jurisdiction of suits to recover from national banks, twice amount of illegal interest received.

Cited in notes in 48 L.R.A. 40; 23 L. ed. U. S. 197,—on jurisdiction of state courts of actions against national banks to recover penalty for usurious interest; 56 L.R.A. 691, on jurisdiction of action by state courts against national bank for taking of usury where interest is actually paid.

Forfeiture of interest by national bank for exacting usury.

Cited in *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925, holding forfeiture of interest prescribed by section 5198 of U. S. Revised Statutes of 1878, for usurious charge of interest, is to be treated as defense to recovery of interest.

Cited in note in 56 L.R.A. 686, on availability of defense of usury by national bank in suit by bank where usury is charged but not paid.

Distinguished in *Union Glass Co. v. First Nat. Bank*, 10 Pa. Co. Ct. 574,

holding act giving person, who has paid interest to bank in excess of legal rate, right to recover twice amount of such excess, imposes penalty.

30 AM. REP. 349, MILLER v. HANOVER JUNCTION & S. R. CO. 87 PA. 95.

Secret agreement between stock subscriber and company — Validity of.

Cited in *Nickerson v. English*, 142 Mass. 267, 8 N. E. 45, holding secret agreement between subscriber and promoter of corporation that subscriber should have certain shares free, void in fraud of other subscribers; *Hoffman v. Bloomsburg & S. R. Co.* 157 Pa. 174, 27 Atl. 564, 33 W. N. C. 60, on secret agreement with agent, obtaining subscription, to pay less, unenforceable.

Cited in note in 12 L.R.A. 123, as to when secret agreement is void.

Distinguished in *The Poconoket*, 67 Fed. 262, holding parol agreement that title to vessel to be constructed should pass when work was commenced cannot be repudiated, where purchasers reduced demand as to amount of security required of builders in consideration thereof; *Meyer v. Blair*, 109 N. Y. 600, 4 A. S. R. 500, 17 N. E. 228 (reversing 19 Abb. N. C. 214), holding agreement by company to take back stock with interest at end of year if subscriber desired to sell, enforceable.

— As defense to action on subscription.

Cited in *McCarty v. Selinsgrove & N. B. R. Co.* 87 Pa. 332, holding parol evidence of assurance by president that certain conditions were to be considered part of subscription contract, admissible in action thereon; *Marles Carved Moulding Co. v. Stulb*, 215 Pa. 91, 64 Atl. 431, holding subscriber to corporation stock cannot set up against suit upon subscription secret representation of agent that he would not have to pay subscription; *Philadelphia & D. County R. Co. v. Conway*, 177 Pa. 364, 35 Atl. 716, holding same as to violation by company of parol agreement between subscriber and agent procuring subscription; *Jeannette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96, holding subscriber cannot escape liability by showing that his subscription was subject to parol condition. *Real Estate Trust Co. v. Riter-Conley Mfg. Co.* 223 Pa. 350, 72 Atl. 695, to point that subscriber to stock is estopped to set up secret parol agreement as to liability thereon.

Cited in reference note in 38 A. R. 801, on right to recover amount paid on stock purchased under fraudulent representations.

Distinguished in *Moore v. Hanover Junction & S. R. Co.* 94 Pa. 324, 38 Phila. Leg. Int. 72, holding subscriber to corporation stock in suit on subscription may show that alteration in route was material variation from that in subscription paper.

Nature of subscription to stock.

Cited in *Dettra v. Central Traction Co.* 147 Pa. 566, 30 A. S. R. 763, 23 Atl. 884, to the point that subscription to shares of stock is undertaking with all other subscribers.

Cited in reference note in 12 A. S. R. 707, on subscription to joint stock.

Cited in notes in 136 Am. St. R. 745, on nature and validity of subscription agreement to corporate stock; 25 L.R.A. 101, on feigned subscriptions to corporations.

Parol evidence to vary subscription for stock.

Cited in note in 81 A. D. 396, on parol evidence to vary written subscription for stock.

30 AM. REP. 352, INSURANCE COMPANY OF N. A. v. COM. 87 PA. 173.

Power of state to tax business of corporation doing foreign business.

Cited in *Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County*, 28 Mont. 484, 98 A. S. R. 572, 72 Pac. 982, holding legislature may tax foreign insurance company upon excess of premiums received over losses and expenses within state; *Philadelphia & S. Mail S. S. Co. v. Com.* 104 Pa. 109, 14 W. N. C. 23, 41 Phila. Leg. Int. 175, holding state may tax receipts of steamship company from ocean freight in foreign interstate trade.

Cited in reference note in 88 A. D. 518, on shares of stock in foreign corporation being taxable in state where owner resides.

Cited in notes in 1 L.R.A. 233, on tax on gross receipts of railroads; 60 L.R.A. 676, on taxation of excises on domestic corporations.

Distinguished in *Com. v. Pennsylvania Coal Co.* 17 Phila. 595, 41 Phila. Leg. Int. 125, holding that state cannot tax capital stock to include portion of assets invested outside of state.

Nature of tax on gross premiums of insurance company.

Cited in *Mutual Reserve Fund Life Asso. v. Augusta*, 109 Ga. 73, 35 S. E. 71, holding tax imposed by municipal corporation on gross premiums of insurance company doing business in city, business tax.

Insurance as interstate commerce.

Cited in note in 60 L.R.A. 646, on taking out of policies by nonresidents as not interstate commerce.

30 AM. REP. 357, KIRK'S APPEAL, 87 PA. 243.

Power of attorney.

Cited in reference notes in 9 A. S. R. 546, on authority of attorneys; 43 A. S. R. 788, on authority of attorney to give indemnity; 73 A. S. R. 581, on power of attorney over action.

Cited in notes in 76 A. D. 263, on attorney's powers over judgments and executions; 132 Am. St. R. 173, on implied authority of attorney in conducting litigation.

— To compromise or release claim for client.

Cited in *Robinson v. Murphy*, 69 Ala. 543, holding attorney cannot accept less sum than is actually due in satisfaction of judgment; *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63, holding attorney may negotiate compromise, where there is not time for consultation and circumstances of case require immediate action; *Zimmerman v. Floyd*, 19 Montg. Co. L. Rep. 35, 8 Del. Co. Rep. 576, 8 North. Co. Rep. 393, 20 Lanc. L. Rev. 17, 27 Pa. Co. Ct. 385, holding general attorney not empowered to satisfy judgment obtained by confession without aid of his professional skill; *Ely v. Lamb*, 10 Pa. Co. Ct. 209, holding attorney cannot compromise client's claim; *Armstrong v. Hurst*, 39 S. C. 498, 18 S. E. 150, holding notices signed by attorneys that their clients accept terms of deed of assignment, and offer releases as thereby acquired, cannot be accepted as release; *White v. Chester*, 10 Del. Co. Rep. 394, holding that attorney has no authority to make agreement for entry of decree not supported by pleadings.

Cited in reference note in 55 A. S. R. 763, on right of attorney to release lien of client.

Cited in notes in 34 A. D. 94, on power of attorney to release judgment; 41 A. R. 848, on implied power of attorney to settle his client's cause of action.

Act putting party on inquiry as notice.

Cited in *Sharpe v. Hutchison*, 10 Luzerne Leg. Reg. 193, holding record of assignment of mortgage as notice of assignment of bond.

30 AM. REP. 361, CHESS'S APPEAL, 87 PA. 362.

When legacy or devise vests.

Cited in *Bunting v. Speck*, 41 Kan. 424, 3 L.R.A. 690, 21 Pac. 288, holding heirs take vested remainder in fee at death of testator, under devise to wife for life to descend to his legal heirs; *Pechin's Estate*, 13 Phila. 323, 37 Phila. Leg. Int. 104, 8 W. N. C. 504, holding grandchildren of testator take vested interest at his death, under trust for son's life use to be conveyed to son's children on son's death; *Bassett v. Hawk*, 118 Pa. 94, 11 Atl. 802, 20 W. N. C. 399, 18 Pittsb. L. J. N. S. 319, 45 Phila. Leg. Int. 206, holding grandchildren's remainder vests on testator's death, where devise over to them is dependent on event which does not affect their capacity to take or transmit; *Tettermer's Estate*, 190 Pa. 102, holding sum certain which was to be delivered to R. on death of H., cannot be delivered on death of life beneficiary before death of H.; *Hubbert's Estate*, 6 Pa. Dist. R. 96, holding brothers and sisters of each grandchild have vested interests in remainder, where limitation after death of grandchild was to brothers and sisters of one so dying; *Ferguson's Estate*, 31 Pa. Super. Ct. 422, holding interest of brother vested, where testator devised land to son in trust until he was of age, and in case of his dying before to brother and others, where he died before reaching majority and brother before him; *Foltz's Estate*, 19 Lanc. L. Rev. 133, holding nephew's interest vested on death of testator, under will directing income of residue to be paid to sister during life and to nephew on her death, where nephew dies first; *Re Morton*, 32 Pittsb. L. J. N. S. 406, (earlier trial of same case in 26 Pittsb. L. J. N. S. 403), holding grandchild takes vested interest under provision for substitution on death of children leaving issue; *Keller's Estate*, 11 Lanc. L. Rev. 185, holding interest of children of daughter vests on testator's death, where he left estate to her for life and to another if she leave no children; *Re Morrow*, 13 Pittsb. L. J. N. S. 294, holding legacies are contingent, where there is no gift except as it is implied from direction to pay over; *Schively's Estate*, 9 W. N. C. 223, on legacy vesting in son on testator's death under directions to trustees to pay him income until maturity; *Coggins's Appeal*, 124 Pa. 10, 10 A. S. R. 565, 16 Atl. 579, 23 W. N. C. 206, 46 Phila. Leg. Int. 260, on legacy vesting where remainder is void as perpetuity; *Re Kauntz*, 35 Pittsb. L. J. N. S. 267, on legacy vesting where there is doubt as to its being vested or contingent; *Wagner's Estate*, 16 Pa. Dist. R. 184, holding future estate vested where limited to ascertained person, subject to prior gift to others unascertained who may never come into existence.

Cited in reference notes in 4 A. S. R. 592; 10 A. S. R. 575,—as to whether legacies are vested or contingent.

Cited in note in 10 A. S. R. 474, on rules as to vesting of legacies.

Transmissibility of contingent remainder.

Cited in *Re Twaddell*, 3 N. B. N. Rep. 752, 110 Fed. 145, holding child of wife to whom certain real estate is devised for life and then to her surviving children, has vested interest therein which passes to trustee in bankruptcy; *Morae v. Proper*, 82 Ga. 13, 8 S. E. 625, holding husband who takes contingent remainder in fee under trust deed may devise same to wife; *Fotterall's Estate*,

19 Phila. 49, 45 Phila. Leg. Int. 134, 5 Pa. Co. Ct. 143, holding remaining children vested with share of child dying without issue, where property is left in trust for children and lawful issue of deceased child; Wenzel's Estate, 12 Pa. Dist. R. 63, holding estate left in trust for brother during life and then to brother's children, is gift taking effect on death of testator; Brooke's Estate, 214 Pa. 46, 63 Atl. 411, 15 Pa. Dist. R. 137, on right of heirs of party to whom property is left in default of children of testator's daughter, to property after such default; Fisher v. Wagner, 109 Md. 243, 21 L.R.A. (N.S.) 121, 71 Atl. 999, holding that when contingent remainder after life estate is limited to person definitely described, it may be devised by him; Scull's Estate, 18 Pa. Dist. R. 297, to the point that contingent interests pass as asset of estate, if contingency is not one affecting capacity to take.

What is meant by interpretation of devise.

Cited in Kennard v. Kennard, 63 N. H. 303, holding interpretation of devise is ascertainment of testator's intention.

Meaning of words used in will.

Cited in Stone v. McMullen, 12 Pittsb. L. J. N. S. 389, 39 Phila. Leg. Int. 421, 1 Pennyp. 108, on meaning of words "die without legitimate issue."

30 AM. REP. 364, KING v. THOMPSON, 87 PA. 365.

What constitutes a nuisance.

Cited in Tomle v. Hampton, 28 Ill. App. 142, holding unprotected opening in sidewalk ten inches wide and five feet long, is nuisance per se; Witham v. Portland, 72 Me. 539, holding six and one-half inch depression in walk in front of window not defect in legal sense; Ziegler v. Philadelphia, 19 Phila. 400, 46 Phila. Leg. Int. 78, holding iron fence extending three feet into sidewalk, surmounted by sharp arrow head points, is nuisance; Com. v. Kembel, 30 Pa. Super. Ct. 199, holding second story bay window projecting into street constitutes public nuisance; Tomle v. Hampton, 28 Ill. App. 142, holding that unprotected opening in sidewalk, ten inches wide is nuisance per se.

Cited in note in 39 L.R.A. 679, on municipal power over selling in streets as nuisances.

Right to show custom to disprove negligence or nuisance.

Distinguished in McNerney v. Reading, 150 Pa. 611, 25 Atl. 57, 30 W. N. C. 534, holding existence of like nuisance elsewhere, will not legalize existence of large unguarded opening in sidewalk; Brown v. White, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962, holding evidence to show that it was customary in certain borough to drain water from lots, roofs, and waste pipes over and through uncovered drains to gutters, properly refused.

Negligence in maintaining obstruction in street.

Cited in Stackhouse v. Vendig, 166 Pa. 582, 31 Atl. 349, holding party not guilty of negligence in maintaining cellar doors partly open in sidewalk; Purcell v. Riebe, 227 Pa. 503, 76 Atl. 212, holding that mere elevation in sidewalk is not negligence per se.

Cited in note in 10 L.R.A. 741, on instructions in actions against cities for injuries in streets or on sidewalk.

When traveler on public street guilty of contributory negligence.

Cited in Gosport v. Evans, 112 Ind. 133, 2 A. S. R. 164, 13 N. E. 256, holding pedestrian seeing obstruction on sidewalk and knowing its dangerous

character, guilty of contributory negligence in deliberately going upon same; *Sale v. Aurora & L. Turnp. Co.* 147 Ind. 324, 46 N. E. 669, holding traveler voluntarily casting himself upon known peril in driving in highway guilty of contributory negligence; *Ziegler v. Philadelphia*, 19 Phila. 400, 46 Phila. Leg. Int. 78, holding party running at night in apparently unobstructed street not guilty of contributory negligence as matter of law; *Bruch v. City*, 5 Pa. Dist. R. 718, holding pedestrian cannot recover for injury, where evidence shows that depression could have been avoided if he had looked; *Siegler v. Mellinger*, 19 Lanc. L. Rev. 249, holding pedestrian walking on sidepath instead of center of country road on dark night guilty of contributory negligence; *Bruch v. Philadelphia*, 40 W. N. C. 474, on contributory negligence of traveler falling in hole in sidewalk; *Farrell v. Plymouth*, 26 Pa. Super. Ct. 183 (dissenting opinion), on pedestrian falling into depression covered with snow being guilty of contributory negligence.

Cited in reference note in 35 A. R. 202, on contributory negligence of one using defective sidewalk.

Cited in note in 4 L.R.A. 214, on contributory negligence of traveler failing to avoid known dangerous obstruction in highway.

Negligence as question of law.

Cited in *Koons v. Western U. Teleg. Co.* 102 Pa. 164, holding that court must pass upon question of negligence on undisputed state of facts; *Barnes v. Sowden*, 119 Pa. 53, 12 Atl. 804, 21 W. N. C. 81, 18 Pittsb. L. J. N. S. 488, 45 Phila. Leg. Int. 247, holding refusal to instruct jury to find for defendant in action to recover damages from fall into ditch across city pavement, error, where negligence was not shown by uncontradicted evidence; *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096, 41 W. N. C. 495, 28 Pittsb. L. J. N. S. 333, holding that court should instruct jury that on undisputed facts there is or is not proof of negligence in action against city for negligence as to street gutter; *Lerner v. City*, 13 Pa. Dist. R. 165, holding that court may pass upon question of defendant's negligence upon undisputed state of facts.

Duty of persons using public streets.

Cited in *Lumis v. Philadelphia Traction Co.* 181 Pa. 268, 37 Atl. 414, 40 W. N. C. 326, holding pedestrian bound to use reasonable care for his own safety and to avoid open and apparent danger; *Robb v. Connellsville*, 137 Pa. 42, 20 Atl. 564, 26 W. N. C. 517, 47 Phila. Leg. Int. 445, holding law requires travelers on public streets to look where they are going, especially when crossing intersecting street; *Mason v. Philadelphia*, 205 Pa. 177, 54 Atl. 773, holding municipality not liable for misstep by party using public street; *Strayline v. Philadelphia*, 15 Pa. Dist. R. 387, holding pedestrian bound to look so as to see the ground from his feet forward; *Lerener v. City*, 13 Pa. Dist. R. 165, holding pedestrian who steps out to edge of pavement next to curb should exercise more care than while walking in center.

Duty of owner of property in maintaining public footway.

Cited in *Stewart v. Jermon*, 41 W. N. C. 216, 5 Pa. Super. Ct. 609, holding lessee of theatre bound to prepare for unusual and excessive use of footway in inviting unusual crowd.

Cited in notes in 33 A. S. R. 863; 92 A. S. R. 544,—on lessor's liability for injury by coal vaults in sidewalk.

Right of action by husband and wife for personal injury to wife.

Cited in *Tell v. Gibson*, 66 Cal. 247, 5 Pac. 223, holding complaint by hus-

band and wife for consequential injury to husband in losing wife's services, etc., improperly brought; *Mageau v. Great Northern R. Co.* 103 Minn. 290, 15 L.R.A.(N.S.) 511, 115 N. W. 271, 14 A. & E. Ann. Cas. 225, holding that wife has action for direct injuries to her person resulting from defendant's fault and husband for consequential injuries to him; *Mageau v. Great Northern R. Co.* 103 Minn. 290, 15 L.R.A.(N.S.) 511, 115 N. W. 651, 14 A. & E. Ann. Cas. 551, holding that two causes of action may arise for injury to wife by negligence, one in favor of wife, and one in favor of husband for loss of services and society.

Cited in note in 48 A. D. 619, 621, on action for injury to wife not resulting in death.

— Evidence necessary to recovery.

Cited in *Kelley v. Mayberry Twp.* 154 Pa. 440, 26 Atl. 595, 32 W. N. C. 224, holding evidence necessary to entitle husband and wife, respectively to recover in separate actions, includes facts tending to show direct and incidental loss to husband and personal injury to wife.

Right of action for injury to family's personal comfort.

Cited in *Gavigan v. Atlantic Ref. Co.* 3 Pa. Super. Ct. 628, holding that man cannot recover for injury and inconvenience inflicted on personal comfort of wife and family.

Separate rights of married woman as to real property.

Cited in *Simon's Estate*, 20 Pa. Super. Ct. 450, holding woman may execute deed without her husband joining and ratify same after being declared feme sole trader.

Statutory construction of general words following specific terms.

Cited in *St. Paul F. & M. Ins. Co. v. Penman*, 81 C. C. A. 151, 151 Fed. 961, holding "other explosives" includes blasting powder when used in policy following certain specified high explosives; *Com. v. Marsh*, 3 Pa. Dist. R. 489, 14 Pa. Co. Ct. 369, holding act requiring semi-monthly payment of wages to employees, applies only to employers engaged in business of mining for manufacturing where such occupations are specified; *Lee v. Huff*, 61 Ark. 494, 33 S. W. 846, on construction of statute giving examiner power to revoke teacher's license as to meaning of "and for other adequate causes."

Assumption on appeal as to facts stated in refused request.

Cited in *Com. v. Long*, 17 Pa. Super. Ct. 641, holding that appellate court must assume that jury would have found facts as stated in request, which court refused where point is raised.

30 AM. REP. 367, BARR v. MOORE, 87 PA. 385.

What constitutes libel.

Cited in *Chase v. Scranton*, 4 Walk. (Pa.) 355, holding libel a written or printed publication which charges person with infamous crime, or with matter which renders him odious or ridiculous in public eye; *Brown v. Boynton*, 122 Mich. 251, 80 N. W. 1099, holding published letter charging that party got up raffle for benefit of writer without his consent, and that beneficiary received nothing from it, not libelous; *Oles v. Pittsburgh Times*, 2 Pa. Super. Ct. 130, 27 Pittsb. L. J. N. S. 59, 38 W. N. C. 461, holding publication by newspaper, circulated in district in which witchcraft is believed in, that certain person is witch, libelous.

— **What publications are actionable per se.**

Cited in *Upton v. Hume*, 24 Or. 420, 41 A. S. R. 863, 21 L.R.A. 493, 33 Pac. 810, holding publication which imputes crime to candidate is libelous per se and can be justified only by proof of its truth; *Collins v. Despatch Pub. Co.* 152 Pa. 187, 34 A. S. R. 636, 25 Atl. 546, 31 W. N. C. 316, 23 Pittsb. L. J. N. S. 247, holding publication that "complaints from outside parties were sent to department, one asking for his dismissal on account of intimacy with well known young local elocutionist," actionable per se; *Wallace v. Jameson*, 179 Pa. 98, 36 Atl. 142, 39 W. N. C. 387, 27 Pittsb. L. J. N. S. 251, holding imputing corrupt or dishonorable action to attorney in his professional conduct, actionable per se though not bribery.

— **What publication privileged.**

Cited in *Shelly v. Dampman*, 1 Lack. Legal News, 77, on last clause of constitution of 1874, art. 1, sec. 7, relating to privileged communications applying to criminal prosecutions only; *Briggs v. Garrett*, 111 Pa. 404, 56 A. R. 274, 2 Atl. 513, 17 W. N. C. 129, 43 Phila. Leg. Int. 99, holding section of constitution in reference to conviction in prosecution for publication relating to official conduct of officers, does not apply to civil action to recover damages; *Warden v. Whalen*, 8 Pa. Co. Ct. 660, holding civil action for libel not maintainable on affidavit for search warrant, which is privileged communication, without showing malice; *Jones v. Townsend*, 21 Fla. 431, holding publication by newspaper that candidate is under indictment for felony, not privileged; *Morse v. Times Republican Printing Co.* 124 Iowa, 707, 100 N. W. 867, holding publication in newspaper of defamatory matter affecting character or reputation of private citizen, not privileged; *Wheaton v. Beecher*, 66 Mich. 307, 33 N. W. 503, holding publication of falsehood concerning candidate for public office not privileged; *Post Pub. Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921, holding false and defamatory words spoken or published of party as individual, not privileged; *Conroy v. Pittsburgh Times*, 139 Pa. 334, 23 A. S. R. 188, 11 L.R.A. 725, 21 Atl. 154, 27 W. N. C. 239, 21 Pittsb. L. J. N. S. 241, 48 Phila. Leg. Int. 88, holding presumption of innocence is prima facie evidence of falsity and want of probable cause putting defendant to proof of facts to support claim of privilege, where publication charges indictable offense; *Com. v. Costello*, 1 Pa. Dist. R. 745, holding publication of court records or proceedings, as such, is not privileged; *Clemmons v. Danforth*, 67 Vt. 617, 48 A. S. R. 836, 32 Atl. 626, holding utterance, by party appearing before commissioners who are to pass on physician's claim, which is immaterial, not privileged.

Cited in reference note in 31 A. R. 757, as to what charges against politician are libelous.

Cited in notes in 86 A. D. 88, as to what publications libelous to candidates are justifiable; 58 A. R. 692, on libel of public officers and candidates for public office; 15 A. S. R. 350, on what publications as to public officials are privileged; 104 A. S. R. 136, on application of doctrine of privilege to statements concerning candidates for political and official positions; 104 A. S. R. 137, on application of doctrine of privilege to statements by newspapers or periodicals relative to matters of public interest.

— **Interference as to malice.**

Cited in *Com. v. Brown*, 30 W. N. C. 320, 1 Pa. Dist. R. 565, holding malice is inferred, where article published is libellous and not privileged, although defendant did not entertain ill-will against prosecutor; *Neeb v. Hope*, 111 Pa.

145, 2 Atl. 568, 17 W. N. C. 93, 16 Pittsb. L. J. N. S. 272, 43 Phila. Leeg. Int. 227, holding legal malice inferred, where wilful and unprivileged publication having other qualities of libel, is made; *Com. v. Costello*, 1 Pa. Dist. R. 745, holding legal malice is implied from intentional publication of libel; *Com. v. Pascoe*, 39 Pa. Super. Ct. 163, holding that if publication be defamatory, jury should find malice.

Presumption as to damages from libel.

Cited in *Candrian v. Miller*, 98 Wis. 164, 73 N. W. 1004, holding general damages presumed from publication of article libelous per se.

Liability of newspaper for libel.

Cited in *Bruce v. Reed*, 104 Pa. 408, 49 A. R. 586, 14 Pittsb. L. J. N. S. 245, 42 Phila. Leg. Int. 5, holding proprietors of newspaper liable for publication of libelous article written by employee.

Admissibility of evidence of other publications in action for libel.

Cited in *Gribble v. Pioneer Press Co.* 34 Minn. 342, 25 N. W. 710, holding evidence of other publications by defendant in libel suit, admissible to prove actual malice in publication prosecuted for.

What is legal malice.

Cited in *Harter v. Whitebread*, 13 Luzerne Leg. Reg. 300, holding malice in slander action is any wrongful act done intentionally without cause; *Montgomery v. Landis*, 26 Lanc. L. Rev. 108, holding that malice in legal sense signifies wrongful act intentionally done without justification or excuse.

Recovery of exemplary damages.

Cited in note in 28 A. S. R. 882, on recovery of exemplary damages for criminal tort.

30 AM. REP. 371, PITTSBURG, FT. W. & C. R. CO. v. COLLINS, 87 PA. 405.

What constitutes contributory negligence.

Cited in *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676, on right of traveler to recover for injury, where he drove on street knowing that his horse might shy at obstruction thereon.

Cited in note in 55 A. D. 672, on knowledge of or reason to apprehend danger as essential to contributory negligence which will defeat recovery for injury.

—Of trespasser on railroad track.

Distinguished in *Ham v. Delaware & H. Canal Co.* 155 Pa. 548, 20 L.R.A. 682, 26 Atl. 757, 32 W. N. C. 335, holding party who is wrongfully ejected from car is not on track as trespasser guilty of contributory negligence.

Degree of care due from railroad company to trespasser.

Cited in *Berry v. Missouri P. R. Co.* 124 Mo. 223, 25 S. W. 229, holding railroad company liable for gross negligence only to parties who are trespassers on its flat car.

Cited in reference note in 90 A. D. 56, on liability of railroad company, in absence of contract relation, to person lawfully on its premises.

30 AM. REP. 374, GERMAN AMERICAN BANK v. AUTH, 87 PA. 419.

Liability of surety on bond.

Cited in *National Bank v. Rutledge*, 84 Fed. 400, holding sureties liable on bond of county auditor who affixes signature and seal to fraudulent bonds under

authority to issue genuine bonds by such course; *Tyler v. Old Post Bldg. Asso.* 87 Ind. 323, holding bond of secretary of association for faithful performance of his duties covers moneys received whether paid at times required by by-laws or not; *Chew v. Ellingwood*, 86 Mo. 260, 56 A. R. 429, holding sureties on bond of bookkeeper not relieved from liability by fact that bookkeeper had taken bank money with consent of its cashier; *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805, on liability of sureties on defaulting cashier's bond.

Cited in reference note in 32 A. R. 243, on surety's liability on bond for faithful performance as affected by change of principal's duties.

— **Effect of principal's performing other duties than specified in bond.**

Cited in *Detroit Sav. Bank v. Ziegler*, 49 Mich. 157, 43 A. R. 456, 13 N. W. 496, holding sureties liable on receiving teller's bond although he performs duties of general teller in his absence; *American Teleg. Co. v. Lennig*, 139 Pa. 594, 21 Atl. 162, 27 W. N. C. 349, 48 Phila. Leg. Int. 290, holding surety not relieved from bond of book-keeper, because he acted as secretary and assistant treasurer in absence of that officer in violating his bond.

Distinguished in *Northwestern Nat. Bank v. Keen*, 8 W. N. C. 283, 14 Phila. 7, 37 Phila. Leg. Int. 124, holding surety of bookkeeper in bank cannot be held liable for default of principal as cashier.

30 AM. REP. 376, HOWE SEWING MACH. CO. v. SLOAN, 87 PA. 438.

Liability of stranger's goods in possession of tenant to distress for rent.

Cited in *Page v. Middleton*, 118 Pa. 546, 12 Atl. 415, 20 W. N. C. 568, 18 Pittsb. L. J. N. S. 475, 45 Phila. Leg. Int. 85, holding goods of stranger in possession of tenant as favor and without hire, not exempt from distress for rent; *Myers v. Esery*, 134 Pa. 177, 19 Atl. 488, holding landlord's right of distress for rent extends to furniture leased by owner to tenant; *Brown v. Stackhouse*, 155 Pa. 582, 35 A. S. R. 908, 26 Atl. 669, 32 W. N. C. 407, 10 Lanc. L. Rev. 321, 24 Pittsb. L. J. N. S. 38, holding landlord who distrains upon goods knowing that they were left with tenant for sale on commission liable to owner for trespass; *Wanamaker v. Carter*, 22 Pa. Super. Ct. 625, holding landlord who leases store with knowledge that tenants are to sell goods of others on commission, cannot distrain on such goods; *Clothier v. Braithwaite*, 22 Pa. Super. Ct. 521, holding goods, placed, in hands of agent who is dealer, in trust to sell at certain price and account for proceeds, not subject to distress for rent; *Davis v. Washington*, 18 Tex. Civ. App. 67, holding landlord acquires no lien for rent on chattels of others on tenant's premises; *Bare v. Wenrich*, 17 Pa. Dist. R. 279, 231, holding goods in possession of tenant in course of business not liable to distress.

Cited in reference note in 35 A. S. R. 910, on what subject to distress for rent.

Cited in note in 25 L.R.A.(N.S.) 795, on right of one leaving chattels in another's possession as against latter's vendees or creditors.

30 AM. REP. 378, FIRST NAT. BANK v. GRUBER, 87 PA. 468.

To what banks provision of statute applies.

Cited in *Re Lebanon Trust & S. D. Bank*, 10 Lanc. L. Rev. 393, 3 Pa. Dist. R. 286; *Dreisbach v. Price*, 133 Pa. 560, 19 Atl. 569, 26 W. N. C. 61,—holding that act of 1850, regulating banks, applies only to banks of issue; *Re Miners' Bank*, 13 W. N. C. 370, holding same as not applying to savings banks;

Am. Rep. Vol. XVII.—14.

Re Shackamalon Bank, 18 Phila. 365, 43 Phila. Leg. Int. 138, 4 Pa. Co. Ct. 194, holding act of 1850 regulating banks, applicable to bank of discount, although not bank of issue; Merchants' Bank v. Shouse, 40 Phila. Leg. Int. 326, to the point that act of 1859, has no application to savings banks.

What are banks of issue.

Cited in De Haven v. O'Rourke, 17 Pa. Dist. R. 445, 35 Pa. Co. Ct. 116, holding that, prior to act of 1874, only institutions known as "banks" or "banking institutions" were banks of issue; De Haven v. Pratt, 223 Pa. 633, 72 Atl. 1068, on "bank" or "banking institutions" as the only banks of issue.

Right of bank of issue to charge interest in excess of legal rate.

Cited in Lebanon Nat. Bank v. Karmany, 98 Pa. 65, 11 W. N. C. 42, 12 Pittsb. L. J. N. S. 401, 38 Phila. Leg. Int. 365, holding no bank of issue in Pennsylvania authorized to charge rate of interest in excess of legal rate; Lebanon Nat. Bank v. Karmany, 98 Pa. 65, holding that there were no banks in state authorized to take more than six per cent interest.

What will be judicially noticed.

Cited in note in 49 A. R. 206, as to what will be judicially noticed.

Remedy for usury by national bank.

Cited in notes in 39 A. R. 47; 55 A. D., 400,—on affirmative relief at law against usury.

30 AM. REP. 380, LAZEAR v. PORTER, 87 PA. 513, Affirmed in 109 U. S. 84, 27 L. ed. 865, 3 Sup. Ct. Rep. 58, 14 W. N. C. 261, 14 Pittsb. L. J. N. S. 175.

What will divest of right to dower.

Cited in Re Moore, 30 Pittsb. L. J. N. S. 394, holding agreement between husband and wife to live apart, does not deprive widow of her right to dower on death of husband.

Cited in note in 18 L.R.A. 77, on effect of husband's bankruptcy to defeat wife's right of dower.

—Sale of land by assignee as divesting assignor's wife of dower.

Cited in Kelso's Appeal, 102 Pa. 7, 12 W. N. C. 475, 13 Pittsb. L. J. N. S. 369, 40 Phila. Leg. Int. 150, holding sale by assignee in bankruptcy of bankrupt's land "free of all liens and incumbrances" does not divest right of bankrupt's widow to claim dower; Mills v. Ritter, 197 Pa. 353, 47 Atl. 194, holding sale by assignee of assignor's real estate, does not pass title free from contingent dower of assignor's wife; Re Stevenson, 33 Pittsb. L. J. N. S. 419, holding wives of bankrupts have dower interest in husbands property which has been sold; Gannon v. Widman, 3 Pa. Dist. R. 835, 15 Pa. Co. Ct. 474, 25 Pittsb. L. J. N. S. 248, holding proceedings in bankruptcy do not divest dower interest of wife in real estate owned by husband and sold to assignee; Youngs v. Hannas, 1 Pa. Co. Ct. 579, holding that wife's dower is divested by sale of land by assignee for creditors.

Necessity of notice to assignee in bankruptcy of revival of judgment.

Cited in Re Huddell, 47 Fed. 207, holding revival of judgment valid without notice to assignee in bankruptcy.

30 AM. REP. 383, TAYLOR v. MITCHELL, 87 PA. 518.

Covenant to stand seised to use of heirs or promisee — Validity of.

Cited in Bolman v. Overall, 80 Ala. 451, 60 A. R. 107, 2 So. 624, holding

contract in form of will, executed in consideration of personal services and delivered to devisee therein named, valid; *Jones v. Abbott*, 228 Ill. 34, 119 A. S. R. 412, 81 N. E. 791, holding party may agree to allow his property to pass under certain prior will or descend to heirs under statute; *Heath v. Heath*, 18 Misc. 521, 42 N. Y. Supp. 1087, holding action for specific performance of agreement that adopted child shall have all covenantor's property subject to widow's interest in consideration of adoption, maintainable, where widow fraudulently procured will leaving property to her; *Carson v. New Bellevue Cemetery Co.* 104 Pa. 575, 14 Pittsb. L. J. N. S. 343, 41 Phila. Leg. Int. 289, holding covenant by party to stand seised to use of heirs, invalidates subsequent will; *Re Carroll*, 37 Pittsb. L. J. N. S. 366, holding parol adoption by feme covert with concurrence of her husband will carry her estate; *Re Vogel*, 27 Pittsb. L. J. N. S. 80, on validity of covenant to stand seised to use of heirs.

Cited in reference notes in 41 A. R. 144, on validity of agreement not to make will to prejudice of covenantor's heirs; 54 A. R. 16, on validity of contract to break will; 16 A. S. R. 536, on agreements to make particular disposition of property by will; 119 A. S. R. 417, on contract by person obligating himself not to make a will.

Cited in note in 14 L.R.A. 861, on validity of covenant to divide property between covenantor's legal heirs.

— Revocability of.

Cited in *Re Krause*, 28 Pittsb. L. J. N. S. 29, holding member of beneficial association may estop himself from changing designation of beneficiary.

30 AM. REP. 385, CULVER v. WILBERN, 48 IOWA, 26.

Usury as defense.

Cited in *Gund v. Ballard*, 73 Neb. 547, 103 N. W. 309, holding officer of bank cannot plead usury to escape payment of interest on debt, where he entered into contract with bank to pay usurious rate of interest thereon; *Palmer v. Carpenter*, 53 Neb. 394, 73 N. W. 690, holding maker of accommodation note payable to debtor cannot interpose defense of usury in contract between said debtor and his creditor to whom said accommodation note was given to pay such contract; *Gund v. Ballard*, 80 Neb. 385, 114 N. W. 420, holding that person who gives his own obligation in place of usurious one cannot set up defense of usury.

30 AM. REP. 387, STATE v. DANFORTH, 48 IOWA, 43.

Right to exhibit child to jury as evidence of resemblance.

Cited in *State v. Smith*, 54 Iowa, 104, 37 A. R. 192, 6 N. W. 153, holding child twenty-five months old may be exhibited before jury in bastardy proceedings; *State v. Danforth*, 73 N. H. 215, 111 A. S. R. 600, 60 Atl. 839, 6 A. & E. Ann. Cas. 557, holding that child whose paternity is controverted question may be exhibited to jury in trial for rape; *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600, holding that jury may consider whether there is resemblance or not between bastard and putative father viewed by them in prosecution for fornication; *State v. Neel*, 23 Utah, 541, 65 Pac. 494, holding child of prosecutrix cannot be introduced to show resemblance to defendant in prosecution for rape; *Hanawalt v. State*, 64 Wis. 84, 54 A. R. 588, 24 N. W. 489, holding bastard child cannot be exhibited for purpose of showing likeness

to defendant in bastardy proceedings; *State v. Harvey*, 112 Iowa, 416, 84 A. S. R. 350, 52 L.R.A. 500, 84 N. W. 535, holding same as to child under two years; *Shorten v. Judd*, 56 Kan. 43, 54 A. S. R. 587, 42 Pac. 337, on right to exhibit child before jury where its paternity is controverted question; *State ex rel. Mundt v. Meier*, 140 Iowa, 540, 118 N. W. 792, holding that in bastardy proceedings resemblance of child to defendant is not proper subject of comment, if no evidence appears in record.

Cited in reference notes in 6 A. S. R. 224, on resemblance of child to defendant in bastardy proceedings; 54 A. S. R. 590, on evidence of family resemblance.

Cited in notes in 87 A. D. 410, on competency of evidence of resemblance of child to prove seduction; 49 A. R. 191; 11 E. R. C. 241,—on exhibition of child to show parentage; 52 L.R.A. 504,—on exhibition of person for purpose of comparison to show relationship.

Admissibility of opinion evidence as to child's resemblance to another.

Cited in *Kilpatrick v. State*, 39 Tex. Crim. Rep. 10, 44 S. W. 830, testimony of physician who delivered prosecutrix in incest case of child, that he saw child several times and in his opinion child favored defendant, inadmissible.

What constitutes corroborative evidence in prosecution for seduction.

Cited in *State v. Painter*, 50 Iowa, 317, holding proof of opportunity for having sexual intercourse does not constitute evidence corroborative of prosecution upon trial for seduction.

Cited in note in 44 A. D. 173, on testimony of seduced female and corroboration and impeachment thereof.

30 AM. REP. 388, STEEL v. FIFE, 48 IOWA, 99.

Letter as contract.

Cited in *Potter v. Hollister*, 45 N. J. Eq. 508, 18 Atl. 204, holding letter written by principal to agent as delegation of authority without authority to deliver, not contract.

Supplying omission in contract by recitals in undelivered deed.

Cited in *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, 2 A. & E. Ann. Cas. 286, holding that undelivered deed cannot be looked to to supply omissions of vendees and description of property in writings between parties.

Sufficiency of memorandum within statute of frauds.

Cited in reference notes in 40 A. R. 352, on sufficiency of memorandum within statute of frauds respecting sale of goods; 41 A. R. 767, as to what is sufficient memorandum of contract for sale of lands to bind vendor.

30 AM. REP. 390, BURLINGTON & H. COUNTY FERRY CO. v. DAVIS, 48 IOWA, 133.

Power of city to grant exclusive license.

Cited in *Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co.* 73 Iowa, 513, 33 N. W. 610, holding that city may grant exclusive right to operate street railways under statute giving power to authorize or forbid laying down of tracks.

Cited in notes in 34 A. D. 638, on right of municipality to grant exclusive license; 59 L.R.A. 522, on power of municipalities to establish and regulate ferries; 59 L.R.A. 538, on exclusiveness of right of ferries.

Ferry as part of highway.

Cited in *Montgomery v. Multnomah R. Co.* 11 Or. 344, 3 Pac. 435, holding ferry is part of highway.

Jurisdiction of equity to enjoin interference with exclusive right.

Cited in *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 396, holding that equity has jurisdiction to restrain party from damaging private right of another to exclusive privilege of transporting person across river.

30 AM. REP. 395, ARTHUR v. CRAIG, 48 IOWA, 264.**Power to grant conditional pardon or parol.**

Cited in *Fuller v. State*, 122 Ala. 32, 82 A. S. R. 17, 45 L.R.A. 502, 26 So. 146, holding governor empowered to grant convict conditional parole; *Ex parte Hawkins*, 61 Ark. 321, 54 A. S. R. 209, 30 L.R.A. 736, 33 S. W. 106, holding governor empowered to grant pardon on condition that convict shall leave state and never return; *State v. Horne*, 52 Fla. 125, 7 L.R.A. (N.S.) 719, 42 So. 388, holding pardoning board empowered to impose condition in pardon binding on prisoner; *Re Prout*, 12 Idaho, 494, 5 L.R.A. (N.S.) 1064, 86 Pac. 275, 10 A. & E. Ann. Cas. 199, holding board of pardons may impose conditions upon granting parole; *State v. Mateer*, 105 Iowa, 66, 74 N. W. 912, holding governor empowered, to conditionally suspend further execution of specified judgment; *State ex rel. Davis v. Hunter*, 124 Iowa, 569, 104 A. S. R. 361, 100 N. W. 510, holding governor empowered to grant conditional pardon; *Re Convicts*, 73 Vt. 414, 56 L.R.A. 658, 51 Atl. 10, holding provision in pardon that prisoner may be apprehended upon governor's warrant for violation of conditions therein properly inserted in pardon; *State v. Turney*, 77 Iowa, 269, 42 N. W. 190, on power of governor to annex condition of pardon.

Cited in notes in 59 A. D. 576, on power of executive to grant conditional pardon; 82 A. S. R. 22; 14 L.R.A. 286,—on conditional pardons; 111 A. S. R. 112, on condition in pardon against use of liquor.

Procedure on breach of condition in pardon.

Cited in *State ex rel. O'Connor v. Wolfer*, 53 Minn. 135, 39 A. S. R. 582, 19 L.R.A. 783, 54 N. W. 1065, holding pardoned convict cannot be remanded to suffer original sentence for nonperformance of condition, upon mere order of governor; *Spencer v. Kees*, 47 Wash. 276, 91 Pac. 963, holding governor empowered to revoke conditional pardon for violation thereof; *State v. Collins*, 225 Mo. 633, 125 S. W. 465, holding that paroled prisoner cannot upon rearrest contend that statute permitting rearrest without warrant was invalid.

Cited in reference note in 39 A. S. R. 587, on recommitment upon breach of condition in pardon.

Cited in notes in 59 A. D. 577, on effect of prisoner's failure to perform condition in pardon; 111 A. S. R. 113, on right to hearing as to breach of conditions in pardon; 14 L.R.A. 289, on method of enforcement of forfeiture by breach of condition of pardon.

Effect of conditional pardon to bind acceptor.

Cited in *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047, holding provisions of pardon giving governor power to revoke same binding on acceptance thereof; *Ex parte Houghton*, 49 Or. 232, 9 L.R.A. (N.S.) 737, 89 Pac. 801, 13 A. & E. Ann. Cas. 1101, holding provision in pardon that stated official

shall determine whether conditions on which it was issued have been broken, binding upon acceptance thereof.

Cited in reference note in 49 A. R. 684, on effect of conditional pardon.

Cited in note in 16 L.R.A.(N.S.) 306, as to whether time prisoner is out on parole or conditional pardon is to be deducted from term of sentence.

30 AM. REP. 398, FARMERS' & M. BANK v. WASSON, 48 IOWA, 336.

How far by-laws of corporation are binding.

Cited in *Des Moines Nat. Bank v. Warren County Bank*, 97 Iowa, 204, 66 N. W. 154, holding transferee of stock from bank officer and stockholder takes same free from lien for officer's indebtedness to bank, where he has no notice of bylaw providing that bank has lien on stock as security; *Victor G. Bloede Co. v. Bloede*, 84 Md. 129, 57 A. S. R. 373, 33 L.R.A. 107, 34 Atl. 1127, holding by law of corporation making it obligatory on stockholder to sell stock to other stockholders before to the public, not binding in public; *State ex rel. Reed v. Smith*, 15 Or. 98, 14 Pac. 814, holding owner of stock which he has assigned to another as security for note entitled to vote same although it has been transferred on books of corporation; *Miller v. Farmers' Mill. Elevator Co.* 78 Neb. 441, 126 A. S. R. 606, 110 N. W. 995, holding that corporations cannot enforce law as to transfer of stock so as to operate as unreasonable restraint upon their disposition.

Cited in notes in 85 A. D. 619, on bylaws of private corporation which have been sustained as valid; 85 A. D. 621, on validity of bylaws abridging or enlarging corporate powers or disturbing vested rights; 43 A. S. R. 154, 155, 156, on limitations on power of private corporations to enact bylaws; 57 A. S. R. 385, on validity of restraint on alienation of corporate stock imposed by means of bylaws; 27 L.R.A. 272, on restriction by bylaws on right to sell shares of stock.

Corporation's right to lien on its stock in hands of its debtor.

Cited in *Dempster Mfg. Co. v. Downs*, 126 Iowa, 80, 106 A. S. R. 340, 101 N. W. 735, 3 A. & E. Ann. Cas. 187, holding corporation may create lien on stock to secure amount of stockholder's liability to it, by provision in incorporation papers.

Cited in notes in 57 A. S. R. 386; 32 A. S. R. 420,—on lien of corporation on shareholder's stock for debt to corporation; 57 A. S. R. 394, on existence of lien as restraint upon alienation of corporate stock.

Rights of corporation officers as creditors of corporation.

Cited in *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. 680, holding deed of trust on corporate lands executed to directors to secure corporate indebtedness to them, valid; *Nappanee Canning Co. v. Reid, M. & Co.* 159 Ind. 614, 59 L.R.A. 199, 64 N. E. 870, holding corporation may prefer creditors for whose claims certain directors were surety; *City Nat. Bank v. Goshen Woolen Mills Co.* 35 Ind. App. 562, 69 N. E. 206, holding director creditors of insolvent corporation have no right to prefer themselves in deed of assignment of corporation; *Garrett v. Burlington Plow Co.* 70 Iowa, 697, 59 A. R. 461, 29 N. W. 395, holding director of corporations holding mortgage against it to secure indebtedness, may enforce preference thus obtained, where same was taken in good faith; *Patrick v. Boonville Gaslight Co.* 17 Mo. App. 462, holding president of corporation, who purchases dishonored debentures of corporation, holds them *prima facie* as trustee of corporation.

Right to compel transfer of stock on corporate books.

Cited in *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632, holding bank can be compelled to make transfer on its books upon presentation of certificates and deed thereof.

Cited in note in 136 Am. St. Rep. 1028, 1032, on duty of corporations to transfer stock on their books.

Validity of transfers of stock not entered on books.

Cited in reference note in 32 A. S. R. 640, on validity of transfers of corporate stock not entered on books.

Right of directors to control transfers of stock.

Cited in reference note in 30 A. S. R. 668, no right of directors to control transfers of corporate stock.

30 AM. REP. 403, STATE v. BRUCE, 48 IOWA, 530.**Use of intoxicating liquors by jury as affecting verdict.**

Cited in *Patrick v. Victor Knitting Mills Co.* 37 App. Div. 7, 55 N. Y. Supp. 340, holding intermittent drinking of intoxicating liquor by jury during evening and night while deliberating on verdict, ground for granting new trial; *State v. Andre*, 14 S. D. 215, 84 N. W. 782, holding imbibing undisclosed quantity of whisky just before being called as juror insufficient of itself to invalidate conviction; *State v. Livingston*, 64 Iowa, 560, 21 N. W. 34, holding mere fact that juror was intoxicated on evening during trial not ground for new trial; *State v. Kennedy*, 77 Iowa, 208, 41 N. W. 609, holding mere drinking of intoxicating liquor by juror during adjournment of court will not authorize setting verdict aside; *Hemmi v. Chicago, G. W. R. Co.* 102 Iowa, 25, 70 N. W. 746, holding new trial will not be granted because certain jurors drank beer while trial was in progress; *State v. Minor*, 106 Iowa, 642, 77 N. W. 330, holding treating of certain jurors to beer by material prosecuting witness before deliberation on verdict, insufficient to show misconduct of jurors; *Grottkau v. State*, 70 Wis. 462, 36 N. W. 31, holding motion for new trial on ground that counsel for state treated jurors to liquor during trial, denied, where defendant with knowledge failed to object until four days after verdict.

Cited in reference notes in 33 A. R. 506, on effect on verdict of jury being furnished with intoxicants; 134 Am. St. Rep. 1035, on misconduct of jurors other than their separation for which a verdict may be set aside.

What opinion will disqualify juror.

Cited in *State v. Sopher*, 70 Iowa, 494, 30 N. W. 917; *State v. Munchrath*, 78 Iowa, 268, 43 N. W. 211; *State v. Field*, 89 Iowa, 34, 56 N. W. 276,—holding fact that juror has formed opinion as to guilt of accused does not necessarily disqualify him; *State v. Crofford*, 121 Iowa, 395, 96 N. W. 889, holding defendant's challenge of juror on prosecution for murder should be sustained, where he had read testimony against defendant and believed it to be true, and was prejudiced; *State v. Brown*, 130 Iowa, 57, 106 N. W. 379, holding impression on part of certain jurors that defendant was connected with commission of crime, not disqualifying opinion; *State v. Carrick*, 16 Nev. 120, holding juror who stated that he had unqualified opinion that there was deficiency in defendant's accounts, but had no opinion as to his guilt, not disqualified.

Degree of evidence necessary to prove defense.

Cited in *State v. Fry*, 67 Iowa, 475, 25 N. W. 738, on degree of evidence necessary to establish alibi; *State v. Wells*, 48 Iowa, 671, holding presumption of previous chaste character of prosecuting witness in seduction case must be overcome by fair preponderance of evidence.

— Of insanity.

Cited in *Jones v. People*, 23 Colo. 276, 47 Pac. 275, holding jury should acquit defendant on trial for murder, if they entertain reasonable doubt as to sanity of defendant at time of homicide; *State v. Hemrick*, 62 Iowa, 414, 17 N. W. 594, holding defendant bound to prove defense of insanity or alibi by preponderance of evidence; *State v. Robbins*, 109 Iowa, 650, 80 N. W. 1061; *State v. Thiele*, 119 Iowa, 659, 94 N. W. 256; *State v. Humbles*, 126 Iowa, 462, 102 N. W. 409,—holding defendant has burden of proving defense of insanity by preponderance of evidence; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241, holding insanity as defense to crime must be established by preponderance of evidence.

Cited in notes in 97 A. D. 176, on burden of proof when insanity set up as defense to crime; 39 L.R.A. 740, on proof of insanity in criminal cases by preponderance of the evidence; 39 L.R.A. 737, on proof of insanity in criminal cases to satisfaction of jury.

— Of irresponsible drunkenness.

Cited in *State v. Gear*, 29 Minn. 221, 13 N. W. 140, holding instruction that defendant must establish defense of irresponsible drunkenness by fair preponderance of evidence, not error.

Trial judge's discretion as to order of testimony.

Cited in *State v. Thomas*, 135 Iowa, 717, 109 N. W. 900, holding introduction of evidence in rebuttal which should have been introduced before, discretionary with trial court.

30 AM. REP. 407, STATE v. LEWIS, 48 IOWA, 578.**Right to convict for one crime where another is alleged or proved.**

Cited in *Graff v. People*, 208 Ill. 312, 70 N. E. 299, holding conviction for conspiracy may be had, although one of overt acts is felony; *United States v. Gardner*, 42 Fed. 829, on offense of conspiracy to commit larceny being merged into larceny.

— Seduction where force was used.

Cited in *State v. Carter*, 8 Wash. 272, 36 Pac. 29, holding defendant cannot be convicted of seduction, where case shows it was rape; *Carlisle v. State*, 73 Miss. 387, 19 So. 207, on duty of court to acquit prisoner on indictment for seduction where crime is rape; *Barnes v. State*, 37 Tex. Crim. Rep. 320, 39 S. W. 684, holding that female must yield alone to solicitation of other party in consideration of promise to marry, to sustain indictment for seduction; *Marshall v. Taylor*, 98 Cal. 55, 35 A. S. R. 144, 32 Pac. 867, on proof of rape defeating action for damages for seduction.

— Fornication on trial for rape.

Cited in *State v. Shear*, 51 Wis. 460, 8 N. W. 287, holding information for rape will not sustain conviction of fornication.

What constitutes seduction.

Cited in notes in 44 A. D. 164, on what constitutes seduction; 87 A. D. 405,

on seduction as criminal offense; 76 A. S. R. 672, on use of seductive arts as element of crime of seduction.

30 AM. REP. 408, STATE v. NORTHRUP, 46 IOWA, 583.

Right of accused to introduce evidence of previous good character.

Cited in *State v. Cather*, 121 Iowa, 106, 96 N. W. 722, holding refusing defendant right to show good character with respect to trait involved in charge, error; *Welch v. Jungeneimer*, 56 Iowa, 11, 41 A. R. 77, 8 N. W. 673, on right to show good character of accused as defense.

Cited in note in 103 A. S. R. 891, 892, on admissibility of evidence of defendant's good character for purpose of creating doubt as to his guilt.

Weight to be given evidence of good character as question for jury.

Cited in *State v. Richart*, 57 Iowa, 245, 10 N. W. 657, holding instruction that accused must overcome presumption of guilt arising from possession of stolen property by preponderance of evidence, erroneous; *State v. Donovan*, 61 Iowa, 278, 16 N. W. 130, holding instruction that value of accused's previous good character as defensive evidence must be determined by jury, not erroneous; *State v. House*, 108 Iowa, 68, 78 N. W. 859, holding good character should be considered in connection with all other facts, its weight being for jury; *State v. King*, 122 Iowa, 1, 96 N. W. 712, holding proof of good character is to be given such weight only as jury may deem it entitled to receive; *Daniels v. State*, 2 Penn. (Del.) 586, 54 L.R.A. 286, 48 Atl. 196, holding character evidence is to be weighed by jury according to weight of other testimony by which it is supported.

Weight of evidence necessary—To establish alibi.

Cited in *State v. Red*, 53 Iowa, 69, 4 N. W. 831, holding instruction that burden of proof to establish alibi was upon defendant, not erroneous; *State v. Hamilton*, 57 Iowa, 596, 11 N. W. 5, holding instruction that defendant must establish alibi by preponderance of evidence, correct; *People v. Kessler*, 13 Utah, 69, 44 Pac. 97, holding charge that if prosecution made out case that would sustain verdict of guilty, then burden is upon defendant to establish alibi by preponderance of evidence, not erroneous.

Cited in note in 95 A. D. 760, 761, on degree of evidence necessary to establish alibi.

—To overcome presumption as to previous chaste character.

Cited in *State v. Wells*, 48 Iowa, 671, holding defendant must produce evidence to overcome presumption of law in favor of previous chaste character of prosecuting witness, by fair preponderance; 101 A. S. R. 505, on effect of good reputation on presumption of guilt from possession of stolen property; 20 L.R.A. 619, on weight and effect of evidence as to character of accused.

Instructions as to character as error.

Cited in *State v. Horning*, 49 Iowa, 158, holding instruction that jury should entirely disregard good character of defendant if there is positive evidence showing his guilt, error; *State v. Gustafson*, 50 Iowa, 194, holding instruction that if jury find evidence positive and conclusive as to defendant's guilt, then his former good character cannot be considered, error; *State v. Lindley*, 51 Iowa, 343, 33 A. R. 139, 1 N. W. 484, holding instruction that previous good character cannot avail as ground of acquittal as against facts positively or strongly proven, error; *State v. Jones*, 52 Iowa, 150, 2 N. W. 1060, holding instruction that good character affects nothing as against established facts, error; *State v. Linde*, 54 Iowa, 139, 6 N. W. 168, holding instruction that evidence of good character will

not overcome positive and direct evidence of guilt, erroneous; *State v. Wolf*, 112 Iowa, 458, 84 N. W. 536, holding instruction that jury may consider evidence of good character of defendants in determining whether state's witnesses have testified falsely, error; *State v. Birkey*, 122 Iowa, 102, 97 N. W. 980, holding instruction limiting benefit of proof of previous good character to cases where guilt of accused is doubtful, error; *State v. Sloan*, 22 Mont. 293, 56 Pac. 364, holding instruction which practically tells jury not to consider evidence of previous good character unless they are in doubt whether deceased was aggressor, erroneous; *Johnson v. State*, 34 Neb. 257, 51 N. W. 835, holding instruction that "good character is circumstance of great weight in doubtful cases and of less weight in less doubtful," error; *State v. Daley*, 53 Vt. 442, 38 A. R. 694, holding instruction by court that defendant had right to put his good reputation before jury "as kind of makeweight in his favor, if there is pinch in case" error; *State v. Fitzgerald*, 49 Iowa, 260, 31 A. R. 148; *State v. Clemons*, 51 Iowa, 274, 1 N. W. 546,—on instructions as to general good character of accused; *State v. Richards*, 126 Iowa, 497, 102 N. W. 439, on question of instruction as to defendant's previous good character.

30 AM. REP. 412, RAUSCH v. MOORE, 48 IOWA, 611.

Unassigned dower or distributive share of husband as subject of execution.

Cited in *Brightman v. Morgan*, 111 Iowa, 481, 82 N. W. 954, holding unmeasured distributive share of husband in deceased wife's real estate, not subject to levy under execution; *Getchell v. McGuire*, 70 Iowa, 71, 30 N. W. 7, on right of court of equity to cause widow's dower to be set aside, at instance of widow's creditor for purpose of levying execution; *Wold v. Berkholtz*, 105 Iowa, 370, 75 N. W. 329, on levy on assigned dower interest.

Cited in note in 39 A. S. R. 26, on unassigned dower as not subject to execution.

What constitutes "dower."

Cited in *Ditson v. Ditson*, 85 Iowa, 276, 52 N. W. 203, holding word "dower" as used in antenuptial contract whereby wife agreed to take certain sum as her full dower in estate, included all her interest in estate, both real and personal; *Grubbs v. Leyendecker*, 153 Ind. 348, 53 N. E. 940, holding widow's right of dower, without assignment, does not constitute life estate in land.

Rights of heirs in unassigned dower.

Cited in *Potter v. Worley*, 57 Iowa, 86, 7 N. W. 685, holding heirs of widow who has failed to have her dower interest set apart, may recover same after her death.

Nature of distributive share of widow.

Cited in *Re Kuhn*, 125 Iowa, 449, 101 N. W. 151, 2 A. & E. Ann. Cas. 657, holding distributive share of widow under code does not go to her by inheritance.

Rights of attachment debtor.

Cited in *Cox v. Allen*, 91 Iowa, 462, 59 N. W. 335, on right of debtor to insist that property should not have been taken under attachment, where motion to discharge same is denied.

Cited in reference note in 15 A. S. R. 204, on right to attach unassigned dower.

Right of attorney to verify pleading.

Cited in *Searle v. Richardson*, 67 Iowa, 170, 25 N. W. 113, holding attorney's

knowledge that certain facts pleaded were adjudicated in former trial, does not qualify him to verify pleading; *Yoe v. Nichols*, 51 Iowa, 330, 1 N. W. 664, holding attorney may verify pleading, where he states that his knowledge of facts is better than party's and he knows them to be true.

Widow as heir.

Cited in *Braun v. Mathieson*, 139 Iowa, 409, 116 N. W. 789, holding that widow is not "heir" and takes no interest in land patented to entryman's heirs.

30 AM. REP. 414, SCHMIDT v. HUMPHREY, 48 IOWA, 652.

Violation of Sunday law by plaintiff as defense.

Cited in *Taylor v. Western U. Teleg. Co.* 95 Iowa, 740, 64 N. W. 660, holding fact that horses were transported on Sunday, no defense to action for delay in delivering message engaging stable room; *Tinble v. Chicago, B. & Q. R. Co.* 40 Iowa, 333, 14 N. W. 320, holding that liability of railroad for killing animals by train run on Sunday is to be determined by same rules as if accident occurred on week day.

Cited in reference note in 34 A. R. 670, on action for tort occurring on Sunday.

Distinguished in *Gunderson v. Richardson*, 56 Iowa, 56, 41 A. R. 81, 8 N. W. 683, holding fact that contract was made on Sunday, good defense to action to recover damages for fraudulent representations made as inducement thereto.

—To action for personal injury.

Cited in *Matthes v. Imperial Acci. Asso.* 110 Iowa, 222, 81 N. W. 484, holding fact that plaintiff was working on Sunday when injured, no defense to action on accident insurance policy; *Gross v. Miller*, 93 Iowa, 72, 26 L.R.A. 605, 61 N. W. 385; *Platz v. Cohoes*, 89 N. Y. 219, 42 A. R. 286; *Kansas City v. Orr*, 62 Kan. 61, 50 L.R.A. 783, 61 Pac. 406,—holding fact that deceased was violating Sunday law when injured through negligence of another, no defense; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Solarz v. Manhattan R. Co.* 8 Misc. 656, 29 N. Y. Supp. 1123, 31 Abb. N. C. 428; *Hoadley v. International Paper Co.* 72 Vt. 79, 47 Atl. 169,—holding fact that injured party was working for defendant on Sunday no defense to action for injury due to defendant's negligence.

Cited in reference note in 9 A. S. R. 893, on right of recovery for injuries to one while violating Sunday law.

Violation of law generally by plaintiff as defense.

Cited in *Tackett v. Taylor County*, 123 Iowa, 149, 98 N. W. 730, holding fact that party was conducting threshing engine across bridge violated law in not planking same, no defense to action for injury from defective bridge, where violation did not directly contribute to injury.

Cited in reference notes in 4 A. S. R. 361, on violation of law directly contributing to injury as bar to recovery; 11 A. S. R. 620, on recovery of damages for negligence by one who was violating law when injured.

—Boarding moving train.

Cited in *Johnson v. Chicago, St. P. M. & O. R. Co.* 116 Iowa, 639, 88 N. W. 311, holding fact that plaintiff's act in boarding moving train violated law, no defense to action for injury from forcible ejection therefrom; *Young v. Chicago, M. & St. P. R. Co.* 100 Iowa, 357, 69 N. W. 682, holding person injured while boarding moving train in violation of law cannot recover therefor.

— Permitting animals to run at large.

Cited in *Beckler v. Merringer*, 131 Iowa, 614, 109 N. W. 185, holding fact that horse was running at large in violation of law when attacked by dogs no defense to action for injury to horse caused by dogs; *Vanhorn v. Burlington, C. R. & N. R. Co.* 63 Iowa, 67, 18 N. W. 679, on fact that plaintiff's horses were running at large in violation of city ordinance being no defense to action for their injury.

Jurisdiction of justice of the peace.

Cited in *Wilson v. Sparkman*, 17 Fla. 871, 35 A. R. 110, on justice being ousted of jurisdiction where action involves amount beyond his jurisdiction.

30 AM. REP. 419, FISHER v. CONWAY, 21 KAN. 18.

Impeachment as attack upon present credibility of witness.

Cited in *McGuire v. Kenefick*, 111 Iowa, 147, 82 N. W. 485, holding evidence as to reputation of witness in town he left seven years before trial inadmissible; *State v. Summar*, 143 Mo. 220, 45 S. W. 254, holding exclusion of evidence of reputation prior to commission of crime there years before trial correct; *Sun Fire Office v. Ayerst*, 37 Neb. 184, 55 N. W. 635, holding evidence of reputation should not relate to residence which had ceased two and one half years before trial; *Long v. State*, 23 Neb. 33, 36 N. W. 310, holding evidence of reputation of witness at time of trial competent; *Smith v. Hine*, 179 Pa. 203, 36 Atl. 222, 39 W. N. C. 402, 27 Pittsb. L. J. N. S. 336, holding limiting inquiry as to reputation of witness whose character for veracity has been attacked to period before filing petition to open judgment, error; *Fry v. State*, 96 Tenn. 467, 35 S. W. 883, holding evidence of good general reputation of accused at former residence six years before trial competent.

Cited in note in 82 A. S. R. 34, on impeachment of witness by proof of character.

When pleading states action for trespass only.

Cited in *Gunn v. Fellows*, 41 Hun, 257, holding complaint alleging that defendant did assault, beat and injure plaintiff, etc., states cause of action for assault and battery.

Relations of husband and wife as to each other's real estate.

Cited in *Warner v. Brokuet*, 54 Kan. 649, 39 Pac. 228, holding husband cannot obtain valid tax title to wife's property by purchase at tax sale.

When wife is husband's agent.

Cited in note in 98 A. S. R. 631, on wife as husband's agent in his absence.

Evidence of assault in action for trespass.

Cited in note in 19 L.R.A.(N.S.) 1035, on admissibility of evidence of assault and battery in action for trespass to realty.

30 AM. REP. 421, FRYE v. SANDERS, 21 KAN. 26.

Ratification of contract by partnership.

See *Bates Partnership*, p. 441, on necessity that contract by one partner be ratified without modification, if at all.

30 AM. REP. 425, CASE v. ALLEN, 21 KAN. 217.

Priority of lien of chattel mortgagee — Over subsequent agister's lien.

Cited in *Willard v. Whinfield*, 2 Kan. App. 53, 43 Pac. 314; *Smith v. Stevens*,

36 Minn. 303, 31 N. W. 55,—holding lien for keeping horses superior to that of prior mortgagee; *Everett v. Barse Live Stock Commission Co.* 115 Mo. App. 482, 88 S. W. 165, holding agister's lien superior to that of prior mortgagee, where contract was made in Kansas; *Chapman v. First Nat. Bank*, 98 Ala. 523, 22 L.R.A. 78, 13 So. 764; *Sullivan v. Clifton*, 55 N. J. L. 324, 39 A. S. R. 652, 20 L.R.A. 719, 26 Atl. 964; *McGhee v. Edwards*, 87 Tenn. 506, 3 L.R.A. 654, 11 S. W. 316,—holding lien of livery stable keeper subordinate to that of prior mortgagee; *Wright v. Sherman*, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; *Hanch v. Ripley*, 127 Ind. 151, 11 L.R.A. 61, 26 N. E. 70; *Lazarus v. Moran*, 64 Mo. App. 239,—holding lien for keeping horse subordinate to that of prior mortgagee.

Cited in reference notes in 39 A. S. R. 654; 121 A. S. R. 611,—on priority between agister's lien and chattel mortgage; 72 A. S. R. 833; 41 A. R. 737,—on priority of statutory agister's lien over prior chattel mortgage.

Cited in note in 12 L.R.A.(N.S.) 311, on priority as between lien of chattel mortgage and lien acquired by furnishing food or care to animals.

Distinguished in *Central Nat. Bank v. Brecheisen*, 65 Kan. 807, 70 Pac. 895, holding lien created by contract between mortgagor of live stock and agister subordinate to that of prior mortgagee.

— Over subsequent laborer's lien.

Cited in *Wilson v. Donaldson*, 121 Cal. 8, 66 A. S. R. 17, 43 L.R.A. 524, 53 Pac. 404, holding laborer's lien on crop subordinate to lien of prior chattel mortgage; *Sitton v. Dubois*, 14 Wash. 624, 45 Pac. 303, holding lien of laborer on crop superior to lien of prior chattel mortgage; *Garr v. Clements*, 4 N. D. 559, 62 N. W. 640, holding same as to threshing engine.

— Over subsequent landlord's lien.

Distinguished in *Hempstead Real Estate Bldg. & Bkg. Asso. v. Cochran*, 60 Tex. 620, holding lien of landlord on tenant's personal property subordinate to that of prior mortgagee.

30 AM. REP. 430, WILLIAMS v. HADLEY, 21 KAN. 350.

Construction of voluntary assignment by copartners.

Cited in *Lowry v. Cowles Electric Smelting & Aluminum Co.* 56 Fed. 488; *Cowles Electric Smelting & Aluminum Co. v. Lowrey*, 24 C. C. A. 816, 47 U. S. App. 531, 79 Fed. 331,—holding assignment by two inventors of all their discoveries, applications and patents, passes title to pending individual application of one; *Becker v. Leonard*, 42 Hun. 221, holding assignment by two persons followed by word copartners, of all and singular the real and personal estate of parties of first part, includes individual property; *Coffin v. Douglass*, 61 Tex. 406, holding assignment by firm of "all wares, merchandise etc., belonging to us" now in their store, embraces individual property; *Eau Claire Grocer Co. v. Hubbard*, 97 Wis. 661, 73 N. W. 570, holding assignment, which refers to copartnership name in affidavit as to value of property and property inventoried as well as creditors are of firm, is assignment by firm; *Cissell v. Johnston*, 4 App. D. C. 335, on words "trading as blank Co.," following individual names of copartners in assignment being descriptive personae.

30 AM. REP. 433, WICKS v. SMITH, 21 KAN. 412.

Right to rescind contract for fraud.

Cited in *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255, on right to rescission of contract where no rights have been surrendered and no benefits acquired.

— Waiver of.

Cited in *Scott v. Walton*, 32 Or. 460, 52 Pac. 180, holding party to exchange of lands waives right to rescind for fraud, where he endeavors to sell same as owner after discovering fraud.

Cited in note in 30 L.R.A.(N.S.) 874, on waiver of purchaser's right to rescind land contract.

30 AM. REP. 436, RUSSELL v. ANTHONY, 21 KAN. 450.**What constitutes libel.**

Cited in *Hetherington v. Sterry*, 28 Kan. 426, 42 A. R. 169, holding article, charging lawyer with wantonly abandoning case at great expense to client, *prima facie* libelous; *Kirkpatrick v. Eagle Lodge No. 32*, 26 Kan. 384, 40 A. R. 316, holding publication which brings party into contempt and disgrace, libelous; *Spurlock v. Lombard Invest. Co.* 59 Mo. App. 225, on imputation of professional misconduct being libelous.

Cited in notes in 15 A. S. R. 349; 57 A. R. 222,—on criticism of public officer as privileged.

What publication constitutes criminal contempt.

Cited in *State ex rel. Crow v. Shepherd*, 177 Mo. 205, 99 A. S. R. 624, 76 S. W. 79, holding newspaper article charging decision of court in cause still pending to be result of bribery, is criminal contempt.

Sufficiency of case made.

Cited in *St. Louis & S. F. R. Co. v. Sullivan*, 7 Kan. App. 527, 48 Pac. 945, holding case-made sufficient, where certificate shows that it was duly presented for settlement, both parties being present without objection.

Right to amend case made.

Cited in *Cloud County v. Citizens' Nat. Bank*, 6 Kan. App. 330, 51 Pac. 55, holding case-made cannot be amended or supplemented in appellate court.

Extrinsic evidence as to case made.

Cited in *Wilson v. Jones*, 29 Kan. 233, holding extrinsic evidence admissible to show that counsel were present and that plaintiff's counsel suggested amendments and made objections; *Jones v. Kellogg*, 51 Kan. 263, 37 A. S. R. 278, 33 Pac. 997, holding extrinsic evidence proper to show that case-made was served within proper time.

30 AM. REP. 441, BUTLER v. BUTLER, 21 KAN. 521.**Conveyance or gift of husband or wife as fraud on marital rights.**

Cited in *Arnegard v. Arnegard*, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797, holding deed of homestead to son on eve of marriage to second wife, fraudulent as to wife's rights; *Daniher v. Daniher*, 201 Ill. 489, 66 N. E. 239; *Alkire v. Alkire*, 134 Ind. 350, 32 N. E. 571; *Beechley v. Beechley*, 134 Iowa, 75, 120 A. S. R. 412, 9 L.R.A.(N.S.) 955, 108 N. W. 762, 13 A. & E. Ann. Cas. 101,—holding voluntary conveyance to his children in contemplation of another marriage, valid, where no false representations were made; *Small v. Small*, 56 Kan. 1, 54 A. S. R. 581, 30 L.R.A. 243, 42 Pac. 323, holding husband may, during coverture, give away to his children bulk of his property without violating wife's marital rights; *Walker v. Walker*, 66 N. H. 390, 49 A. S. R. 616, 27 L.R.A. 799, 31 Atl. 14, holding husband's purchase of property during coverture as trustee for his sons, not in fraud of wife's marital rights; *Dudley v. Dudley*, 76 Wis.

567, 8 L.R.A. 814, 45 N. W. 602, holding deed given by husband to mother few days before marriage not in fraud of wife's marital rights; *Green v. Green*, 34 Kan. 740, 55 A. R. 256, 10 Pac. 156, on voluntary conveyance by woman of all her property on eve of marriage, being in fraud of husband's marital rights.

Cited in reference notes in 35 A. R. 696, on validity of woman's conveyance pending marriage negotiations; 4 A. S. R. 215, on conveyance fraudulent as against intended marriage.

Cited in notes in 8 L.R.A. 814, on equitable relief against antenuptial fraud of husband or wife; 6 E. R. C. 877, on validity of antenuptial agreements; 12 E. R. C. 765, on validity of settlements to cut off intended husband or wife.

Distinguished in *Murray v. Murray*, 115 Cal. 266, 56 A. S. R. 97, 37 L.R.A. 626, 47 Pac. 37, holding conveyance by husband to his brother before marriage in fraud of wife's right to support, where she is deserted after marriage.

Rights of married woman.

Cited in *State v. Walker*, 36 Kan. 297, 59 A. R. 556, 13 Pac. 279, on rights of married woman.

Cited in reference note in 42 A. R. 39, on action by wife to set aside antenuptial conveyance.

Rights of husband and wife in real estate.

Cited in *Baker v. Stewart*, 40 Kan. 442, 10 A. S. R. 213, 2 L.R.A. 434, 19 Pac. 904, holding conveyance to husband and wife conveys to them in entirety, with survivor taking entire estate.

30 AM. REP. 447, SCHOOL DIST. v. PERKINS, 21 KAN. 536.

Validity of unauthorized township warrants in hands of transferee.

Cited in *Salamanca Twp. v. Jasper County*, 22 Kan. 696, holding no action can be maintained on township warrant which was issued without authority, in hands of transferee thereof; *Webster v. Haskell County*, 7 Kan. App. 764, 53 Pac. 529, holding county warrants which are invalid in hands of payee are invalid in hands of holder.

Burden of proving authority for contract by school board.

Cited in *School Dist. v. Brown*, 2 Kan. App. 309, 43 Pac. 102, holding party to contract with school board for building school must show that same was authorized by voters of district.

What may be purchased as "necessary appliances."

Cited in reference note in 57 A. S. R. 854, on what may be purchased as "necessary appliances."

30 AM. REP. 451, RE TAYLOR, 48 MD. 28.

Power of legislature to regulate admission of attorneys.

Cited in *Re Maddox*, 93 Md. 727, 55 L.R.A. 298, 50 Atl. 487, holding that right to practise law may constitutionally be regulated by statute to exclude females; *Re Branch*, 70 N. J. L. 537, 57 Atl. 431, holding act requiring court to recommend individuals without examination for appointment as lawyers, unauthorized exercise of legislative control.

Cited in reference note in 94 A. S. R. 863, on requisites to admission of attorney to practise.

Cited in note in 27 L. ed. U. S. 836, on constitutionality of statute regulating admission of attorneys.

Application of constitutional provision as to special privileges.

Cited in *Morris v. Powell*, 125 Ind. 281, 9 L.R.A. 326, 25 N. E. 221, holding provisions of Constitution respecting bestowal of special privilege does not apply to legislation as to right of suffrage.

Cited in note in 1 L.R.A. 113, on authority of the several states to establish and regulate right of suffrage.

30 AM. REP. 455, KIRBY v. CITIZENS' R. CO. 48 MD. 168.**Paramount right of city over its streets.**

Cited in *Anderson v. Fuller*, 51 Fla. 380, 120 A. S. R. 170, 6 L.R.A. (N.S.) 1026, 41 So. 684, holding city not liable to water company for cost of relaying its pipe due to fact that city constructed sewer in same streets.

Cited in notes in 9 L.R.A. 206, on statutory regulations of drains and sewers; 50 L.R.A. 145, on privilege of using streets for water pipes and mains as a contract within constitutional provision against impairing obligation of contracts.

— As against railway company.

Cited in *North Baltimore Pass. R. Co. v. Baltimore*, 75 Md. 247, 23 Atl. 470, holding city may tear down and reconstruct bridge on its highway without interference from railroad company having right of way across it; *Kansas City, St. J. & C. B. R. Co. v. Morley*, 45 Mo. App. 308, holding right of street railway company in street subject to city's right to improve street by laying sewer; *San Antonio v. San Antonio Street R. Co.* 15 Tex. Civ. App. 1, 39 S. W. 136, holding injunction in behalf of street railway company will not be granted to restrain city from laying sewer pipes where they will interfere with tracks.

Cited in note in 6 L.R.A. (N.S.) 1028, on duty and right of municipality to reimburse street railroad for expenses entailed by improvements in street.

Distinguished in *Baltimore v. Cowen*, 88 Md. 447, 71 A. S. R. 433, 41 Atl. 900, holding city opening street across railway company's tracks, chargeable with cost of strengthening side walk under track in laying sewer; *Central Pass. R. Co. v. Philadelphia W. & B. R. Co.* 95 Md. 428, 52 Atl. 752, holding street railway company crossing steam railroad tracks in city must bear expense of constructing and repairing crossing; *Canton v. Canton Cotton Warehouse Co.* 84 Miss. 268, 65 L.R.A. 561, 36 So. 266, holding railroad company having right of way across city street may reasonably obstruct street for purpose of laying conduit under it.

30 AM. REP. 456, SHAFER v. AHALT, 48 MD. 171.**Slander in charging women with unchastity.**

Cited in note in 24 L.R.A. (N.S.) 588, 603, on slander and libel in charging woman with unchastity.

Necessity of averring special damage in slander action.

Cited in *Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289, holding complaint in slander for calling one a "whore," insufficient without averment of special damage.

30 AM. REP. 458, BALTIMORE v. MUSGRAVE, 48 MD. 272.**Right to dismiss condemnation proceedings.**

Cited in *Brokaw v. Terre Haute*, 97 Ind. 451, holding city may dismiss proceedings to widen street, on payment of costs, though they have taken possession of

property; *McCready v. Rio Grande W. R. Co.* 30 Utah, 1, 83 Pac. 331, 8 A. & E. Ann. Cas. 732, holding railway company not liable to landowner for expenses incurred in preparing defense, where it dismissed condemnation proceedings in good faith; *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 352, 20 L.R.A. 126, 26 Atl. 510, holding that railroad company has no claim against city for repealing ordinance authorizing laying of tracks, where company had notice before tracks were laid.

Cited in note in 22 E. R. C. 201, on right to abandon proceeding to take lands by eminent domain after notice given.

Municipal liability for delay in instituting or dismissing condemnation proceedings.

Cited in *Black v. Baltimore*, 50 Md. 235, 33 A. R. 320, holding city not liable to property owner for delay in repealing ordinance condemning and opening street, where no complaint was made by landowner; *Shanfelter v. Baltimore*, 80 Md. 483, 27 L.R.A. 648, 31 Atl. 439, holding that lessee of hotel on site of property to be condemned, has no right of action against city for delay in instituting condemnation proceedings, where balance of site has been condemned.

Powers of agents of municipal corporation.

Cited in *State ex rel. Wildman v. Kidd*, 63 Wis. 337, 23 N. W. 703, holding petitioners for division of school district cannot bind new district by agreement to surrender its property rights.

Cited in note in 1 L.R.A. 608, on necessity that officer acts be within scope of his employment to render corporation liable.

—Notice of to one dealing with.

Cited in *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263, on landowner having notice that street commissioners were exceeding their authority in giving him notice of opening street; *Mealey v. Hagerstown*, 92 Md. 741, 48 Atl. 746, holding municipal corporation may set up plea of ultra vires in action on contract made by its officers.

30 AM. REP. 466, JONES v. JONES, 48 MD. 391.

Presumption as to validity of former marriage.

Cited in *Williams v. Williams*, 63 Wis. 58, 53 A. R. 253, 23 N. W. 110, holding publicly marrying another while living near alleged spouse and openly living with said other raises inference against validity of former marriage.

Cited in note in 14 L.R.A. 544, on proof of former marriage to overthrow subsequent one.

Presumption arising from cohabitation and repute.

Cited in *Moore v. Moore*, 102 Tenn. 148, 52 S. W. 778, holding no presumption of marriage arises from conduct otherwise affording plenary proof of marriage, where wife had another husband living; *Re Campbell*, 12 Cal. App. 707, 108 Pac. 669, holding that presumption of marriage arising from cohabitation is overcome by subsequent marriage to another in lifetime of first spouse.

Cited in note in 124 A. S. R. 121, on effect of separation of parties on presumption of marriage from cohabitation and reputation.

Distinguished in *Kilburn v. Kilburn*, 89 Cal. 46, 23 A. S. R. 447, 26 Pac. 636, holding evidence of marriage of defendant in divorce action for adultery, to woman alleged as correspondent, inadmissible where marriage between plaintiff and defendant is not proved by presumption from cohabitation.

Am. Rep. Vol. XVII.—15.

When former marriage prevails.

Cited in *Applegate v. Applegate*, 45 N. J. Eq. 116, 17 Atl. 293, holding proof by admission of wife and cohabitation with former husband, estops wife from obtaining alimony from man to whom she was formally married.

Admissibility of evidence of cohabitation and repute to establish marriage.

Cited in *White v. White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276, holding evidence of cohabitation and repute admissible to show marriage in divorce action on ground of adultery.

When strict proof of marriage is necessary.

Cited in *Jenkins v. Jenkins*, 83 Ga. 283, 20 A. S. R. 316, 9 S. E. 541, holding circumstantial evidence as well as direct, may be used to establish actual occurrence of prior marriage; *Le Brun v. Le Brun*, 55 Md. 496, holding former marriage must be strictly proven to warrant decree bastardizing issue and imputing crime to woman; *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, holding antecedent marriage must be proved by strict proof where it would invalidate formal marriage with children; *Stanley v. Stanley*, 4 Dem. 416, holding former marriage will not be presumed from cohabitation in action wherein two women ask for letters of administration on man's estate as his widow; *State v. Sherwood*, 68 Vt. 414, 35 Atl. 352, holding former marriage cannot be proven by acts of cohabitation in prosecution for bigamy.

Cited in note in 57 A. R. 455, on when proof of actual marriage is necessary.

Distinguished in *Camden v. Belgrade*, 75 Me. 126, 46 A. R. 364, holding proof of due solemnization of marriage will not suffice, in civil action, to exclude circumstantial evidence of previous marriage.

Necessity of reputation of marriage being general.

Cited in *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752, holding reputation from which marriage is to be inferred should be general.

30 AM. REP. 472, LAFLIN & R. POWER CO. v. SINSHEIMER, 48 MD. 411.**Failure of consideration as defense by drawee in bill.**

Cited in *American Nat. Bank v. Western Hay & Grain Co.* 69 Ill. App. 268, holding failure of consideration between drawer and drawee cannot be set up by drawee after payment against bona fide payee; *Bank of Commerce v. Evans*, 2 Tex. Civ. App. Cas. (Willson) 667, holding failure of consideration for acceptance cannot be pleaded as defense in action by holder of bill against acceptor.

Cited in reference note in 40 A. S. R. 382, on inquiry concerning consideration of negotiable instruments in hands of bona fide holder.

Parol evidence as to nature of acceptance.

Cited in *Morrison v. Baechtold*, 93 Md. 319, 48 Atl. 926, holding parol evidence admissible to show that parties were acting as agents of corporation, where offer was made to corporation and final acceptance was signed by parties individually; *Schmittler v. Simon*, 114 N. Y. 176, 11 A. S. R. 621, 21 N. E. 162, holding parol evidence admissible to show character of acceptance of draft where unintelligible words are used therein.

Cited in reference notes in 34 A. R. 68, on evidence of character of acceptance of negotiable instrument; 37 A. R. 143, on evidence to explain character of signature where unintelligible; 76 A. S. R. 633, on parol evidence to explain writings.

Liability on note executed by agent.

Cited in reference note in 56 A. R. 106, on liability of one signing company note as agent.

Cited in notes in 21 L.R.A.(N.S.) 1047, 1081, on liability of principal on negotiable paper executed by agent; 4 E. R. C. 284, on personal liability of one signing written instrument as agent.

30 AM. REP. 476, PEOPLE'S BANK v. SHRYOCK, 48 MD. 427.**Liability of partnership assets for claims against partner.**

Cited in reference note in 11 A. S. R. 334, on right of partner to attach debt due partnership.

Cited in notes in 57 A. S. R. 439, on possession of partnership assets, which may be taken under writ against one partner only; 57 A. S. R. 442, right to deliver possession to purchaser under writ against one partner only; 57 A. S. R. 442, on garnishment of interest of one partner in debt due partnership; 46 L.R.A. 486, on what may be sold under levy on partnership property for debt of partner; 59 L.R.A. 379, on garnishment of partnership claims on contract.

30 AM. REP. 481, FAWSETT v. CLARK, 48 MD. 494.**When words actionable per se are not slanderous.**

Cited in *Merrill v. Marshall*, 113 Ill. App. 447, holding charging party with being thief in reference to past transaction which was not larceny, not slanderous; *Bridgman v. Armer*, 57 Mo. App. 528, holding refusal to instruct that if words "you are a thief" were used as mere term of abuse plaintiff could not recover in slander action, error; *Robertson v. Edelstein*, 104 Wis. 440, 80 N. W. 724, holding words "I know you are nothing but a damned old bitch" spoken of married woman, cannot reasonably be constructed to charge that she was a whore or prostitute; *Rocky Mountain News Printing Co. v. Fridborn*, 46 Colo. 440, 24 L.R.A.(N.S.) 891, 104 Pac. 956, holding that though words ordinarily having defamatory sense may be shown to have been understood in nonactionable sense.

Distinguished in *Shockey v. McCauley*, 101 Md. 461, 61 Atl. 583, 4 A. & E. Ann. Cas. 921, on words "he stole them pulleys" not being actionable where no felony was intended to be charged.

Damages recoverable in slander action.

Distinguished in *Gambrill v. Schooley*, 95 Md. 260, 63 L.R.A. 427, 52 Atl. 500, on damages recoverable in slander action being limited to compensation.

30 AM. REP. 486, TAYLOR v. HENRY, 48 MD. 550.**What constitutes valid gift — Inter vivos.**

Cited in *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 A. S. R. 35, 59 Pac. 390, holding deposit of money belonging to wife in names of husband and wife payable to either, does not constitute gift to husband on death of wife; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119, holding deposit on certificate of deposit in name of another, does not constitute valid gift, where certificate is not delivered; *Second Nat. Bank v. Wrightson*, 63 Md. 81, holding deposit payable to order of depositor or another on return of certificate of deposit, does not authorize payment to said other after death of depositor; *Dougherty v. Moore*, 71 Md. 48, 17 A. S. R. 524, 18 Atl. 35, holding statement in passbook by depositor that he gave wife all money credited or to be credited to him therein, not valid gift, where he continues to deposit and draw; *Northrop v. Hale*, 73 Me. 60;

Savings Bank v. McCarthy, 89 Md. 194, 42 Atl. 929,—holding deposit in name of relative subject to depositor's order, does not constitute gift; *Gorman v. Gorman*, 87 Md. 358, 39 Atl. 1038; *Re Seigler*, 49 Misc. 189, 98 N. Y. Supp. 929; *Whalen v. Milholland*, 89 Md. 199, 44 L.R.A. 208, 43 Atl. 45,—holding deposit in name of depositor and another as joint owners payable to order of either and survivor, does not create gift to survivor, where depositor retains pass-book; *De Grange v. De Grange*, 96 Md. 609, 54 Atl. 663, holding note delivered by maker as gift not enforceable against maker's estate, because same is mere promise without consideration; *Simpson v. Harris*, 21 Nev. 353, 31 Pac. 1009, holding evidence of declarations of party that he had made gift of money together with evidence of note given for same, insufficient to establish gift; *Ossipee Valley Ten Cents Sav. Bank v. Smith*, 64 N. H. 228, 9 Atl. 792, holding deposit in bank in name of daughter subject to depositor's right to have income during life, valid gift; *Skillman v. Wiegand*, 54 N. J. Eq. 198, 33 Atl. 929, holding mere permitting of deposit to remain in name of depositor and his son, does not constitute valid gift; *Ralling v. Manhattan Sav. Bank & T. Co.* 110 Tenn. 288, 75 S. W. 1051, holding gift of depositor's money in bank by delivery of pass-book on contingency that donor never returned, not valid gift *inter vivos*; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 A. R. 781, holding gift *inter vivos* not created by deposit in another's name payable to himself during life and after death to said other, where pass-book is not delivered; *Baker v. Hedrich*, 85 Md. 645, 37 Atl. 363, on deposit in two names subject to order of either and survivor being valid gift; *Robinson v. Mutual Sav. Bank*, 7 Cal. App. 642, 95 Pac. 533, holding that deposit of money to joint account of depositor and his agent did not constitute joint tenancy with right of survivorship; *Candee v. Connecticut v. Sav. Bank*, 81 Conn. 372, 22 L.R.A. (N.S.) 568, 71 Atl. 551, holding that written order to pay donee money in savings bank where book was lost, constituted gift of principal, though use was retained; *Curtis's Estate*, 1 Cof. Prob. Dec. Anno. 533, to the point that to constitute valid gift donor must part with dominion over it and title must vest in donee.

Cited in reference note in 4 A. S. R. 334, on deposit of money in bank in another's name as a gift.

Cited in notes in 34 A. S. R. 222, on circumstances under which gift is regarded as complete; 11 L.R.A. 686, on deposit of money as gift; 31 L.R.A. 454; 105 A. S. R. 736; 12 L.R.A. (N.S.) 355,—on deposit in joint names as gift to codepositor.

— Causa mortis.

Cited in *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575, holding request by deceased few days before death, for another to take charge of his effects and give them to his daughter on his death, insufficient gift *causa mortis*; *Caylor v. Caylor*, 22 Ind. App. 666, 72 A. S. R. 331, 52 N. E. 465, holding instruction to husband within hour of death to deliver all her property which was in husband's possession to nephew as gift from her, valid gift *causa mortis*; *Conser v. Snowden*, 54 Md. 175, 39 A. R. 368, holding giving written order on bank to pay deposited money to said person and order on holder of bank book for same, insufficient gift, where evidence does not show that book was obtained or that depositor died of his ailment; *Thomas v. Lewis*, 89 Va. 1, 37 A. S. R. 848, 18 L.R.A. 170, 15 S. E. 389, holding gift of all of donor's personal property under apprehension of death with delivery, valid as *donatio causa mortis*; *Jones v. Crisp*, 109 Md. 30, 71 Atl. 515,

holding that delivery of bank book saying that person receiving should have deposit upon death of depositor was not valid gift.

Cited in notes in 23 A. D. 606, on giving donor's own note as a *donatio mortis causa*; 10 A. S. R. 403; 9 E. R. C. 863; 99 A. S. R. 891,—on definition and requisites of valid gift *causa mortis*; 99 A. S. R. 905, on delivery of bank book under gift *causa mortis* as passing deposit in joint names of donor and donee.

When valid voluntary trust created.

Cited in *Norway Sav. Bank v. Merriam*, 88 Me. 146, 33 Atl. 840, holding deposit in name of depositor and another or their survivor in joint tenancy, and declarations tending to show intention that same should take place of provisions in will, insufficient to create voluntary trust; *Milholland v. Whalen*, 89 Md. 212, 44 L.R.A. 205, 43 Atl. 43, holding deposit in trust for depositor and another subject to order of either, balance to survivor, creates valid trust; *Snader v. Slingluff*, 95 Md. 356, 52 Atl. 510, holding placing bonds with another in trust for certain children interest to be paid to donor during his life creates valid trust; *Bartlett v. Remington*, 59 N. H. 364, holding fund deposited in name of depositor in trust for stranger, remains part of depositor's estate, where he retained control of same; *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571, 33 A. S. R. 944, 25 Atl. 487, holding deposit in bank by father for son with himself as trustee, creates voluntary trust in favor of son; *Trubey v. Pease*, 240 Ill. 513, 88 N. E. 1005, 16 A. & E. Ann. Cas. 370, holding that words or acts relied upon as creating trust must show clearly intention of donor.

Cited in notes in 31 A. R. 454, on validity of trust created by deposit in a bank of depositor's own money in trust for another who is ignorant thereof until depositor's death; 12 L.R.A. (N.S.) 549, on sufficiency of declaration to establish voluntary trust where legal title is retained by settler.

Effect of want of consideration on otherwise valid trust.

Cited in *Gordon v. Small*, 53 Md. 550, holding vesting of right by bond in trustee for benefit of cestui que trust, sufficient to obtain aid of equity to enforce payment, although legal obligation was voluntary.

Cited in notes in 11 L.R.A. 118, on necessity for consideration to authorize specific performance of contracts; 11 L.R.A. 457, on enforcement of voluntary executory trust.

Parol evidence as to declarations of trust in personality.

Cited in *Gerrish v. New Bedford Inst. for Sav.* 128 Mass. 159, 35 A. R. 365, holding parol evidence of declarations of deceased to effect that he had put money in bank for children, admissible to prove trust.

Declaration of party as to ownership of property as affecting title.

Cited in *Gerting v. Walls*, 103 Md. 624, 64 Atl. 433, holding declarations of one of two persons depositing bonds jointly, that he did not own any bonds will not divest him of his title.

30 AM. REP. 492, DICKINSON v. BALTIMORE, 48 MD. 583.

When action on case in nature of waste lies.

Cited in *Moses v. Old Dominion Iron & Nail Works Co.* 75 Va. 95, holding landlord may bring action on case for damages done to building during severe storm while tenant was in possession.

—Effect of transfer of premises.

Cited in reference note in 8 A. S. R. 260, effect on action for waste by transfer of premises from plaintiff to defendant.

30 AM. REP. 496, JAMES v. STATE, 55 MISS. 57.**Right to poll jury.**

Cited in *Hindrey v. Williams*, 9 Colo. 371, 12 Pac. 436, holding right to grant or refuse poll of jury, within discretion of trial court; *District of Columbia v. Humphries*, 11 App. D. C. 68, holding presence of only eleven jurors in court when counsel asked for poll, violates right to poll jury; *State v. Meier*, 32 Kan. 481, 4 Pac. 812; *Smith v. Paul*, 133 N. C. 66, 45 S. E. 348,—holding refusal to permit jury to be polled, error.

Cited in reference notes in 36 A. R. 89, on right of defendant in criminal action to poll jury; 37 A. R. 847, on right to poll jury in civil case; 68 A. S. R. 822; 9 A. S. R. 784,—on right to poll jury.

Validity of voluntary tax-collector's bond.

Cited in *State v. Harney*, 57 Miss. 863, holding tax collector's bond is valid security for taxes, although voluntarily executed, where code recognizes such bond.

Effect of separation of jury.

Cited in notes in 43 A. D. 80, on effect of separation of jury after finding sealed verdict; 103 A. S. R. 157, on effect of separation of jury after agreeing upon verdict; 31 L.R.A.(N.S.) 1008, on separation of jury in criminal cases, other than capital, after finding but before rendition of verdict.

30 AM. REP. 500, HAMILTON v. BOOTH, 55 MISS. 60.**Right of spouse to profits of labor — On land of other.**

Cited in *Seeber v. Randall*, 42 C. C. A. 272, 102 Fed. 215, holding wife not vested with community interest in husband's property because of improvements thereon made with proceeds of crops raised by joint labor; *Trapnell v. Conklyn*, 37 W. Va. 242, 38 A. S. R. 30, 16 S. E. 570, holding products of land belonging to wife not liable for husband's debts, although his labor and skill produced same; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, on profits of separate property which accrue mainly from property go with property; *Trapnell v. Conklyn*, 37 W. Va. 242, 38 A. S. R. 30, 16 S. E. 570, on crop raised on land leased by husband being his although wife contributed in production with stock, implements and hired labor.

Cited in note in 21 L.R.A. 631, on right of spouse to profits of labor on land of others.

— Under bond of other.

Cited in *Applegate v. Taylor*, 56 Miss. 685, holding contractors for whom work is performed by husband under wife's bond, cannot be garnished as debtors of husband.

30 AM. REP. 502, PORTER v. HALEY, 55 MISS. 66.**Force of contract by married woman to pay attorney's fee.**

Cited in reference note in 1 A. S. R. 608, as to when contract by married woman to pay attorney's fee is binding.

30 AM. REP. 504, FOSTER v. METTS, 55 MISS. 77.**Liability of railroad company as mail carrier.**

Cited in *Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. S. M. R. Co.* 65 L.R.A. 397, 54 C. C. A. 608, 117 Fed. 434, holding railroad company not

liable for negligence of its employees in carrying mail; *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 A. R. 334, on liability of railroad company carrying mails for loss of money from letter.

Cited in note in 40 A. D. 100, on liability of carrier of mail for loss of letters.

What constitutes sufficient consideration for note.

Cited in *Wright v. McKittrick*, 2 Kan. App. 508, 43 Pac. 977, holding promise in writing to pay debt against father's estate in consideration of cancellation of said debt, sufficient; *Boone v. Boone*, 58 Miss. 820, holding compromise of claim of doubtful validity, sufficient consideration to support note; *Gunning v. Royal*, 59 Miss. 45, 42 A. R. 350, holding giving note to settle dispute respecting injury to hired property, does not preclude maker from showing want of consideration from non-liability.

Cited in note in 15 L.R.A. 438, on whether claim must be doubtful to sustain a compromise note.

Distinguished in *Jones v. Hughes*, 66 Miss. 413, 6 So. 239, holding promise by third person buying property to pay entire mortgage debt, in consideration of cancellation of lien, where part of debt is disputed, sufficient consideration.

30 AM. REP. 508, JONES v. LOVING, 55 MISS. 109.

Liability of public officers for acts within their powers.

Cited in *Com. v. Kennedy*, 118 Ky. 618, 82 S. W. 237, 4 A. & E. Ann. Cas. 940, holding magistrates who ex officio constitute fiscal court, not liable on official bonds for levying taxes in excess of constitutional limit; *Russell v. Tate*, 52 Ark. 541, 20 A. S. R. 193, 7 L.R.A. 180, 13 S. W. 130, on members of city council not being liable for erroneous exercise of discretion in voting on measure.

Cited in reference note in 41 A. R. 101, on personal liability of municipal officers for passage of ordinance.

Cited in notes in 79 A. D. 476, on liability of municipal officers in exercise of legislative powers; 90 A. D. 728, on liability of officer of municipal corporation for mistaken use of power; 95 A. S. R. 84, on liability of county boards, boards of supervisors, and other governing bodies for legislative functions.

30 AM. REP. 510, PERKINS v. GUY, 55 MISS. 153.

When lex loci governs.

Cited in *Eingartner v. Illinois Steel Co.* 103 Wis. 373, 74 A. S. R. 871, 79 N. W. 433, holding citizen of sister state who has allowed statute to run against claim against another such citizen, cannot enforce claim here; *Ross v. Kansas City S. R. Co.* 34 Tex. Civ. App. 586, 79 S. W. 626, same as to claim against railroad company doing business in such state.

Cited in reference note in 74 A. S. R. 877, on conflict of laws as to limitation of action.

Cited in notes in 48 L.R.A. 631, on statute of limitations governing action on contract in another state or country when right of action is extinguished as well as the remedy affected; 5 E. R. C. 944, on lex fori as governing remedy.

Right to open and close.

Cited in *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332, holding verdict will not be set aside on ground that prevailing party was allowed to open and close, where no injustice was done.

Cited in note in 61 L.R.A. 530, on effect of making admission in bad faith for purpose of obtaining right to open and close.

Effect on verdict of use of unproved facts or improper language by counsel in summing up.

Cited in *Martin v. State*, 63 Miss. 505, 56 A. R. 812, holding statement of fact not in evidence, used by counsel in summing up, presents ground for reversal, where same would have been incompetent as evidence; *State v. Johnson*, 48 La. Ann. 87, 19 So. 213, on setting aside verdict on ground of intemperate or improper remarks of counsel.

Effect of withdrawing plea.

Cited in *Lewis v. Buckley*, 73 Miss. 58, 19 So. 197, holding recovery by plaintiff will not be set aside because action is barred by statute, where defendant withdrew such plea in testifying.

Confidential communications between attorney and client.

Cited in note in 36 A. R. 632, on communications by client to attorney as privileged.

30 AM. REP. 514, GARY v. JACOBSON, 55 MISS. 204.

Defenses to action for price.

Cited in reference note in 36 A. S. R. 206, on failure of title as defense to seller's action for price.

Validity as between parties thereto of contract in fraud of others.

Cited in *Harcrow v. Gardiner*, 69 Ark. 6, 58 S. W. 553, holding note given in fraud of creditors valid as between parties; *Knut v. Nutt*, 83 Miss. 365, 102 A. S. R. 452, 35 So. 686, holding attorney may recover from client for prosecuting claim under contract which called for "diplomatic negotiations"; *Davy v. Kelley*, 66 Wis. 452, 29 N. W. 232, holding assignment of property for purpose of defrauding creditors, valid as between parties; *Boro v. Harris*, 13 Lea, 36, on right of grantor to enforce against grantee in fraud of creditors, ostensible consideration of conveyance.

Cited in reference notes in 12 A. S. R. 517, on validity of fraudulent conveyance as between the parties; 29 A. S. R. 932, as to whether fraudulent conveyances are binding on the parties and other privies.

Cited in note in 3 A. S. R. 734, on grantor's right to set aside conveyance made in fraud of creditors.

Distinguished in *Woodson v. Hopkins*, 85 Miss. 171, 107 A. S. R. 275, 70 L.R.A. 645, 38 So. 298, holding usurious lender, cannot maintain suit for accounting with one whom he placed in charge of such business.

30 AM. REP. 521, PLANTERS' INS. CO. v. MYERS, 55 MISS. 479.

Insurance solicitor as agent of insurer.

Cited in *Murphy v. Independent Order S. & D. J.* 77 Miss. 830, 50 L.R.A. 111, 27 So. 624, holding failure of subordinate lodge to perform its duty in respect to proof of death of member, will not forfeit members rights in benevolent society.

Cited in reference note in 76 A. D. 589, on insurance company's being chargeable with agent's knowledge of facts material to risk.

Cited in notes in 47 A. R. 776; 53 A. R. 201; 77 A. D. 726,—on effect of stipulations making agent of insurer agent of assured; 11 L.R.A. 343, on knowl-

edge of insurance agent as knowledge of company; 20 L.R.A. 280, as to when insurance agent is agent of assured as to filling in of application; 16 L.R.A. (N.S.) 1213, on doctrine of waiver and estoppel as applied to insurance contracts for purpose of avoiding forfeiture; 16 L.R.A. (N.S.) 1249, on estoppel because of agent's interpretation to avoid policy void at inception.

Distinguished in *Alabama Gold L. Ins. Co. v. Herron*, 56 Miss. 643, holding delivery of policy to agent consummates insurance, where application stipulates that agent shall act for both parties.

— In writing false answers in application.

Cited in *Sullivan v. Phoenix Ins. Co.* 34 Kan. 170, 8 Pac. 112; *American L. Ins. Co. v. Mahone*, 56 Miss. 180,—holding company bound by answers incorrectly written in application by agent after correct answers were given by insured; *Mutual Reserve Fund Life Asso. v. Ogletree*, 77 Miss. 7, 25 So. 869, holding insurance company cannot avoid policy on ground of false answer as to illness, where agent was fully informed; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 So. 46; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366,—holding insurance company estopped from setting up encumbrance as defense to action on policy, where insured told agent of same.

Cited in notes in 8 A. S. R. 913; 4 L.R.A. (N.S.) 609,—on effect of agent's insertion in application of false answers to questions correctly answered by insured; 16 L.R.A. (N.S.) 1233, on estoppel to a void policy because of fraud or mistake of agent preparing application where correct answers were made by applicant; 16 L.R.A. 36, on effect of agent's perversion of information by the insured.

— In misdescribing property in application.

Cited in *Phenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85; *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 7 A. S. R. 557, 18 Pac. 291,—holding insurance agent is not agent of insured in falsely describing property in application, although stipulation states that description is made by owner; *Aetna Ins. Co. v. Brannon*, 99 Tex. 391, 2 L.R.A. (N.S.) 548, 89 S. W. 1057, 13 A. & E. Ann. Cas. 1020, on insurance company being estopped from setting up misdescription as defense, where agent wrote same.

— Effect of stipulation making solicitor agent of insured.

Cited in *Supreme Lodge K. P. v. Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611, holding provision of rules of beneficial order making subsecretary agent of insured, nugatory, where such secretary is agent of order; *New York L. Ins. Co. v. Russell*, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94, on right of insurance company to make its agent, agent of insured; *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.* 2 S. D. 17, 48 N. W. 310, holding stipulation in insurance policy making solicitor agent of insured not binding as to act prior to delivery of policy; *Sullivan v. Phenix Ins. Co.* 34 Kan. 170, 8 Pac. 112, holding insurance company cannot make its agent, agent of insured by ambiguous provision obscurely printed in policy; *Bernard v. United L. Ins. Co.* 17 Misc. 115, 39 N. Y. Supp. 356, holding stipulation in application for life insurance making solicitor agent of insured, does not apply to persons who are acting within scope of authority previously conferred.

— Effect of solicitor being agent of insurer and insured.

Cited in *Greenwood Ice & Coal Co. v. Georgia Home Ins. Co.* 72 Misc. 46, 17 So. 83, holding insurance company not bound by policy issued by its agent who is also officer of insured.

What constitutes agency as to third persons.

Cited in *Board of Trade v. Hammond Elevator Co.* 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740, holding service of process on persons who are under arrangement with foreign corporation which practically amounts to agency, sufficient.

What constitutes waiver of condition in policy.

Cited in *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369, 12 S. W. 915, holding delivery by agent, who has been informed by assured that building is on leased land, of policy in which that fact is not noted, amounts to waiver of condition requiring it; *Ætna L. Ins. Co. v. Fallow*, 110 Tenn. 720, 77 S. W. 937, holding condition in policy as to payment of premium prior to accident, waived, where agent had custom of calling for premium any time after it was due.

Statements in application for insurance as warranties.

Cited in *Van Cleave v. Union Casualty & Surety Co.* 82 Mo. App. 668, holding statement in application that beneficiary was wife when she was not, is breach of warranty.

Cited in note in 11 L.R.A.(N.S.) 984, as to when statements may be regarded as representations although expressly denominated in policy as warranties.

Application of parol evidence rule to policies.

Cited in note in 16 L.R.A.(N.S.) 1170, on distinction between action at law and action in equity in respect to parol evidence rule as to varying or contradicting written contracts, as applied to policies of insurance.

30 AM. REP. 530, SCHMIDLAPP v. CURRIE, 55 MISS. 597.**Right of partnership to dispose of its property.**

Cited in *Fitzpatrick v. Flannagan*, 106 U. S. 648, 27 L. ed. 211, 1 Sup. Ct. Rep. 369, holding surviving partner of firm may use firm assets to pay his individual debts, where no bill has been filed for winding of firm; *Merchants' Bank v. Thomas*, 57 C. C. A. 374, 121 Fed. 306, holding firm's agreement to pay debt of individual member cannot be attacked by subsequent creditors; *Woodmansie v. Holcomb*, 34 Kan. 35, 7 Pac. 603, holding solvent firm may transfer firm property in payment of individual member's debt; *Fulton v. Hughes*, 63 Misc. 61, holding member of firm who has purchased copartner's interest may dispose of firm assets in payment of individual debt; *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. 564, holding agreement to pay from partnership funds, debt of individual member, proper; *Re Edwards*, 122 Mo. 126, 29 L.R.A. 681, 25 S. W. 904, holding firm notes made in good faith to individual creditors of partners, valid.

Cited in notes in 27 A. S. R. 246; 43 A. S. R. 374; 2 L.R.A.(N.S.) 256,—on right of partnership as against firm creditors to sell or mortgage firm property to discharge or secure individual debt of member; 7 A. S. R. 41; 35 A. R. 306,—on payment by partner of individual debt from funds of insolvent firm: 12 A. S. R. 304, on sales of firm property by one partner; 23 A. S. R. 427; 29 L.R.A. 682, 683,—on assumption by partnership of individual debts of partners.

Not followed in *Mechanics' Sav. Bank v. Fargason*, 79 Miss. 64, 29 So. 791, holding creditor of partner having knowledge of facts, who is paid with firm assets, liable therefor to firm creditors.

— When insolvent.

Cited in *Goodbar v. Cary*, 16 Fed. 316, holding transfer of insolvent firm property to creditor of each individual partner, fraudulent as to judgment creditor of firm; *Sickman v. Abernathy*, 14 Colo. 174, 23 Pac. 447, holding good faith sale of insolvent firm assets valid as against firm creditors; *Sargent v. Blake*, 17 L.R.A.(N.S.) 1040, 87 C. C. A. 213, 160 Fed. 57; *Ellison v. Lucas*, 87 Ga. 223, 27 A. S. R. 242, 13 S. E. 445; *Myers v. Tyson*, 2 Kan. App. 464, 43 Pac. 91,—holding good faith transfer of insolvent firm property to creditor of individual partner in consideration of such debt, valid; *Hanover Nat. Bank v. Klein*, 64 Miss. 141, 60 A. R. 47, 8 So. 208, holding member of insolvent firm may with partner's consent use firm assets to pay premiums on his life insurance for benefit of wife; *Jackson Bank v. Durfey*, 72 Miss. 971, 48 A. S. R. 596, 31 L.R.A. 470, 18 So. 456, holding trust deeds of partnership property executed by insolvent partners to secure individual debts, fraudulent where firm is insolvent; *Victor v. Glover*, 17 Wash. 37, 40 L.R.A. 297, 48 Pac. 788, holding insolvent partners have right to transfer partnership property to any class of creditors as preference; *Blake v. Third Nat. Bank*, 219 Mo. 644, 118 S. W. 641; *Sargent v. Blake*, 17 L.R.A.(N.S.) 1040, 87 C. C. A. 213, 160 Fed. 57, 15 A. & E. Ann. Cas. 58,—holding that application of insolvent firm's property to payment of debt of partner within four months of filing petition in bankruptcy, does not evidence intent to defraud creditors of firm.

Rights of copartnership creditors in firm assets.

Cited in *Farley v. Moog*, 79 Ala. 148, 58 A. R. 585, holding firm creditors may enforce right of priority of payment out of partnership assets, where individual creditors of surviving insolvent partner have levied attachments on firm property; *Goldsmith v. Eichold Bros.* 94 Ala. 116, 33 A. S. R. 97, 10 So. 80, holding firm creditor may maintain suit to subject firm assets after obtaining judgment against surviving partner; *Roach v. Brannon*, 57 Miss. 490, holding general creditor of firm, who has no lien, cannot maintain bill in chancery against surviving partner to subject firm assets; *Hyman v. Stadler*, 63 Miss. 362, holding creditors of firm have no right to proceeds of partnership property sold under judgment obtained by firm creditor against one partner; *Tenant v. McKean*, 46 Mo. App. 486, holding creditor of firm cannot follow assets into hands of good faith purchaser thereof; *Stahl v. Osmers*, 31 Or. 199, 49 Pac. 958, holding contract creditors of firm cannot subject proceeds of firm assets to payment of firm debts after partners have parted with their interest therein.

Cited in notes in 43 A. S. R. 369, on rights and remedies of creditors of bankrupt or insolvent partnership; 19 E. R. C. 632, 633, on right of firm creditors to resort to partnership assets as quasi lien.

Rights of copartner as to his share of firm property.

Cited in *Swearingen v. Bassett*, 65 Tex. 267, holding partner in solvent firm may designate his interest in partnership realty as part of homestead.

Rights of corporation creditors in corporation assets.

Cited in *McLaren v. First Nat. Bank*, 76 Wis. 259, 45 N. W. 223, on right of creditors of company to object to payment of officer's individual account out of corporation assets.

30 AM. REP. 537, SMITH v. SPARKMAN, 55 MISS. 649.

When sale complete.

Cited in reference note in 57 A. R. 633, on nature of question as to when sale was intended to be completed.

30 AM. REP. 451, MERCHANTS' DISPATCH & TRANSP. CO. v. MOORE, 88 ILL. 136.

When common carrier's liability as such, ceases.

Cited in *Gregg v. Illinois C. R. Co.* 147 Ill. 550, 37 A. S. R. 238, 35 N. E. 343, holding common carrier's liability as such ceases when carloads of corn are sidetracked at destination; *Schumacher v. Chicago & N. W. R. Co.* 207 Ill. 199, 69 N. E. 825 (affirming 108 Ill. App. 520), holding common carrier's liability as such terminates when coal has been held in car at destination for reasonable length of time; *Hicks v. Wabash R. Co.* 131 Iowa, 295, 8 L.R.A.(N.S.) 235, 108 N. W. 534, holding common carrier's liability as such terminates when goods reach destination, although owner has received no notice of arrival.

Cited in reference notes in 15 A. S. R. 429, on duration of liability of carrier of goods; 37 A. S. R. 247, on carrier's liability as warehouseman.

Cited in notes in 72 A. D. 238, on termination of liability on delivery to succeeding carrier; 42 A. R. 667, on connecting carrier's liability beyond its line; 53 A. R. 558, on carrier's duty to notify consignee of arrival of goods; 2 A. S. R. 62, on power of carrier to limit liability to its own line; 2 A. S. R. 325, on liability of connecting carriers; 97 A. S. R. 93, on reduction of carrier's liability to that of warehouseman on notice of arrival of goods; 17 L.R.A. 692, on time when liability of railway carrying goods ceases to be that of carrier.

Acceptance of goods by carrier as contract.

Cited in *Chicago & N. W. R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596, holding acceptance and receipt by carrier of goods marked to place beyond terminus of its own line, constitutes prima facie contract to deliver to such place.

Common carrier's implied contracts.

Cited in *Schumacher v. Chicago & N. W. R. Co.* 207 Ill. 199, 69 N. E. 825 (affirming 108 Ill. App. 520), holding lien upon car load freight for car service charges may arise by implication.

Presumption arising from frequent use of blank forms.

Cited in *Erie & W. Transp. Co. v. Dater*, 91 Ill. 195, 33 A. R. 51, holding assent to limitation of liability in bill of lading will not be presumed from previous acceptance of similar bills alone; *Webbe v. Western U. Teleg. Co.* 169 Ill. 610, 61 A. S. R. 207, 48 N. E. 670 (reversing 64 Ill. App. 331), holding presumption arising from frequent use of telegraph blanks, rebutted by sworn statement that same was never read.

30 AM. REP. 543, CARY v. PEKIN, 88 ILL. 154.

Uniformity of taxation.

Cited in *Vestal v. Little Rock*, 54 Ark. 321, 11 L.R.A. 778, 15 S. W. 891, on all city property bearing alike burden of taxation.

—Agricultural lands within city limits.

Cited in *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. 558; *Kimball v. Grantsville City*, 19 Utah, 368, 45 L.R.A. 628, 67 Pac. 1; *Ferguson v. Snohomish*, 8 Wash. 668, 24 L.R.A. 795, 36 Pac. 969,—holding municipal taxation of agri-

culture lands within city limits constitutional; *Atherton v. Essex Junction*, — Vt. —, 27 L.R.A.(N.S.) 695, 74 Atl. 1118, holding that farm lands in village will not be relieved from taxation because they received no benefit therefrom.

Cited in notes in 56 A. D. 525; 72 A. S. R. 776; 67 A. S. R. 475,—on municipal taxation of farming lands within city; 27 L.R.A. 741, on injunction against collection of taxes on agricultural lands; 34 L.R.A. 193, on validity of exemption or discrimination in rates for municipal taxation of rural lands.

Want of benefit from taxation as objection thereto.

Cited in *St. Louis Bridge Co. v. East St. Louis*, 121 Ill. 238, 12 N. E. 723, holding city tax upon bridge structure, will not be enjoined because such property has received no benefit therefrom.

30 AM. REP. 545, CHICAGO PACKING & PROVISION CO. v. CHICAGO, 88 ILL. 221.

Extra-territorial police power of municipalities.

Cited in *Van Hook v. Selma*, 70 Ala. 361, 45 A. R. 85, holding legislature may grant city power to require license for selling goods beyond corporate limits; *People v. Raims*, 20 Colo. 489, 39 Pac. 341, holding town may regulate liquor traffic within one mile outside corporate limits; *Gower v. Agee*, 128 Mo. App. 427, 107 S. W. 999, holding town may under statute regulate dram shops within one-half mile outside of boundary, although in adjoining county; *Malone v. Williams*, 118 Tenn. 390, 121 A. S. R. 1002, 103 S. W. 798, holding statute giving city power to exercise governmental and police powers within two miles outside of city limits, unconstitutional; *State ex rel. Atty. Gen. v. Burns*, 38 Fla. 367, 21 So. 290, on power of municipalities to exercise police jurisdiction extra-territorially.

Cited in note in 15 L.R.A.(N.S.) 296, on power of city to extend exercise of taxing or licensing power beyond the corporate limits.

Distinguished in *New Martinsville v. Dunlap*, 33 W. Va. 457, 10 S. E. 803, holding license to sell spirituous liquors in certain town which is within mile of another town, may be granted, although statute prohibits granting of license within mile of town without towns consent.

What constitutes valid exercise of police power.

Cited in *Allerton v. Chicago*, 9 Biss. 552, 6 Fed. 555, holding ordinance requiring street railway company to pay license, valid exercise of police power; *Chicago v. Wilkie*, 88 Ill. App. 315, holding regulation of all occupations affecting health of people, is within police power of city; *State v. United States & C. Exp. Co.* 60 N. H. 219, holding imposing of two per cent tax on express company, unconstitutional.

Right of state to confer its power on municipality.

Cited in *Carrollton v. Bazette*, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837, on power of legislature to confer upon city authority to license itinerant merchants; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451, holding legislature empowered to confer upon city, power to pass ordinance requiring street car transfers; *Jordan v. Evansville*, 163 Ind. 512, 67 L.R.A. 613, 72 N. E. 544, 2 A. & E. Ann. Cas. 96, holding legislature empowered to delegate power to municipality to license liquor traffic within four miles of corporate limits; *Frelinghuysen v. Morristown*, 76 N. J. L. 271, 70 Atl. 77, holding that statute giving city power to erect sewage disposal works within bounds of another municipality is not invalid.

License as means of regulation.

Cited in *Laundry License Case*, 22 Fed. 701, holding power to regulate wash-house includes power to license; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260, holding city may require license for sale of meats under power to regulate sale thereof; *Banta v. Chicago*, 172 Ill. 204, 40 L.R.A. 611, 50 N. E. 233, holding city authorized to license brokers for purpose of regulation or revenue; *Gundling v. Chicago*, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 444, holding council may provide for license to sell cigarettes, under power to pass regulation for protection of public health; *State ex rel. Moriarity v. McMahon*, 69 Minn. 265, 38 L.R.A. 675, 72 N. W. 79, holding ordinance requiring scavengers to have licenses and permit, is within police power to regulate same.

Cited in notes in 129 Am. St. Rep. 266, on constitutional limitations on power to impose license or occupation taxes; 30 L.R.A. 435, on what impositions of license fees of municipalities are reasonable.

Distinguished in *Chicago v. Collins*, 175 Ill. 445, 67 A. S. R. 224, 49 L.R.A. 408, 51 N. E. 907, holding city cannot impose license fee on use of streets by public under power to regulate same.

License as a tax.

Cited in *Ft. Smith v. Ayers*, 43 Ark. 82, holding license fee demanded by municipality for running dray, is not tax upon occupation; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560, holding license fee required of ferry keeper, not tax within constitutional clause as to uniformity of taxes; *Howland v. State*, 56 Fla. 422, 21 L.R.A.(N.S.) 192, 47 So. 963 (dissenting opinion), on license fees as not taxation and not governed by constitutional provisions regarding equality and uniformity of taxation.

Meaning of "regulate" as used in statute.

Cited in *Perry v. Salt Lake City*, 7 Utah, 143, 11 L.R.A. 446, 25 Pac. 739, holding power to regulate liquor traffic, gives council discretion as to granting license to different persons.

30 AM. REP. 551, FITZGERALD v. STAPLES, 88 ILL. 234.**Construction of contracts.**

Cited in reference note in 79 A. D. 327, on rule that contract must receive reasonable interpretation according to intention of parties.

30 AM. REP. 554, GAUCH v. ST. LOUIS MUT. L. INS. CO. 88 ILL. 251.**Who are "heirs."**

Cited in *Knights Templars & Masonic Mut. Aid Asso. v. Greene*, 79 Fed. 461, holding insurance payable to "heirs" will be distributed to those who would take personal estate in case of intestacy where such intention is shown by context; *Tompkins v. Levy*, 87 Ala. 263, 13 A. S. R. 31, 6 So. 346, holding children of wife take no interest as against husbands creditors, in policy payable to wife her heirs etc., where wife dies first; *Hubbard v. Turner*, 93 Ga. 752, 30 L.R.A. 593, 20 S. E. 640, holding word "heirs" in policy payable to heirs, means next of kin where assured left neither wife nor child; *Silvers v. Michigan Mut. Ben. Asso.* 94 Mich. 39, 53 N. W. 935, holding insurance payable to surviving brothers and sisters under policy payable to wife, heirs, etc., where wife, children, father and mother are dead; *Illinois Masons' Ben. Soc. v. Booth*, Fed. Cas. No. 7,009, on right to insurance under policy payable to wife or his legal representatives.

Cited in notes in 44 A. S. R. 407, 408, on rights of widow and children under insurance policy payable to heirs; 3 L.R.A. (N.S.) 905, on who are legal heirs to whom insurance is payable.

— Widow as.

Cited in *Johnson v. Knights of Honor*, 53 Ark. 255, 8 L.R.A. 732, 13 S. W. 794, holding benefit certificate payable to heirs of intestate dying childless, goes to brothers and sister instead of widow; *Anderson v. Grosbeck*, 26 Colo. 3, 55 Pac. 1086, holding insurance payable to legal heirs, is divided one half to widow and balance to children; *Alexander v. Northwestern Masonic Aid Asso.* 126 Ill. 558, 2 L.R.A. 161, 18 N. E. 556, holding widow entitled to insurance to exclusion of next of kin father, brothers, etc., under policy payable to heirs-at-law where insured died intestate and childless; *Weisert v. Muehl*, 81 Ky. 336, holding mother, brother and sisters take insurance payable to heirs, where insured died without father or child; *Tillman v. Sullivan*, 63 How. Pr. 355, holding widow is not "heir" of her husband; *Weston v. Weston*, 38 Ohio St. 473, holding that widow took as heir at law under will giving property to heir at law; *Royal League v. Kasey*, 144 Ill. App. 1, holding that widow is not "legal heir" under insurance policy payable to legal heirs.

Cited in note in 30 L.R.A. 596, on widow as "heir" within meaning of life insurance policy.

Distinguished in *Lyons v. Yerex*, 100 Mich. 214, 43 A. S. R. 452, 58 N. W. 1112, holding widow entitled to share in insurance payable to "heirs at law."

Presumption as to use of word in its primary sense.

Cited in *Peterson v. Modern Brotherhood*, 125 Iowa, 562, 67 L.R.A. 631, 101 N. W. 289, holding word "shafts" as applied to breaking of both bones of lower leg as used in policy, does not mean breaking of one and dislocation of other; *Weidner v. Standard Life & Acci. Ins. Co.* 130 Wis. 10, 101 N. W. 246 (dissenting opinion), on presumption as to words burglary and robbery being used in their legal sense in insurance policy.

Policy as controlling right to insurance.

Cited in *People use of Brooks v. Petrie*, 191 Ill. 497, 85 A. S. R. 268, 61 N. E. 499, holding executor receives insurance money as trustee for devisees under policy directing payment to devisees named in will.

Construction of dower act.

Cited in *Sutton v. Read*, 176 Ill. 69, 51 N. E. 801, holding section 10 of Dower act does not apply in case of intestacy.

30 AM. REP. 558, CUMMINS v. CRAWFORD, 88 ILL. 312.

Evidence in civil damage action — Character of parties.

Cited in *Lowe v. Ring*, 123 Wis. 107, 101 N. W. 381, holding evidence of plaintiffs general reputation as quarrelsome person, admissible in assault action where self-defense is pleaded; *Geary v. Stevenson*, 169 Mass. 23, 47 N. E. 508, holding that in action for false imprisonment, plaintiff cannot give evidence of good reputation.

— Previous threats or difficulties.

Cited in *Forbes v. Snyder*, 94 Ill. 374, holding refusal to allow proof of previous threats of violence by adversary, not error; *Hulse v. Tollman*, 40 Ill. App. 490, holding conduct and deportment of party on previous occasions, inadmissible in action for assault and battery; *Davis v. Collins*, 69 S. E. 460, 48

S. E. 469, holding previous difficulty cannot be considered in mitigation of damages, where person has time to cool before final conflict; *Heffernon v. Lloyd*, 145 Ill. App. 583, holding that evidence of threats are only competent when party alleged to have made them makes some hostile demonstration prior to being attacked.

Threats as justification for killing.

Cited in *Price v. People*, 131 Ill. 223, 23 N. E. 639, holding instruction that if person is threatened so that he reasonably believes that he is in danger of losing life, he may kill, whether danger is real or only apparent, erroneous.

—Necessity of overt act.

Cited in *Wilson v. People*, 94 Ill. 299, on necessity of some overt act before party has right to attack one threatening his life.

Competency of affidavit to impeach jury's verdict.

Cited in *Palmer v. People*, 138 Ill. 356, 32 A. S. R. 146, 28 N. E. 130, holding affidavits of statements made by jurors, not received to impeach verdict.

Provocation in mitigation of damages.

Cited in reference note in 68 A. D. 717, on admissibility of evidence of provocation in mitigation of damages for assault.

Cited in note in 1 L.R.A.(N.S.) 138, on effect of provocation to mitigate damages for assault.

30 AM. REP. 562, SCOTT v. KIRKENDALL, 88 ILL. 465.

Covenant of warranty.

Cited in *Pierce v. Coryn*, 126 Ill. App. 244, on warranty of title being against one lawfully claiming and seizing property.

—What constitutes breach of.

Cited in *Roberson v. Tippie*, 126 Ill. App. 579, holding mere existence of paramount title in another, insufficient to constitute breach of covenant of warranty; *Ogden v. Ball*, 40 Minn. 94, 41 N. W. 453, holding bringing of suit by party holding paramount title, sufficient breach of warranty; *Newman v. Sevier*, 134 Ill. App. 544, on covenant of warranty being broken only by eviction or something equivalent thereto.

Cited in reference note in 2 A. S. R. 334, on breach of covenant of warranty without actual eviction by legal process.

Cited in notes in 53 A. S. R. 118, on breach of covenant for quiet enjoyment in deed; 120 A. S. R. 855, on necessity for eviction by legal process to breach of covenant of warranty; 120 A. S. R. 856, on existence of outstanding title as eviction; 17 L.R.A.(N.S.) 1181, on necessity of eviction to maintenance of action for breach of covenant of warranty of title.

30 AM. REP. 566, GRIDLEY v. BLOOMINGTON, 88 ILL. 554.

Validity of ordinance as to sidewalks—Requiring owners to repair.

Cited in *Chicago v. Crosby*, 111 Ill. 538; *Ford v. Kansas City*, 181 Mo. 137, 79 S. W. 923,—holding ordinance requiring owners or occupants of real property to keep sidewalks in repair, void; *Lincoln v. Janesch*, 63 Neb. 707, 93 A. S. R. 478, 56 L.R.A. 702, 89 N. W. 280, holding statute imposing upon city lot owners duty of keeping walks in repair and free from ice and snow, valid; *Rochester v. Campbell*, 123 N. Y. 405, 20 A. S. R. 760, 10 L.R.A. 393, 25 N. E. 937, on abutting property owner's duty to repair sidewalks.

—Requiring owners to remove snow.

Cited in *McGuire v. District of Columbia*, 24 App. D. C. 22, 65 L.R.A. 430, holding act of congress providing for removal of snow and ice from sidewalk of District of Columbia, unconstitutional and void; *Chicago v. O'Brien*, 111 Ill. 532, 53 A. R. 640; *Anderson v. Schubert*, 55 Ill. App. 227; *Chicago v. McDonald*, 111 Ill. App. 436; *State v. Jackman*, 69 N. H. 318, 42 L.R.A. 438, 41 Atl. 347,—holding municipal ordinance requiring occupant or owner of adjoining land to remove snow from walks, void; *State v. McMahon*, 76 Conn. 97, 55 Atl. 591; *St. Louis v. Connecticut Mut. L. Ins. Co.* 107 Mo. 92, 28 A. S. R. 402, 17 S. W. 637; *Carthage v. Frederick*, 122 N. Y. 268, 19 A. S. R. 490, 10 L.R.A. 178, 25 N. E. 480; *State v. McGrillis*, 28 R. I. 165, 9 L.R.A.(N.S.) 635, 66 Atl. 301, 13 A. & E. Ann. Cas. 701,—holding ordinance of city requiring occupants or owners of real estate to remove snow and ice from sidewalks under penalty, valid.

Cited in notes in 21 L.R.A. 264; 24 L.R.A. 413,—on right of city to impose on abutting owners, duty of removing ice and snow from sidewalks.

Distinguished in *Chicago v. Chicago Union Traction Co.* 199 Ill. 259, 59 L. R.A. 666, 65 N. E. 243, holding ordinance requiring street railway company to remove snow, dirt, etc., from its tracks, valid.

Right to enforce assessments by fines and penalties.

Cited in *Vicksburg, S. & P. R. Co. v. Traylor*, 104 La. 284, 29 So. 141, on right to enforce assessment by penalty.

Constitutionality of act making abutting property liable for cost of street sprinkling and sweeping.

Cited in *Reinken v. Fuehring*, 130 Ind. 382, 30 A. S. R. 247, 15 L.R.A. 624, 30 N. E. 414, holding act authorizing city to sprinkle and sweep streets at cost of abutting property holders, constitutional.

Control of city streets.

Cited in *Farson v. Fogg*, 205 Ill. 326, 68 N. E. 755, on control of city streets being left to discretion of counsel.

Duty of caring for streets.

Cited in *O'Haver v. Montgomery*, 120 Tenn. 448, 127 Am. St. Rep. 1014, 111 S. W. 449, to the point that duty of caring for streets cannot be imposed on abutting owners; *Rockford City R. Co. v. Matthews*, 50 Ill. App. 267, to point that caring for streets in city is duty of city.

Sidewalk as part of highway.

Cited in *Chicago v. Pittsburg, C. C. & St. L. R. Co.* 146 Ill. App. 403, holding that sidewalk is part of highway.

Validity of sidewalk assessments.

Cited in reference note in 34 A. R. 451, on power of municipal corporation to make assessments for sidewalks; 21 L.R.A. 566, on validity of assessment for sidewalks on abutting property made by charging on each piece the cost of improvement in front of it; 14 L.R.A. 759, on right to charge burden of street improvements on abutting lot directly; 28 L.R.A.(N.S.) 1133, on assessments for improvements by front-foot rule.

30 AM. REP. 568, HARE v. GIBSON, 32 OHIO ST. 33.

Liability of husband in divorce action for wife's attorney's fees.

Cited in *Sherer v. Price*, 3 Ohio C. C. 107, holding attorney cannot recover
Am. Rep. Vol. XVII.—16.

from husband for services rendered wife in defending action brought by husband for divorce.

Liability of husband for wife's necessities.

Cited in reference note in 33 A. S. R. 921, on husband's liability for wife's necessities while living apart, where wife has means.

Cited in note in 98 A. S. R. 650, on effect of pendency of suit for divorce on wife's right to charge husband for necessities.

30 AM. REP. 572, BIRDSALL v. HEACOCK, 32 OHIO ST. 177.

Construction of contracts of guaranty.

Cited in *United States v. Freel*, 92 Fed. 299, holding same rules of construction employed in ascertaining true intent, meaning, and scope of surety contract as are employed in interpretation of other contracts; *Northern Light Lodge, No. 1, I. O. O. F. v. Kennedy*, 7 N. D. 146, 73 N. W. 524, holding true question in construction of contract of surety or guarantor is what was intent of parties as disclosed by instrument read in light of surrounding circumstances; *Rochford v. Rothschild*, 16 Ohio C. C. 287, holding guarantor of payment of goods to be furnished to third party "on open account" continuing guaranty; *Blyth v. Pinkerton Nat. Detective Agency*, 10 Wyo. 135, 57 L.R.A. 468, 67 Pac. 619, holding that guaranty to pay for services to be rendered by detective agency in murder case does not cover services rendered upon new trial.

Cited in reference note in 38 A. R. 434, on what constitutes continuing guaranty.

Cited in notes in 55 A. R. 703, as to how long guaranties continue; 105 A. S. R. 503, on contract of guaranty; 105 A. S. R. 523, on continuing and limited guaranties; 15 L.R.A.(N.S.) 1115, on request to make advances to another as implied guaranty of payment.

Presumption as to guaranty being continuing.

Cited in *Carson v. Reid*, 137 Cal. 253, 70 Pac. 89, holding presumption that guaranty is not continuing; *Wright v. Griffith*, 121 Ind. 478, 6 L.R.A. 639, 23 N. E. 281, holding guaranty continuing unless words in which it is expressed fairly imply that liability of guarantor is limited; *First Nat. Bank v. Goodman*, 55 Neb. 409, 75 N. W. 846, holding preponderance of evidence sufficient to establish continuing pledge.

Parol evidence that guaranty was limited.

Cited in *Henry McShane Co. v. Padian*, 1 Misc. 332, 20 N. Y. Supp. 679, holding parol evidence admissible to show that guaranty was intended by parties to apply only to particular transaction.

Application of payments.

Cited in reference note in 86 A. D. 54, on application of payments.

30 AM. REP. 577, BERKMEYER v. KELLERMAN, 32 OHIO ST. 239.

Burden of proof as to fairness of transaction between persons in confidential relations.

Cited in *Keck v. Sayre*, 3 Ohio N. P. 45, holding burden on recipient to show fairness of transaction where relationship exists from which undue influence is presumed.

Cited in reference notes in 33 A. R. 710, on presumption of undue influence

in deed from woman to her affianced husband; 2 A. S. R. 361, on presumption of undue influence in conveyance by one on becoming of age to one sustaining relation of parent and guardian.

Cited in notes in 33 A. R. 739, on burden of proof as to undue influence in gift from patient to physician; 11 A. S. R. 758, on burden of proof as to fraudulent conveyances; 21 A. S. R. 102, on presumption of undue influence; 6 E. R. C. 877, on degree of proof necessary on part of one who occupies position of trust or sustains position of legal or natural authority over another, to establish validity of gift or benefit from latter to former or any financial settlement between them.

Right to give away all one's property.

Cited in *Sievert v. Muller*, 3 Ohio N. P. 316, holding that donor may give away his property to extent of making himself destitute.

Statute of limitations in mandamus proceedings.

Cited in *State ex rel. Merrill v. Board of Education*, 4 Ohio C. C. 97, holding that party cannot delay his application for writ of mandamus at pleasure.

Fraud as preventing running of limitations.

Cited in reference note in 93 A. D. 652, on effect of fraud to prevent running of statute of limitations until its discovery.

30 AM. REP. 584, SHINDELBECK v. MOON, 32 OHIO ST. 264.

Liability for injury from leased property becoming out of repair.

Cited in *Maxwell v. Shirts*, 27 Ind. App. 529, 87 A. S. R. 268, 61 N. E. 754, holding landlord not liable for nuisance created by tenant after beginning of tenancy, where he had no knowledge of same; *Purcell v. English*, 86 Ind. 34, 44 A. R. 255, holding landlord not liable for damages to tenant injured on stairway made unsafe by temporary causes; *Deller v. Hofferberth*, 127 Ind. 414, 26 N. E. 889, holding lessor not liable for explosion of steam boilers caused by defects arising subsequently to lessee's taking possession although boilers in need of repair at time of making lease; *State v. Pittsburgh, C. C. & St. L. R. Co.* 135 Ind. 578, 35 N. E. 700, holding consolidated company not liable for penalty incurred by lessee of extinguished company; *De Graffenried v. Wallace*, 2 Ind. Terr. 657, 53 S. W. 452, holding lessors of building not liable for defects caused by lessee; *Little v. Wirth*, 6 Misc. 301, 26 N. Y. Supp. 1110, holding owner of tenement not liable for injuries sustained by slipping upon ice on walk or stoop; *Bailey v. Northwestern Ohio Natural Gas Co.* 4 Ohio C. C. 471, holding that gas company putting in fixtures for heating steam boiler owed no duty to owner's engineer that rendered it liable for negligent installation of same.

Cited in reference notes in 20 A. S. R. 586, on liability of lessee of upper floor of building; 84 A. S. R. 842, on duty as between landlord and tenant to repair water pipes.

Cited in notes in 30 A. R. 695; 1 A. S. R. 432; 1 A. S. R. 490; 92 A. S. R. 503,—on liability to third persons, of lessors of real property for injuries from defective or noxious premises; 92 A. S. R. 527, on lessor's liability to strangers where nuisance exists at time of lease; 5 L.R.A. 796, on when owner and landlord not liable for injury caused by defective premises; 92 A. S. R. 540; 26 L.R.A. 200,—on liability of landlord to third person for injury from icy sidewalks; 9 E. R. C. 456, on implied obligation of landlord to repair.

30 AM. REP. 593, CLARK v. BAYER, 32 OHIO ST. 299.**Who entitled to custody of child.**

Cited in *Schroeder v. State*, 41 Neb. 745, 60 N. W. 89, holding that father may forfeit his right to custody of his child by abandonment; *Wing v. Hibbert*, 7 Ohio N. P. 124, holding any one standing in loco parentis to minor children entitled to their custody; *Quigley v. State*, 5 Ohio C. C. 638; *Re Luck*, 7 Ohio N. P. 49,—holding best interest of child paramount consideration in guardianship; *Purinton v. Jamrock*, 195 Mass. 187, 18 L.R.A.(N.S.) 927, 80 N. E. 802, holding that parent's right to guardianship of child will not be enforced to detriment of child's well being.

Cited in reference note in 2 A. S. R. 183, on when father will be deprived of custody of child.

Cited in notes in 40 A. R. 330; 2 A. S. R. 58,—on right to custody of children as between parents; 34 A. R. 700, on custody of infant on separation of parents; 2 A. S. R. 186, 187, on proper methods for enforcement of parent's right to custody of child; 27 L.R.A. 60, on rights of third person on contract for transfer of parent's authority or responsibility; 13 E. R. C. 54, on right to custody of child.

—Mother.

Cited in *Beall v. Bibb*, 19 App. D. C. 311, holding mother entitled to custody of children upon father's death, if she is able and competent to care for them; *Bradley v. Sattler*, 156 Ill. 603, 41 N. E. 171, holding mother head of family after father's death and entitled to earnings of minor children; *Nugent v. Powell*, 4 Wyo. 173, 62 A. S. R. 17, 20 L.R.A. 199, 33 Pac. 123, holding that mother became natural guardian of child upon its abandonment by father.

Cited in note in 2 A. S. R. 185, on right of mother to custody of child.

—Grandparents.

Cited in *Adams v. Clark*, 48 Fla. 205, 37 So. 734, holding granddaughter member of grandfather's family; *Holmes v. Derrig*, 127 Iowa, 625, 103 N. W. 973, holding grandfather or grandmother natural guardians of infant upon death of both parents.

Cited in note in 88 A. S. R. 872, on transfer of parental custody to grandfather and his responsibility and rights thereunder.

—As between parent and others.

Cited in *Robertson v. Bass*, 52 Fla. 420, 42 So. 243, holding that court will not deprive foster parents of children put in their care voluntarily by mother after lapse of four years, merely because she has bettered her condition; *People ex rel. Curley v. Porter*, 23 Ill. App. 196, holding that foster parents cannot be deprived of child, voluntarily put into their care, by father, merely because latter has remarried and is better fitted to care for it than formerly; *Purinton v. Jamrock*, 195 Mass. 187, 18 L.R.A.(N.S.) 926, 80 N. E. 802, holding that parents have no right of property in minor children, of which they cannot be deprived without their consent; *Hibbette v. Baines*, 78 Miss. 695, 51 L.R.A. 839, 29 So. 80, holding contract made by mother on deathbed, with assent of father by which custody of children is given to mother's parents, void; *Hoxsie v. Potter*, 16 R. I. 374, 17 Atl. 129, holding that court will not deprive foster parents of child, put in their care by indigent widowed mother, and allowed to remain there nine years before claiming it; *Com. v. Airey*, 5 Kulp, 83, holding that court will assist father to recover child where contract of appren-

ticeship void at its inception; *Anderson v. Young*, 54 S. C. 388, 44 L.R.A. 277, 32 S. E. 448, holding custody of minor by fair agreement with parent not such illegal restraint as court must relieve against at will of parent; *Green v. Campbell*, 35 W. Va. 698, 29 A. S. R. 843, 14 S. E. 212, holding that parent will not be permitted to reclaim custody of child transferred to another by fair agreement unless he can show that change of custody will promote child's welfare.

Parent's right of action for injuries to minor child.

Cited in *Netherland-American Steam Nav. Co. v. Hollander*, 8 C. C. A. 169, 20 U. S. App. 225, 59 Fed. 417, holding parent of minor child entitled to recover for injury thereto expenses in care and cure of child and for loss of services.

Necessity of notice to parent in adoption proceedings.

Cited in *Schiltz v. Rolnitz*, 86 Wis. 31, 39 A. S. R. 873, 21 L.R.A. 483, 56 N. W. 194, holding that parent cannot be deprived of his rights to child in adoption proceedings, based on charge of abandonment, without notice.

Cited in note in 88 A. S. R. 870, on validity and essentials of contract for transfer of parental custody and responsibility.

Necessity for setting up husband's control or coercion in tort action against wife.

Cited in *McElroy v. Capron*, 24 R. I. 561, 54 Atl. 44, holding plea insufficient as bar to tort action against wife where it fails to allege that wife was acting under control, direction or coercion of her husband; *Bruce v. Bombeck*, 79 Mo. App. 231, holding husband's consent to wife's tort matter of defense which should be set up in wife's answer and proved as such.

Cited in note in 131 Am. St. Rep. 147, on liability of married women for torts.

Necessity for assigning jurisdictional error on appeal.

Cited in *Parker v. Dekle*, 46 Fla. 452, 35 So. 4, holding that jurisdictional or other fundamental error of law apparent on face of record itself may be considered by appellate court though not assigned; *Jacksonville v. Massey Business College*, 47 Fla. 339, 36 So. 432, holding that appellate court will notice failure of bill to state cause of action where defect ignored in pleadings and assignments of error.

30 AM. REP. 601, RAILWAY CO. v. VALLELEY, 32 OHIO ST. 345.

Duty of carrier as to expulsion of drunken passenger.

Cited in *Louisville & N. R. Co. v. Johnson*, 92 Ala. 204, 25 A. S. R. 35, 9 So. 269; *Edgerly v. Union Street R. Co.* 67 N. H. 312, 36 Atl. 558,—holding removal of drunken man from vehicle of carrier not proximate cause of subsequent injury if removal made in proper manner and at suitable time and place; *Hang v. Great Northern R. Co.* 8 N. D. 23, 73 A. S. R. 727, 42 L.R.A. 664, 77 N. W. 97, holding railroad liable for death of passenger carried beyond station, occasioned by his expulsion from depot, at which he was put off, while in helpless condition from intoxication and on very cold night; *Cincinnati, I. St. L. & C. R. Co. v. Cooper*, 120 Ind. 469, 16 A. S. R. 334, 6 L.R.A. 241, 22 N. E. 340, holding railroad liable for death of injured intoxicated passenger left on track exposed to great and known peril; *Fagg v. Louisville & N. R. Co.* 111 Ky. 30, 54 L.R.A. 919, 63 S. W. 580, holding railroad liable for death of trespasser ejected from freight train in deep cut on dark night while

in drunken and helpless condition; *Southern R. Co. v. Back*, 103 Va. 778, 50 S. E. 257, holding that telegraph operator cannot abandon his post to conduct trespassers safely off premises of company when to do so would jeopardize passengers.

Cited in reference notes in 87 A. D. 716, on right of railroad company to exclude drunken persons because of apprehended danger; 50 A. R. 186, on expulsion between stations of a helpless drunken passenger as negligence; 2 A. S. R. 546, on care required of railroad company in removing trespasser from car; 96 A. S. R. 23, on right to eject drunken passenger.

Cited in notes in 6 A. S. R. 735; 32 A. S. R. 92,—on duty of carrier to eject drunken passenger; 16 A. S. R. 340; 73 A. S. R. 741; 11 L.R.A. 433,—on liability of railway company for ejection of drunken passenger; 25 A. S. R. 42, on intoxication which did not contribute to injury as contributory negligence; 36 A. S. R. 829, on negligent treatment of drunken men as affecting proximate cause of injury; 5 L.R.A. 818, on right of railroads to refuse to receive as passengers drunken persons; 19 L.R.A. 328, on exposure of drunken passenger to danger by ejection from car.

Degree of care owing by carrier to intruding child.

Cited in *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 58 A. R. 387, 6 N. E. 310, holding conductor of train bound to use greater care in dealing with intruding child than required respecting older persons.

30 AM. REP. 607, PETERSON v. ROACH, 32 OHIO ST. 374.

Money borrowed by one partner and used by partnership as firm debt.

Cited in *National Bank v. Meader*, 40 Minn. 325, 41 N. W. 1043, holding firm not liable for money borrowed by partner on his individual credit but used for firm; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339, holding that money borrowed by one partner on his individual credit will not become debt of firm by being used in business.

Distinguished in *McKee v. Hamilton*, 33 Ohio St. 7, holding giving of renewal note by one partner no release of firm's liability after it is once fixed, where same sureties retained on promise that copartner will also sign as principal, although he in fact did not so sign; *Merchants' Nat. Bank v. Little*, 4 Ohio C. C. 195, holding firm liable for money borrowed for its use on credit of member; *Harper v. Tiffin Nat. Bank*, 54 Ohio St. 425, 44 N. E. 97, holding that payee of promissory note given by agent may hold undisclosed principal for money had and received.

Liability of firm for partner's acts.

Cited in *Pickels v. McPherson*, 59 Miss. 216, holding firm not bound by receipt of note of stranger from partnership debtor by one member, which he receipts for in firm name, and agrees to collect and return proceeds; *Valentine v. Hickie*, 39 Ohio St. 19, holding that agreement to purchase stock on individual credit, to be afterwards taken into joint venture at option of others than purchaser does not render latter liable.

Admission of facts by demurrer.

Cited in *Alter v. Cincinnati*, 4 Ohio N. P. 427, holding every allegation of fact set forth in pleading taken as true on demurrer.

30 AM. REP. 610, RICE v. COLUMBUS, T. & T. R. CO. 32 OHIO ST. 380.

Rights and liabilities of married women.

Cited in *Stagge v. Nichols*, 1 Ohio C. C. 408, holding that married woman may be compelled to execute contract in writing made jointly with her husband, to convey her separate real estate; *Hickle v. Hickle*, 6 Ohio C. C. 490, holding wife liable for support of incapacitated husband; *Dukes v. Spangler*, 35 Ohio St. 119, holding that married woman can only divest herself of title to real estate in mode pointed out by statute; *Spearman v. Ward*, 114 Pa. 634, 8 Atl. 430, 18 W. N. C. 554, 17 Pittsb. L. J. N. S. 301, 44 Phila. Leg. Int. 356, holding that Ohio Statutes do not remove common law disability of married women to make contracts generally and personally; *Pelzer v. Campbell*, 15 S. C. 581, 40 A. R. 705, holding that married woman had legal capacity to bind herself as surety on son's notes.

Cited in notes in 30 A. D. 240, on power of feme covert over separate estate in absence of statutory regulation; 7 L.R.A. 642, on wife's capacity to contract.

Overruled in *Williams v. Urmston*, 35 Ohio St. 296, 35 A. R. 611, holding presumption that married woman having separate estate intends to charge it with payment of promissory note executed by her as surety for principal maker.

— Estoppel of.

Cited in *Berry v. Seawall*, 13 C. C. A. 101, 31 U. S. App. 30, 65 Fed. 742, holding married woman estopped to dispute partition, fairly and equally made by her husband by parol, with her consent, and followed by long possession and acquiescence.

30 AM. REP. 614, FARRELL v. STATE, 32 OHIO ST. 456.

Necessity of guilty knowledge to constitute sale unlawful.

Cited in *Haas v. State*, 1 Ohio N. P. 248; *Kelly v. State*, 1 Ohio N. P. 238,—holding defendant in prosecution for sale of adulterated food entitled to show want of guilty knowledge.

Cited in note in 67 A. S. R. 455, on want of guilty knowledge as defense to sale of adulterated food.

— Sale of liquor.

Cited in *State v. Brown*, 38 Kan. 390, 16 Pac. 259, holding defense of intoxication through honest mistake of fact proper in prosecution for being drunk in public place; *State v. Kittelle*, 110 N. C. 560, 28 A. S. R. 698, 15 L.R.A. 694, 15 S. E. 103, holding liquor dealer responsible for illegal sale by clerk to minors contrary to his instructions; *State v. Powell*, 141 N. C. 780, 6 L.R.A.(N.S.) 477, 53 S. E. 515, holding that one selling intoxicating liquor illegally may show that in doing so he was acting under mistake of fact; *State v. Fromer*, 7 Ohio N. P. 172, holding averment that defendant knew that fair was being held within two miles of place where he sold liquor unnecessary; *Altschul v. State*, 8 Ohio C. C. 214, holding that jury in prosecution for sale of adulterated wine need not be satisfied beyond reasonable doubt that accused knew wine to be adulterated; *State v. Chastain*, 19 Or. 176, 23 Pac. 963, holding that statutes prohibiting sale of liquors without license make their violation indictable irrespective of guilty knowledge; *State v. Gulley*, 41 Or. 318, 70 Pac. 385, holding guilty knowledge not essential to unlawful sale of

intoxicating liquor to minor; *Haynes v. State*, 118 Tenn. 709, 121 A. S. R. 1055, 13 L.R.A.(N.S.) 559, 105 S. W. 251, holding ignorance that liquors are intoxicating no excuse for unlawful sale thereof; *State v. Tomasi*, 67 Vt. 312, 31 Atl. 780, holding ignorance of nature of thing sold no excuse for illegal sale of intoxicating liquor; *State v. Denoon*, 31 W. Va. 122, 5 S. E. 315, holding druggist responsible for illegal sale of liquor by clerk without his knowledge and contrary to his instructions.

Cited in reference notes in 31 A. R. 165, on ignorance that liquor sold was intoxicating as defense to charge of selling same; 51 A. R. 322, on necessity for proof of knowledge of minority in prosecution for selling intoxicants to minor; 6 L.R.A.(N.S.) 481, on mistake in beverage sold by dealer as defense to charge of illegal liquor sale.

Distinguished in *Myer v. State*, 10 Ohio C. C. 226 (affirming 1 Ohio N. P. 241), holding that defendant in prosecution for unlawful sale of unadulterated wine cannot prove want of knowledge as defense.

Disapproved in *Haynes v. State*, 118 Tenn. 709, 121 A. S. R. 1055, 13 L.R.A.(N.S.) 559, 105 S. W. 251, 12 A. & E. Ann. Cas. 470, holding that ignorance that liquors are intoxicating does not excuse unlawful sale thereof.

Act for punishment for possessing burglar's tools as police regulation.

Cited in *Ex parte Falk*, 42 Ohio St. 638, holding statute making possession of burglar's tools a crime not mere police regulation for prevention of crime.

Ignorance of fact as defense to crime.

Cited in *O'Donnell v. Com.* 108 Va. 882, 62 S. E. 373, to the point that when statute makes act indictable, irrespective of knowledge, then ignorance of fact is no defense.

Cited in reference notes in 47 A. S. R. 473, on belief in death of former spouse as defense to bigamy; 40 A. S. R. 776, on defenses to bigamy.

Cited in notes in 55 A. S. R. 837, on ignorance of fact as a defense in criminal case; 55 A. S. R. 494, on ignorance of fact; 55 A. S. R. 514, on ignorance of one's rights as ground of relief in criminal cases and torts.

Necessity of criminal intent.

Cited in *Com. v. Lewis*, 25 W. N. C. 432, 7 Pa. Co. Ct. 558, 47 Phila. Leg. Int. 58, holding fact that intention was to kill and not wound pigeon, at shooting match, no justification.

Cited in reference notes in 33 A. R. 374, on good faith as defense to prosecution for sale of liquor to minor; 50 A. R. 270, on criminal liability of saloon keeper for act of agent in keeping it open illegally; 20 A. S. R. 625, on criminal intent essential to larceny.

Cited in notes in 78 A. S. R. 239, on criminal intent as element in acts which may be declared criminal by statute; 23 L.R.A.(N.S.) 385, on right of one to testify as to his intent; 8 E. R. C. 47, on necessity of guilty intent to make act crime.

30 AM. REP. 620, BAKER v. PENDERGAST, 32 OHIO ST. 494.

Illegal nature of producing cause as excuse for contributory negligence.

Cited in *Baltimore & O. R. Co. v. Weedon*, 24 C. C. A. 249, 47 U. S. App. 306, 78 Fed. 584; *Louisville & N. R. Co. v. East Tennessee & G. R. Co.* 2 C. C. A. 308, 22 U. S. App. 136, 60 Fed. 993, holding it not negligence ordinarily for one to act on theory that another will comply with his statutory duty, unless

there is some reason for thinking otherwise; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 10 A. S. R. 136, 20 N. E. 843, holding persons approaching crossing when gates are open and gateman present entitled to assume that there are no approaching trains; *Eaton v. Cripps*, 94 Iowa, 176, 62 N. W. 687, holding that one colliding with approaching teams which she did not see had right to assume that speed of teams would conform to speed ordinance; *Sandifer v. Lynn*, 52 Mo. App. 553, holding pedestrians about to enter streets not at fault in expecting that speed ordinances will be observed; *Lynch v. Metropolitan Street R. Co.* 112 Mo. 420, 20 S. W. 642, holding that boy run over by street car had right to assume, if himself in exercise of ordinary care, that street car company would obey ordinances; *Becker v. Cincinnati Street R. Co.* 1 Ohio N. P. 359, holding speed ordinance competent evidence to show street car company's liability when injury to child resulted from nonobservance of ordinance; *Meek v. Pennsylvania Co.* 38 Ohio St. 632, holding that person approaching crossing in absence of apparent danger had right to assume that company would exercise care demanded of it by ordinance; *Cleveland C. C. & I. R. Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321, holding person approaching crossing when gates are open and gateman present entitled to assume that tracks are safe, and failure to look and listen will not defeat recovery.

Cited in notes in 55 A. D. 674, on effect of defendant's violation of law on right of recovery by one guilty of contributory negligence; 19 L.R.A.(N.S.) 165, on duty of pedestrian when crossing or traveling public street to avoid passing teams; 36 L.R.A. 306, on right of person crossing street to presume that ordinance against fast driving will be obeyed.

Special exception to charge as essential to reversal.

Cited in *Tate v. Cogan*, 4 Ohio C. C. 108; *Dollman v. Haefner*, 12 Ohio C. C. 721; *Bacon v. Daniels*, 37 Ohio St. 279; *Weybright v. Fleming*, 40 Ohio St. 52, —holding special exception to charge not necessary to reversal and award of new trial by reviewing court.

30 AM. REP. 624, BOYD v. BANK OF TOLEDO, 32 OHIO ST. 526.

What constitutes waiver of demand and notice.

Cited in *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145, holding that waiver of presentment for payment may be implied from acts and declarations of indorser calculated to mislead holder, put him off his guard, or induce him to forbear taking necessary steps to charge indorser; *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886, holding that waiver of presentment for payment may be implied from conduct of indorser of promissory note; *Glaze v. Ferguson*, 48 Kan. 157, 29 Pac. 396, holding that indorsers may waive demand, protest and notice of nonpayment of note by informing indorsee at time of transfer that time of payment had been extended and requesting him not to present it for certain time; *Seldner v. Mt. Jackson Nat. Bank*, 66 Md. 488, 59 A. R. 190, 8 Atl. 262, holding any language calculated to induce holder of note not to make demand or protest sufficient waiver; *McMonigal v. Brown*, 45 Ohio St. 499, 15 N. E. 860, holding that waiver of demand and notice may be by verbal agreement for extension of time between holder, maker and indorser.

Cited in reference note in 57 A. S. R. 488, as to what constitutes waiver of notice of presentment and dishonor.

30 AM. REP. 629, LAKE SHORE & M. S. R. CO. v. HUTCHINSON, 32 OHIO ST. 571.**Measure of damages for unintentional trespass.**

Cited in *Lake Shore & M. S. R. Co. v. Hutchins*, 37 Ohio St. 282, holding measure of damages in action for conversion of chattels, against innocent purchaser, from person who had previously converted property to his own use and added to its value by his own labor, value of chattels when taken from owner; *Keys v. Pittsburg & W. Coal Co.* 58 Ohio St. 246, 65 A. S. R. 754, 41 L.R.A. 681, 50 N. E. 911; *Ross v. Scott*, 15 Lea, 479,—holding damages confined to value of property before trespass committed where it has been from ignorance and not wilful.

Cited in note in 24 A. D. 85, on measure of damages in trover as against innocent purchaser.

Cited in notes in 33 A. R. 69, on measure of damages for unintentionally taking minerals from land of another; 93 A. D. 744; 54 A. R. 422,—on measure of damages for trespass by mistake; 17 E. R. C. 879, on measure of damages where trespasser mines beyond limits of his property; 17 E. R. C. 883, on right of innocent trespasser to allowance for his labor and expense.

—By cutting timber.

Cited in *Tuttle v. White*, 46 Mich. 485, 41 A. R. 175, 9 N. W. 528, holding measure of damages for conversion of logs purchased in good faith from wilful trespassers who have put them afloat, value when first taken; *Beede v. Lamprey*, 64 N. H. 510, 10 A. S. R. 426, 15 Atl. 133, holding measure of damages in trover for trees carelessly but not wilfully cut on another's land value of trees immediately after their severance from realty: *Gaskins v. Davis*, 115 N. C. 85, 44 A. S. R. 439, 25 L.R.A. 813, 20 S. E. 188, holding measure of damages for cutting of logs from land of another in mistaken belief that it was his own, value in woods from which they were taken; *Chappell v. Puget Sound Reduction Co.* 27 Wash. 63, 91 A. S. R. 820, 67 Pac. 391, holding measure of damages in action for conversion for unintentional trespass value of timber standing.

Cited in reference notes in 10 A. S. R. 431; 1 A. S. R. 497,—on measure of damages in trespass or trover for timber cut on another's land; 28 A. S. R. 567, on measure of damages for cutting and carrying away trees.

Cited in note in 19 L.R.A. 656, on measure of damages for injuring or destroying trees.

Title by accession to converted property.

Cited in notes in 44 A. S. R. 447, on title by accession of innocent purchaser of personal property; 32 L.R.A. 422, 425, 427, 428, on title by accession to crops, fruit, and timber, severed and converted with wrongful intent; 32 L.R.A. 433, on position of purchaser of crops, fruit, and timber, wrongfully severed.

30 AM. REP. 639, HIGHT v. BACON, 126 MASS. 10.**Implied warranty.**

Cited in *Doyle v. Union P. R. Co.* 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333, holding landlord not liable for injuries to tenant from snow slide or avalanche in absence of fraud or misrepresentation; *Farrell v. Manhattan Market Co.* 198 Mass. 271, 126 A. S. R. 436, 15 L.R.A.(N.S.) 884, 84 N. E. 481, 15 A. & E. Ann. Cas. 1076; to point that implied warranty of quality arises where goods are purchased from dealer for particular purpose.

Cited in reference notes in 16 A. S. R. 759, on implied warranty on sale of personality; 18 A. S. R. 738, on application of rule of caveat emptor.

Cited in note in 1 L.R.A. 645, on implied warranty that thing sold will be satisfactory.

— Of fitness of article sold.

Cited in *Tabor v. Peters*, 74 Ala. 90, 49 A. R. 804, holding that vendor and manufacturer of churn impliedly warrant that it is useful and reasonably suitable for purpose intended; *Miller v. Moore*, 83 Ga. 684, 20 A. S. R. 329, 6 L.R.A. 374, 10 S. E. 360, holding that inspection by buyer before acceptance will not deprive him of protection of warranty of quality as to latent defects; *Horwich v. Western Brewery Co.* 95 Ill. App. 162, holding that implied warranty of fitness does not arise where purchaser selects goods on his own judgment, although vendor knows that they are intended for particular use; *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407, holding that sale of leather by manufacturer to manufacturers of shoes carries implied warranty that leather is suited for purpose bought; *Bowe v. Hunking*, 135 Mass. 380, 46 A. R. 471, holding no warranty implied in letting of unfurnished house or tenement that it is reasonably fit for use; *Murchie v. Cornell*, 155 Mass. 60, 31 A. S. R. 526, 14 L.R.A. 492, 29 N. E. 207, holding implied warranty on sale of ice which purchaser has no opportunity to inspect that it is merchantable; *Leavitt v. Fiberloid Co.* 196 Mass. 440, 15 L.R.A.(N.S.) 885, 82 N. E. 682, holding implied warranty on sale of inflammable substance known as fiberloid used in manufacture of combs that it is merchantable; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. 150, holding no warranty implied from mere fact that vendor of specific logs knew that vendee intended to use them for lumber; *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667, 65 N. W. 513, holding no implied warranty on sale of lumber that it should be merchantable for vendee's use at his factory; *West End Mfg. Co. v. P. R. Warren Co.* 198 Mass. 320, 84 N. E. 488, holding that implied warranty arises where goods are sold by dealer for particular purpose.

Cited in notes in 102 A. S. R. 620, on implied warranty on sale of articles for specific purpose; 22 L.R.A. 190, 192, on implied warranty of fitness of articles by one manufacturing them for special purpose; 22 L.R.A. 194, on knowledge of purpose as affecting implied warranty of fitness of property bought.

30 AM. REP. 642, HIGGINS v. McCABE, 126 MASS. 13.

When practice of midwifery considered practice of medicine.

Cited in *Com. v. Porn*, 196 Mass. 326, 17 L.R.A.(N.S.) 94, 82 N. E. 31, 13 A. & E. Ann. Cas. 569, holding woman who practises midwifery and makes occasional use of obstetrical instruments and in treating her patients prescribes for certain conditions, engaged in practice of medicine; *Com. v. Porn*, 196 Mass. 326, 17 L.R.A.(N.S.) 94, 82 N. E. 31, 13 A. & E. Ann. Cas. 569, to point that treatment of eyes of infant is not within duties of midwifery.

Degree of skill and care required of physician.

Cited in *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992, holding fact that purpose of examination was information and not medical treatment does not affect duty of physician to use ordinary care or necessity of his possessing ordinary skill; *Bigney v. Fisher*, 26 R. I. 402, 59 Atl. 72, holding that physician or surgeon must apply skill and learning which belong to his profession.

Cited in notes in 93 A. S. R. 668, on duty and liability of persons not phy-

sicians, voluntarily attending on sick; 37 L.R.A. 837, on degree of care required of physician or surgeon giving free service.

30 AM. REP. 645, HUFF v. FORD, 126 MASS. 24.

Liability of master for act of servant while in temporary employ of another.

Cited in *Stewart v. California Improv. Co.* 131 Cal. 125, 52 L.R.A. 205, 63 Pac. 177, holding employer of engineer on steam roller hired by city liable for his negligence and not city; *Dutton v. Amesbury Nat. Bank*, 181 Mass. 154, 63 N. E. 405 (dissenting opinion), on liability of master for acts of servants while in temporary employ of another.

Cited in reference note in 32 A. R. 408, on employer's liability for acts of contractor.

Cited in notes in 22 A. S. R. 461, on when relation of master and servant exists; 76 A. S. R. 397, on liability for negligence and other torts of independent contractor where employer reserves direction and control; 57 L.R.A. 79, on circumstances tending to show which employer had control of servant in charge of plant; 37 L.R.A. 74, on position as master of servants sent to work in charge of plant.

— Where master lets team and driver.

Cited in *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58; *Delory v. Blodgett*, 185 Mass. 126, 102 A. S. R. 328, 64 L.R.A. 114, 69 N. E. 1078,—holding presumption that owner of team lent to another retains in his driver right of control; *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922, holding driver servant of one in teaming business while transporting poles for electric lighting company under contract between owner of team and lighting company; *Oulighan v. Butler*, 189 Mass. 287, 75 N. E. 726, holding driver of transportation company servant of such company while transporting powder to and from factory under contract between powder factory and transportation company; *Joslin v. Grand Rapids Ice Co.* 50 Mich. 516, 45 A. R. 54, 15 N. W. 887, holding master liable for negligent driving of servant while he is acting temporarily for third person who has hired team and driver; *Shepard v. Jacobs*, 204 Mass. 110, 134 A. S. R. 648, 26 L.R.A.(N.S.) 442, 90 N. E. 392, holding that owner of automobile is liable to third person for negligence of driver where he lets it with driver; *Cain v. Nawn Contracting Co.* 202 Mass. 237, 88 N. E. 842; *Philadelphia & R. Coal & Iron Co. v. Barrie*, 102 C. C. A. 618, 179 Fed. 50; *Morris v. Tredo*, — Vt. —, 25 L.R.A.(N.S.) 33, 74 Atl. 387,—holding that owner of team is liable for negligence of driver handling team hired by city where no authority in respect to driver had been committed to city; *Saunders v. Toronto*, 26 Ont. App. 265, holding city not liable for injury caused by negligence of driver hired to draw sand with his team.

Cited in notes in 13 L.R.A.(N.S.) 1124, on who is responsible for acts of driver furnished with a hired vehicle; 27 L.R.A. 169, on master's liability towards third person for servant's negligent driving of horse.

Distinguished in *Sacker v. Waddell*, 98 Md. 43, 103 A. S. R. 374, 56 Atl. 599, holding that master may hire or loan his wagon and driver to another for some special purpose, under direction of latter, in such manner that driver becomes servant of hirer; *De Voin v. Michigan Lumber Co.* 64 Wis. 616, 54 A. R. 649, 25 N. W. 552, holding driver not agent of owner of team while in act of obey-

ing directions of bailee at place or in kind of work not contemplated by contract of hire.

30 AM. REP. 646, GILMAN v. GILMAN, 126 MASS. 26.

Right to collaterally impeach foreign judgment.

Cited in *First Nat. Bank v. Cunningham*, 48 Fed. 510; *Wright v. Andrews*, 130 Mass. 149; *American Tube & Iron Co. v. Crafts*, 156 Mass. 257, 30 N. E. 1024; *Reyer v. Odd Fellows' Fraternal Acci. Asso.* 157 Mass. 367, 34 A. S. R. 288, 32 N. E. 469; *Rothrock v. Dwelling House Ins. Co.* 161 Mass. 423, 42 A. S. R. 418, 23 L.R.A. 863, 37 N. E. 206; *Chicago Title & T. Co. v. Smith*, 185 Mass. 363, 102 A. S. R. 350, 70 N. E. 426; *Vilas v. Plattsburgh & M. R. Co. (Vilas v. Butler)*, 123 N. Y. 440, 20 A. S. R. 771, 9 L.R.A. 844, 26 Abb. N. C. 100, 25 N. E. 941, 19 N. Y. Civ. Proc. Rep. 333, holding that defendant to action on foreign judgment may plead and prove that he was not duly served with process and did not authorize an appearance; *Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028, 10 A. & E. Ann. Cas. 710, holding that courts may inquire into jurisdiction of courts of another state to render judgment; *Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158, holding record of foreign judgment prima facie evidence of indebtedness; *Reed v. Reed*, 52 Mich. 117, 50 A. R. 247, 17 N. W. 720, holding that credit given to extraterritorial judicial proceedings does not extend to those in which court was incompetent to act; *Shepard v. Wright*, 59 How. Pr. 512, holding that want of jurisdiction renders foreign judgment mere nullity here; *Prichard v. Sigafus*, 103 App. Div. 535, 93 N. Y. Supp. 152, holding that defendant in action on foreign judgment may attack same where rendered upon unauthorized appearance by attorney; *Price v. Schaeffer*, 161 Pa. 530, 25 L.R.A. 699, 34 W. N. C. 442, 29 Atl. 279, holding that record of foreign judgment may be contradicted by facts impeaching court's jurisdiction; *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969, to the point that lack of jurisdiction of foreign court may be raised in action on its judgment.

Cited in reference notes in 32 A. R. 673, on impeachment of foreign judgment for want of jurisdiction; 1 A. S. R. 663, on defenses available in action on foreign judgment.

Cited in notes in 75 A. D. 149, as to whether foreign judgment on unauthorized appearance by attorney is void, voidable, or conclusive; 21 L.R.A. 858, 859, on effect of judgment of foreign country or sister state obtained on unauthorized appearance by attorney.

Distinguished in *Michels v. Stork*, 52 Mich. 260, 17 N. W. 833, holding return by officer, of service of process, conclusive in any collateral proceeding, upon parties to suit in which process issued.

Effect of voluntary appearance of unserved nonresident on right to render personal judgment.

Cited in *Rothschild v. Knight*, 176 Mass. 48, 57 N. E. 337, holding that voluntary general appearance in personal action of nonresident defendant who has not been served with process gives jurisdiction to render personal judgment against him.

Cited in note in 16 L.R.A. 234, on what property subject to personal judgments rendered upon constructive service of process.

Right to contradict recital of service in domestic judgment on writ of error.

Cited in *Hall v. Staples*, 166 Mass. 399, 44 N. E. 351, holding that recital

of due service of process or appearance by attorney, in domestic judgment may be contradicted on writ of error.

30 AM. REP. 647, COM. v. RICHARDSON, 126 MASS. 34.

Sufficiency of indictment for bigamy.

Cited in *Watson's Petition*, 19 R. I. 342, 33 Atl. 873, holding that indictment for cohabiting with another as husband and wife, having at time husband or wife living, which fails to allege second marriage, defective.

Variance between indictment and proof.

Cited in *State v. Fallon*, 2 N. D. 510, 52 N. W. 318; *Kennedy v. State*, 9 Tex. App. 399,—holding that particular mode of commission of offense, capable of being committed in various modes, charged in indictment must be proved upon trial.

Cited in note in 24 L.R.A. 833, on indictment for bigamy as not supported by proof of second marriage after divorce.

What constitutes bigamy.

Cited in notes in 93 A. D. 254, on marriage in violation of divorce decree limiting defendant's right to remarry as bigamy; 126 Am. St. R. 213, on crime of bigamy.

30 AM. REP. 652, COM. v. DEJARDIN, 126 MASS. 46.

Necessity for setting out obscene matter in indictment as to obscene literature.

Cited in *Com. v. McCance*, 164 Mass. 162, 29 L.R.A. 61, 41 N. E. 133, holding indictment not specifying parts of book relied on as obscene with reasonable certainty defective; *State v. Hayward*, 83 Mo. 299, holding that information in prosecution relative to obscene literature must set out obscene matter: *People v. Danihy*, 63 Hun. 579, 10 N. Y. Crim. Rep. 194, 18 N. Y. Supp. 467, holding that indictment relative to publication of obscene matter must show upon its face that printed matter was of character charged; *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 Sup. Ct. Rep. 480 (dissenting opinion), on necessity of alleging obscene matter in full indictment.

How meaning of words ascertained.

Cited in *Lewis v. Fisher*, 80 Md. 139, 45 A. S. R. 327, 26 L.R.A. 278, 30 Atl. 608, holding that coupling of words together shows that they are to be understood in same sense; *Joplin v. Leckie*, 78 Mo. App. 8, holding that meaning of word is or may be known by accompanying words.

Cited in reference note in 64 A. S. R. 207, on making and selling obscene pictures.

30 AM. REP. 654, BURGESS v. EQUITABLE M. INS. CO. 126 MASS. 70.

Effect of deviation on validity of marine insurance policy.

Cited in *The Iroquois*, 55 C. C. A. 497, 118 Fed. 1003, holding that departure of ship from her course to procure necessary treatment for sick and injured seaman does not invalidate her insurance on that voyage; *Amsinck v. American Ins. Co.* 129 Mass. 185, holding evidence of deviation from voyage insured, by unreasonable delay in prosecuting it admissible under general denial in answer in action on marine policy; *Parker v. China Mut. Ins. Co.* 164 Mass. 237.

41 N. E. 267, holding clause in marine policy prohibiting vessel from certain gulf equivalent to warranty that vessel should not go there during time covered by insurance; *Moore v. Phoenix Ins. Co.* 62 N. H. 240, 13 A. S. R. 556, to point that deviation from stated voyage against condition in policy discharges insurer, though loss does not happen during deviation, no risk increased thereby; *Ex parte O'Hare*, 103 C. C. A. 220, 179 Fed. 662, holding that steam vessel towed from winter berth on Great Lakes to anchorage to be fitted out for season was not "on voyage;" *The Indrapura*, 171 Fed. 929, holding that placing of vessel in dry dock after she had received cargo, for purpose of painting bottom was deviation.

Cited in notes in 80 A. S. R. 308, on revival of insurance forfeited by use of premises by discontinuance of cause of forfeiture before loss; 10 L.R.A. (N.S.) 742, on effect of temporary condition ceasing before loss under specific provision against navigating certain waters; 9 E. R. C. 363, on deviation from course of insured voyage as discharging underwriters.

30 AM. REP. 661, JONES v. GRANITE MILLS, 126 MASS. 84.

Liability of master for injury to servant from negligence of fellow servant.

Cited in *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262, holding master not liable merely because coservant negligently handles appliances in such way as to occasion injury to employee; *Knoxville Iron Co. v. Dobson*, 7 Lea, 367, holding master not liable for injury to servant caused by negligence of fellow servant, when not negligent in his selection or retention after careless habits became known.

Cited in notes in 36 A. D. 280, on employer's liability to servant for injuries from negligence or misconduct of fellow servant; 67 A. D. 594, on liability of master for negligence of fellow servants as affected by nature of their duties; 54 L.R.A. 111, on nonliability of master for negligent use of safe appliances by fellow servants; 54 L.R.A. 115, on liability of master for negligence of coservants related to details of the work; 54 L.R.A. 131, on master's nonliability for fellow-servant's negligence in operating fire hose; 54 L.R.A. 154, on non-imputability to master of negligence of coservants whose duty it is to keep instrumentalities in proper condition.

Duty of master to furnish servant proper appliances and safe place to work.

Cited in *Western Wrecking & Lumber Co. v. O'Donnell*, 101 Ill. App. 492, holding master not bound to furnish servant hired to tear down old building reasonably safe place to work; *Marshall v. Widdicomb Furniture Co.* 67 Mich. 167, 11 A. S. R. 573, 34 N. W. 541, holding that law requires some care in introducing untried novelties in shape of machinery into furniture factory; *Quick v. Millfort Mill Co.* 78 S. C. 472, 59 S. E. 365, holding master not required to furnish such appliances as might have protected from casualty for which he was not responsible.

Cited in notes in 77 A. D. 222, on duty of master to provide appliances that are reasonably safe; 1 L.R.A. 174, on master's duty to furnish proper appliances.

Common law duty to provide building with fire escape.

Cited in *People v. Davis*, 1 Ill. C. C. 245; *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501,—holding that duty to provide building with fire escapes has its origin

in statute; *Huda v. American Glucose Co.* 13 Misc. 657, 34 N. Y. Supp. 931; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999, holding owner of factory at common law not required to furnish more than ordinary means of egress for escape from fires.

Cited in note in 15 L.R.A. 161, on liability for injuries caused by absence of fire escapes on buildings.

Of landlord.

Cited in *Yall v. Snow*, 201 Mo. 511, 119 A. S. R. 781, 10 L.R.A.(N.S.) 177, 100 S. W. 1, 9 A. & E. Ann. Cas. 1161; *Johnson v. Snow*, 102 Mo. App. 233, 76 S. W. 675; *Schmalzried v. White*, 97 Tenn. 36, 32 L.R.A. 782, 36 S. W. 393,—holding landlord not bound to furnish fire escapes in absence of statute or ordinance.

Who are fellow servants.

Cited in notes in 53 A. R. 45; 1 A. S. R. 32,—on who are fellow servants.

30 AM. REP. 666, KEITH v. GRANITE MILLS, 126 MASS. 90.

Common law duty to furnish means of escape from fire.

Cited in *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999, holding owner of factory at common law not bound to furnish anything more than ordinary means of egress to provide against danger from fire.

Cited in note in 15 L.R.A. 161, on liability for injuries caused by absence of fire escapes on buildings.

— Of landlord.

Cited in *Schmalzried v. White*, 97 Tenn. 36, 32 L.R.A. 782, 36 S. W. 393, holding landlord not bound to furnish fire escapes in absence of statute or ordinance.

Propriety of instructions as to negligence.

Cited in note in 54 L.R.A. 63, on propriety of instructions in action for master's negligence involving breach of personal duty.

Duty of master to furnish safe appliances and place to work.

Cited in notes in 92 A. D. 219, on duty of employer to furnish safe premises and conditions in and under which to work; 1 L.R.A. 174, on master's duty to furnish proper appliances.

30 AM. REP. 667, ALLING v. BOSTON & A. R. CO. 126 MASS. 121.

Liability of carrier for loss of merchandise carried as baggage.

Cited in *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711, holding carrier not liable for loss of contents of jeweler's trunk shipped as personal baggage where he did not inform company of its contents; *Rider v. Wabash, St. L. & P. R. Co.* 14 Mo. App. 529, holding carrier not liable for loss of passenger's trunk containing merchandise where passenger put it in box car because it was too large to go in caboose without informing company of its contents; *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287, 33 Atl. 845, holding carrier not liable to firm for injuries done to article belonging to firm but carried by carrier as personal baggage of passenger who is member of firm; *Charlotte Trouser Co. v. Seaboard Air Line R. Co.* 139 N. C. 382, 51 S. E. 973, holding carrier liable for loss of trunks containing merchandise which it carries as baggage knowing it to be merchandise; *Toledo & O. C. R. Co. v. Bowler &*

B. Co. 63 Ohio St. 274, 58 N. E. 813, holding carrier not liable for loss of merchandise package shipped by passenger under guise of baggage where same occasioned by ordinary negligence; *Talcott v. Wabash R. Co.* 159 N. Y. 461, 54 N. E. 1 (dissenting opinion), on liability of carrier for breach of contract to carry merchandise as baggage; dissenting opinion in *Trimble v. New York C. & H. R. R. Co.* 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532 (affirming 39 App. Div. 403, 57 N. Y. Supp. 437), on liability of carrier for loss of trunk containing merchandise; *Wensky v. Canadian Development Co.* 8 B. C. 190 (dissenting opinion), on extent of liability of carrier for loss of baggage.

Cited in reference note in 35 A. R. 620, on carrier's liability for loss of sample cases of passenger.

Cited in notes in 99 A. S. R. 389, on liability of carrier for loss of merchandise carried by sales agent; 11 L.R.A. 761, on liability of carrier for loss of merchandise carried as baggage; 14 L.R.A. 517, on liability of carrier in transporting merchandise entrusted to it by passenger; 4 L.R.A.(N.S.) 1035, 1037, on liability of carrier for loss of drummer's baggage.

When carrier of merchandise as baggage deemed to have notice.

Cited in *Blumantle v. Fitchburg R. Co.* 127 Mass. 322, 34 A. R. 376, holding that agreement to transport merchandise as baggage cannot be proved by custom, or by evidence that appearance of package would raise suspicion that it was merchandise.

Cited in note in 99 A. S. R. 357, on effect of carrier's knowledge of character of property on its liability for merchandise as baggage.

What is baggage.

Cited in reference note in 93 A. D. 141, on what is baggage to which passenger is entitled.

Cited in notes in 71 A. D. 162, on what is baggage to which passenger is entitled; 20 L. ed. U. S. 423, on what is included in "baggage" for which carrier is responsible.

Samples of merchandise as baggage.

Cited in *Kansas City, P. & G. R. Co. v. State*, 65 Ark. 363, 67 A. S. R. 933, 41 L.R.A. 333, 46 S. W. 421, holding samples of merchandise carried for purpose of making sales of goods of same class not baggage.

Cited in notes in 99 A. S. R. 354; 71 A. D. 160, 161,—on merchandise as baggage.

When money constitutes baggage.

Cited in *Hillis v. Chicago, R. I. & P. R. Co.* 72 Iowa, 228, 33 N. W. 643, holding carrier not liable for loss of large sum of money by passenger where he kept same in overcoat in his berth and did not notify carrier of that fact.

Cited in note in 99 A. S. R. 349, on money as baggage.

Disapproved in *St. Louis S. W. R. Co. v. Berry*, 60 Ark. 433, 46 A. S. R. 212, 28 L.R.A. 501, 30 S. W. 764, holding that money constitutes baggage where passenger innocently delivers baggage agent more money than carrier required to transport and informs agent of amount.

30 AM. REP. 671, PETERS v. SIDERS, 126 MASS. 135.

When will deemed revoked by subsequent birth.

Cited in *Re Minot*, 164 Mass. 38, 41 N. E. 63, holding no omission to provide by will for children if after bequest to wife, whom testator knew to be pregnant. Am. Rep. Vol. XVII.—17.

nant he gave whole of rest of his property to trustee to pay whole income to wife during life and reversion to those who at time of her death would be his heirs at law by blood.

Cited in note in 45 A. R. 342, on manner and proof of revocation of will.

Effect of omission to provide for child in will.

Cited in *Hurley v. O'Sullivan*, 137 Mass. 86, holding that mistake or accident dehors will not entitle child who had been intentionally omitted to his distributive share.

Cited in reference notes in 34 A. R. 585, on naming and providing for children in will; 17 A. S. R. 260, on rights of child whose name is omitted from parent's will.

Cited in note in 115 A. S. R. 585, on after-born children as pretermitted heirs.

Extrinsic evidence that omission to provide for child in will was unintentional.

Cited in *Re Stebbins*, 94 Mich. 304, 34 A. S. R. 345, 54 N. W. 159, holding that omission to provide for child in will may be shown to have been unintentional either by terms of will or by extrinsic parol testimony; *Coulam v. Doull*, 4 Utah, 267, 9 Pac. 568, holding parol evidence admissible to rebut presumption that omission of testator to provide for children not mentioned in will was unintentional.

Cited in note in 13 L.R.A.(N.S.) 782, on admissibility of extrinsic circumstances in ascertaining intention of testator in respect to disinheriting an after-born child.

30 AM. REP. 672, ASHCROFT v. EASTERN R. CO. 126 MASS. 196.

Exceptions and reservations of easements.

Cited in *Chappell v. New York, N. H. & H. R. Co.* 62 Conn. 195, 17 L.R.A. 420, 24 Atl. 997, holding reservation in deed regarded as an exception where it is clearly for benefit of principal estate, whoever may be its owner; *Hall v. Wabash R. Co.* 133 Iowa, 714, 110 N. W. 1039, holding that title to abandoned right of way remains in grantor and does not revert to grantee; *Wood v. Boyd*, 145 Mass. 176, 13 N. E. 476, holding that exception retains in grantor some portion of his former estate, which by exception is excluded from grant; *Simpson v. Boston & M. R. Co.* 176 Mass. 359, 57 N. E. 674, holding that clause in deed could not operate by way of exception, because it was new right of way; *Dee v. King*, 77 Vt. 230, 68 L.R.A. 860, 59 Atl. 839, holding technical words of limitation not applicable to exception, for part excepted remains in grantor as of his former title.

Cited in notes in 136 Am. St. Rep. 691, on creation and conveyance of easements appurtenant; 2 L.R.A. 87, on reservations and exceptions in grant of land; 13 L.R.A. 289, defining term "reservations in deeds;" 13 L.R.A. 290, as to what may be reserved in deed; 13 L.R.A. 290; 20 L.R.A. 631,—on general distinction between exception and reservation; 20 L.R.A. 636, on duration of easements appurtenant.

—How determined.

Cited in *Perkins v. Stockwell*, 131 Mass. 529; *Hamlin v. New York & N. E. R. Co.* 160 Mass. 459, 36 N. E. 200,—holding exception or reservation determined by its character rather than by particular words used; *Kimball v. With-*

ington, 141 Mass. 376, 6 N. E. 759, holding word "reserving" in deed construed as "excepting" where reservation could only operate as exception.

Necessity of word "heirs" to create easement in fee by way of reservation.

Cited in *Dawson v. Western Maryland R. Co.* 107 Md. 70, 126 A. S. R. 337, 14 L.R.A.(N.S.) 809, 68 Atl. 301; *Bean v. French*, 140 Mass. 229, 3 N. E. 206; *Claffin v. Boston & A. R. Co.* 157 Mass. 489, 20 L.R.A. 638, 32 N. E. 659,—holding word "heirs" necessary to create easement in fee if easement created by way of reservation; *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 112 A. S. R. 296, 3 L.R.A.(N.S.) 98, 76 N. E. 449, holding that reservation of right of way by grantor in deed of land without use of word "heirs" reserves only right during life of grantor; *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 112 A. S. R. 296, 3 L.R.A.(N.S.) 98, 76 N. E. 449, holding that reservation in deed of right of way without use of word "heirs" reserves right only during life of grantor; *Hagerty v. Lee*, 54 N. J. L. 580, 20 L.R.A. 631, 25 Atl. 319; *Dawson v. Western Maryland R. Co.* 107 Md. 70, 126 A. S. R. 337, 14 L.R.A.(N.S.) 809, 68 Atl. 301, 15 A. & E. Ann. Cas. 678,—to point that when covenant operated by way of reservation, and not by way of exception, words of inheritance were necessary to convey fee simple title to easement, under common law.

Cited in note in 20 L.R.A. 632, on necessity of words of inheritance in reservation of easements.

Distinguished in *Ring v. Walker*, 87 Me. 550, 33 Atl. 174, holding that permanent easement, which may be construed as "exception" from thing granted, needs no words of inheritance.

Criticised in *Smith v. Furbish*, 68 N. H. 123, 47 L.R.A. 226, 44 Atl. 398, holding use of word "heirs" not necessary to create title in fee when there is an unqualified reservation of land.

30 AM. REP. 674, COM. v. ROBINSON, 126 MASS. 259.

Continuing offense as bar to subsequent prosecution.

Cited in *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556 (reversing 4 Utah, 295, 9 Pac. 686), holding offense of cohabiting with more than one woman continuous offense and not one consisting of isolated act; *State v. Brownrigg*, 87 Me. 500, 33 Atl. 11, holding conviction for keeping common nuisance from May 1, to October 31, bar to complaint of same kind from October 17 to April 1, of succeeding year; *People v. Cox*, 107 Mich. 435, 65 N. W. 283, holding keeping of disorderly house continuing offense, conviction for which bars another prosecution for such keeping anterior to date laid in former indictment; *Com. v. Sheridan*, 11 Pa. Dist. R. 529, holding that conviction of continuous offense bars subsequent prosecution for any ingredient thereof.

Cited in notes in 92 A. S. R. 113, on prosecution for less offense as bar to prosecution for greater offense including it; 92 A. S. R. 135, on offenses at different periods of time within rule as to former jeopardy.

—**Sale of Honor.**

Cited in *State v. Nunnally*, 43 Ark. 68, holding conviction for unlawful sale of liquor under proof of several different sales in given time. bar to subsequent indictment for any sale to same party within same time; *Nace v. State*, 117 Ind. 114, 19 N. E. 799, holding keeping of disorderly liquor shop one continuous offense; *Com. v. Dunster*, 145 Mass. 101, 13 N. E. 350, holding conviction for keeping and maintaining tenement for illegal sale and keeping of intoxic-

cating liquors from August 1 to October 4, bar to complaint of same kind from May 1, to Nov. 17, of same year; *Com. v. Goulet*, 160 Mass. 276, 35 N. E. 780, holding acquittal on complaint for unlawful exposing intoxicating liquors for sale on July 1, 1892, and on divers days and time between that day and November 21, 1892, bar to similar offense on November 20, 1892; *People v. Satchwell*, 61 App. Div. 312, 15 N. Y. Crim. Rep. 450, 70 N. Y. Supp. 307, holding conviction under indictment for sale of intoxicating liquors bar to subsequent prosecution for any offense provable against accused under that indictment.

Cited in note in 58 A. D. 546, on application of doctrine of former conviction or acquittal to offenses against liquor law.

Distinguished in *State v. Broeder*, 90 Mo. App. 169, holding that under statute each and every sale of package of beer without inspector's mark thereon is violation of statute.

30 AM. REP. 680, FARRINGTON v. KIMBALL, 126 MASS. 313.

Liability of assignee of lessee for rent.

Cited in *McNeil v. Kendall*, 123 Mass. 245, 35 A. R. 373, holding assignee of lessee liable to original lessor for rent; *Mason v. Smith*, 131 Mass. 510, holding that liability of assignee of lessee to lessor ceases when privity of estate ceases; *Donaldson v. Strong*, 195 Mass. 429, 81 N. E. 267; *McHenry v. Carson*, 41 Ohio, St. 212,—holding lessee who assigns lease entitled to be indemnified by assignee against payment of rent during continuance of such assignee's term.

Cited in note in 10 A. S. R. 563, on liability of assignee of lease for rent.

Distinguished in *Swan v. Emerson*, 129 Mass. 289, holding purchaser of land under power of sale in mortgage, who, after taking possession of land, pays tax, assessed upon land to subsequent mortgagee while latter in possession under mortgage, not entitled to sue subsequent mortgagee to recover tax paid.

Surety's payment of debt as essential to recovery from principal.

Cited in *Williams v. Mercer*, 139 Mass. 141, 29 N. E. 540, holding that surety must pay debt for which he is liable before he can recover of principal.

30 AM. REP. 683, HASTINGS v. STETSON, 126 MASS. 329.

Liability for consequences of act.

Cited in *Tasker v. Stanley*, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417, holding one not bound to anticipate general consequences of his honest advice.

Cited in notes in 11 L.R.A. 548, on action for enticing away servant; 11 L.R.A. 547, on rule that law will look no further back than wrong-doer who is proximate cause of consequences complained of; 21 L.R.A. 234, on liability of inducing third party to break contract.

— **Liability of original slanderer for repetition of slander.**

Cited in *Burkett v. Griffith*, 90 Cal. 532, 25 A. S. R. 151, 13 L.R.A. 707, 27 Pac. 527; *Harris v. Minvielle*, 48 La. Ann. 908, 19 So. 925; *Shurtleff v. Parker*, 130 Mass. 293, 39 A. R. 454; *Elmer v. Fessenden*, 151 Mass. 359, 5 L.R.A. 724, 22 N. E. 635,—holding one not liable for third person's actionable and unauthorized repetition of his slander; *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1, holding libeler not bound to anticipate repetition of libel by third persons; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L.R.A.

794, 51 N. E. 1, to point that slanderer is exempt from damages caused by repetition of his words.

Cited in note in 36 A. S. R. 844, on repetition of slander.

Liability of last wrongdoer.

Cited in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 A. S. R. 279, 15 N. E. 84, holding last wrongdoer in complete and intelligent control of consequences of earlier wrongful act liable.

30 AM. REP. 684, SNOW v. SHELDON, 126 MASS. 332.

When married woman engaged in business on her separate account.

Cited in *Hickey v. Thompson*, 52 Ark. 234, 12 S. W. 475; *Chapin v. Kingsbury*, 135 Mass. 580,—holding married woman owning and carrying on farming business engaged in business on her separate account; *Southworth v. Edmands*, 152 Mass. 203, 9 L.R.A. 118, 25 N. E. 106; *Lockwood v. Corey*, 150 Mass. 82, 22 N. E. 440,—to point that carrying on boarding house by married woman is engaging in business on her separate account; *Wheeler v. Raymond*, 130 Mass. 247, holding married woman owning separate property not doing business on her separate account where she permits her husband to use it in his business; *Desmond v. Young*, 173 Mass. 90, 53 N. E. 151, holding husband agent of wife where entire business owned by her and carried on by him with her assent.

Cited in note in 77 A. S. R. 100, on right of husband's creditors to charge wife's separate estate with increase of value through husband's management.

Liability of wife's separate property for family necessities.

Cited in *Gabriel v. Mullen*, 111 Mo. 110, 19 S. W. 1099, holding that wife's separate property may be seized on execution under judgment against husband for necessities for wife and family.

What constitutes carrying on business.

Cited in *Allen v. Com.* 188 Mass. 59, 69 L.R.A. 599, 74 N. E. 287, holding that farming is a business.

Cited in note in 14 L.R.A. 531, on what constitutes carrying on business.

Status of married women under modern statutes.

Cited in *Harmon v. Old Colony R. Co.* 165 Mass. 100, 52 A. S. R. 499, 30 L.R.A. 658, 42 N. E. 505, on nature of change effected by legislation in legal condition of married women.

30 AM. REP. 686, MORRISSEY v. EASTERN R. CO. 126 MASS. 377.

Liability of railroad for injuries to trespasser on its tracks or grounds.

Cited in *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 A. R. 72, holding railroad not liable for injuries to one present upon its private property without invitation, occasioned by trap or pitfall; *St. Louis, I. M. & S. R. Co. v. Ledbetter*, 45 Ark. 246, holding that railroad owes trespasser and intruder upon freight car no duty except not to injure him wantonly or wilfully; *Little Rock & Ft. S. R. Co. v. Pankhurst*, 36 Ark. 371, holding that contributory negligence will excuse injury occasioned by another's negligence except where wrongdoer might have avoided injury after becoming aware of injured party's negligence; *Toomey v. Southern P. R. Co.* 86 Cal. 374, 10 L.R.A. 139, 24 Pac. 1074, holding railroad not bound to furnish cautionary signals for protection of trespasser upon its tracks; *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250, 14 N. E. 70; *Dull v. Cleveland, C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013;

Barstow v. Old Colony R. Co. 143 Mass. 535, 10 N. E. 255,—holding railroad not liable for causing death of trespasser upon its track unless act of its employees wilful; *Tennis v. Inter-State Consol. Rapid Transit R. Co.* 45 Kan. 503, 25 Pac. 876; *Baltimore & O. R. Co. v. State*, 62 Md. 479, 50 A. R. 233,—holding that persons using railroad as footway assume risk of all perils; *Wright v. Boston & A. R. Co.* 142 Mass. 296, 7 N. E. 866, holding railroad not liable for injury of trespasser upon track in absence of evidence of wilful or reckless misconduct on part of its employees; *Chenery v. Fitchburg R. Co.* 160 Mass. 211, 22 L.R.A. 575, 35 N. E. 554, holding that railroad company has right to run its trains without special precautions in interest of bare licensee; *Birmingham R. Light & P. Co. v. Jones*, 153 Ala. 157, 45 So. 177; *Palmer v. Oregon Short Line R. Co.* 34 Utah, 477, 98 Pac. 689, 16 A. & E. Ann. Cas. 229; *Chesapeake & O. R. Co. v. Hawkins*, 26 L.R.A.(N.S.) 309, 98 C. C. A. 443, 174 Fed. 597,—holding that railroad owes no duty to trespasser on track except not to injure him maliciously or with gross carelessness.

Cited in notes in 11 L.R.A. 385, on duty of railroad company toward trespasser on tracks; 25 L.R.A. 290, on duty to maintain lookout for trespassers on track; 69 L.R.A. 543, 546, on liability of railroad for injuries to trespassers on tracks.

—Trespassing child.

Cited in *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 38 A. S. R. 254, 21 S. W. 1062, holding that railroad owes trespassing boy no duty except not to injure him wantonly; *Louisville, E. & St. L. Consol. R. Co. v. Lohges*, 6 Ind. App. 288, 33 N. E. 449; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 58 A. R. 387, 6 N. E. 310,—holding more care required by persons in charge of train where young child seen upon track than in case of one who has reached age of discretion; *McEachern v. Boston & M. R. Co.* 150 Mass. 515, 23 N. E. 231, holding railroad not liable to trespassing boy who is injured by meddling with defective car standing upon one of its tracks; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 26 A. S. R. 253, 13 L.R.A. 248, 28 N. E. 283, holding that railroad owes trespassing boy no duty to keep its turntable in safe condition; *Gay v. Essex Electric Street R. Co.* 159 Mass. 238, 38 A. S. R. 415, 21 L.R.A. 448, 34 N. E. 186, holding street railway company not liable for injury to boy, by unfastened brake, while playing upon unguarded cars standing in public street; *Frost v. Eastern R. Co.* 64 N. H. 220, 10 A. S. R. 396, 9 Atl. 790, holding landowner under no duty to trespassing infant to keep his premises safe; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 A. R. 706, 12 W. N. C. 349, 13 Pittsb. L. J. N. S. 155, 40 Phila. Leg. Int. 81, holding fact that plaintiff in personal injury action to whom railroad owed no duty was child of tender years did not alter duty of railroad; *Bishop v. Union R. Co.* 14 R. I. 314, 51 A. R. 386, holding horse car company under no duty to employ second man to guard cars from intrusion by children during their transit.

Cited in note in 14 A. S. R. 596, on liability of railroad for injuries to children trespassing on track.

Duty of railroad toward children — To keep lookout.

Cited in *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350; *Thomas v. Chicago, M. & St. P. R. Co.* 93 Iowa, 248, 61 N. W. 967,—holding that railroad was no more required to keep lookout for infant trespassers than for adult persons; *Louisville & N. R. Co. v. Lodgsdon*, 118 Ky. 600, 81 S. W. 657, holding railroad not liable for injury of infant from failure to maintain outlook

where no outlook is required; *Williams v. Kansas City S. & M. R. Co.* 96 Mo. 275, 9 S. W. 573, holding railroad not required to be on outlook for trespassing infants; *Lindsay v. Canadian P. R. Co.* 68 Vt. 556, 35 Atl. 513, holding evidence that children were frequently upon track where accident occurred and that this was known by railroad employees admissible as bearing upon negligent lookout for children.

Cited in note in 25 L.R.A. 785, on duty of railroad employees to discover children on track.

—To fence against.

Cited in *New York C. & H. R. R. Co. v. Price*, 16 L.R.A.(N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330, holding railroad not bound in absence of statute to fence at places other than crossings so as to exclude children from its tracks; *McCarty v. Fitchburg R. Co.* 154 Mass. 17, 27 N. E. 773, holding railroad not required to fence where use of road would be obstructed and not liable for injury to boy while crossing street and passing on to track; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069, holding railroad not required to fence its yards in cities and towns nor to prevent child playing therein from jumping on its moving cars.

Liability of landowner for injuries to trespassing infants.

Cited in *Ryan v. Towar*, 128 Mich. 463, 92 A. S. R. 481, 55 L.R.A. 310, 87 N. W. 644, holding owner of land not liable to trespassing children for injuries sustained not due to his wanton or wilful acts; *Galligan v. Metacomet Mfg. Co.* 143 Mass. 527, 10 N. E. 171, holding owner's mere failure to drive children off no invitation imposing responsibility for condition of lot.

Cited in notes in 59 A. R. 24; 49 A. S. R. 416,—on duty of owner of premises, to infant trespassing thereon; 9 L.R.A. 642, on duty of landowner to infant trespassers; 19 L.R.A.(N.S.) 1150, on application of doctrine of attractive nuisance to attractions on private premises.

Liability of traveler for negligently running over child playing in street.

Distinguished in *O'Brien v. Hudner*, 182 Mass. 381, 65 N. E. 788, holding traveler on street liable for negligently running over child playing in street.

Duty of railroad to keep lookout for trespassing animals.

Cited in *Mongogna v. Illinois C. R. Co.* 115 La. 597, 39 So. 699, holding railroad not bound to keep lookout for trespassing animals.

Rights of trespasser injured through landowner's negligence.

Cited in *Gwynn v. Duffield*, 66 Iowa, 708, 55 A. R. 286, 24 N. W. 523, holding that trespasser can only recover for wilful or wanton negligence of owner in respect to property.

Contributory negligence of infants.

Cited in note in 49 A. S. R. 412, on what acts of infant constitute contributory negligence.

30 AM. REP. 689, REGAN v. BALDWIN, 126 MASS. 485.

What constitutes voluntary payment.

Cited in *Medart Patent Pulley Co. v. Dubuque Turbine & Roller Mill Co.* 121 Iowa, 244, 96 N. W. 770, holding that debtor's election to pay amount claimed rather than resist payment of any portion of it makes payment voluntary; *Standard Box Co. v. Mutual Biscuit Co.* 10 Cal. App. 746, 103 Pac. 938, holding

that some element of compulsion or threatened exercise of power over person or property must exist in order to constitute duress.

Recovery back of voluntary payments.

Cited in *Burlock v. Cook*, 20 Ill. App. 154, holding no recovery for overpayments made under protest but not superinduced by fraud, deceit or duress; *Hollingsworth v. Stone*, 90 Ind. 244, holding money voluntarily paid under no mistake of fact not recoverable, although paid under legal compulsion and not legally due; *Matthews v. William Frank Brewing Co.* 26 Misc. 46, 35 N. Y. Supp. 241, holding part payment of brewer's tax under protest not recoverable.

Cited in notes in 45 A. D. 169, on right to recover money wrongfully demanded as rent and paid under threat of ejectment; 94 A. S. R. 422, on recovery back of payments to landlords; 22 L.R.A. 614, on recovery back of rent paid after destruction of leased building.

30 AM. REP. 692, LINNEHAN v. SAMPSON, 126 MASS. 506.

Voluntarily incurring danger as contributory negligence.

Cited in *Pomeroy v. Westfield*, 154 Mass. 462, 28 N. E. 899, holding that mere knowledge of defects in highway will not prevent recovery for injury in its use at night; *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 31 A. S. R. 537, 29 N. E. 464, holding mill-hand not precluded by mere knowledge of iciness of steps at only exit, from recovery for injury therefrom; *Davis v. Forbes*, 171 Mass. 548, 47 L.R.A. 170, 51 N. E. 20 (dissenting opinion), as to experienced minor assuming risk of sufficiency of stirrup strap when convinced of its sufficiency by employer's foreman; *The E. D. Holton*, 55 Fed. 1010, sustaining liability for injury of rival tug grounding after incurring risk by taking tow after danger was increased by defendant's unlawful interference; *Connell v. Prescott*, 20 Ont. App. 49; *Hainlin v. Budge*, 56 Fla. 342 47 So. 825,—to point that person is not guilty of contributory negligence if when placed in sudden peril by another's negligence he acts as ordinarily prudent person would have done.

Distinguished in *Mundle v. Hill Mfg. Co.* 86 Ma. 400, 30 Atl. 16, denying right of employee to recover for injury from defective condition of floor, long appreciated without complaint made.

—To save one's self from apprehended danger.

Cited in *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, 20 L.R.A. 853, 55 N. W. 872, holding person in great peril not bound to exercise care in determining means of saving self demanded of careful person under ordinary circumstances; *Baker v. Kansas City, Ft. S. & M. R. Co.* 147 Mo. 140, 48 S. W. 838, holding person driving upon tracks after passing of engine and cars making flying switch, to be held only to conduct of reasonably prudent person, when approaching remainder of train is discovered; *Cody v. New York & N. E. R. Co.* 151 Mass. 462, 7 L.R.A. 843, 24 N. E. 402, holding carrier liable for injury to passenger who reasonably concludes to jump from train when collision is imminent, although he might safely have retained his seat; *Gannon v. New York, N. H. & H. R. Co.* 173 Mass. 40, 43 L.R.A. 833, 52 N. E. 1075, holding passenger impulsively escaping to baggage car from imminent peril of fire in coach, not precluded from recovery for injury in so doing.

Cited in notes in 55 A. D. 675, on error of judgment in trying to escape imminent danger as contributory negligence preventing recovery; 36 A. S. R. 849, on liability for acts caused by desire to save life.

— To save others.

Cited in *Saylor v. Parsons*, 122 Iowa, 679, 101 A. S. R. 283, 64 L.R.A. 542, 98 N. W. 500, holding rescuer of human life in imminent danger not guilty of contributory negligence as matter of law; *McCarthy v. Morse*, 197 Mass. 332, 83 N. E. 1109, holding rescuer of human life in imminent danger in sudden emergency not guilty of such contributory negligence as would bar action for his personal injury; *Whitworth v. Shreveport Belt R. Co.* 112 La. 363, 65 L.R.A. 129, 36 So. 414; *Chattanooga Light & P. Co. v. Hodges*, 109 Tenn. 331, 97 A. S. R. 844, 60 L.R.A. 459, 70 S. W. 616,—holding that where one person is exposed to peril of life or limb by negligence of another, latter will be liable in damages for injuries received by third party in reasonable effort to rescue one imperiled; *Mobile & O. R. Co. v. Ridley*, 114 Tenn. 727, 86 S. W. 606, 4 A. & E. Ann. Cas. 925, holding rescuer of human life in imminent danger in sudden emergency not guilty of such contributory negligence as would bar action for his wrongful death; *Manthey v. Rauenhuehler*, 71 App. Div. 173, 75 N. Y. Supp. 714, holding act of blacksmith in leaving forge to stop runaway horse in street being used by many children, not negligence per se; *Corbin v. Philadelphia*, 195 Pa. 461, 78 A. S. R. 825, 49 L.R.A. 715, 45 Atl. 1070, holding that going into trench filled with deadly gas, negligently left in public place, to rescue one who went there to recover article accidentally dropped, not negligence relieving city from liability; *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 38 Atl. 835, holding quarryman not guilty of contributory negligence in failing to abandon one upon derrick whom he is to lower to ground, and fly to place of safety upon receiving warning of blast; *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 A. S. R. 441, 42 L.R.A. 842, 42 Atl. 60, holding workman not chargeable with contributory negligence in voluntarily exposing himself to danger to save others from consequences of employer's negligence; *Chicago Terminal Transfer R. Co. v. Kotoski*, 101 Ill. App. 300, holding delay of escape from trestle whereon train is approaching, to aid girl to escape, not negligence per se; *Louisville & N. R. Co. v. Orr*, 121 Ala. 489, 26 So. 35; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 A. S. R. 553, 13 L.R.A. 190, 28 N. E. 172,—holding one springing to rescue of child on track and suffering injury before escape can be made, not negligent per se; *Donahue v. Wabash, St. L. & P. R. Co.* 83 Mo. 560, 53 A. R. 584, holding railroad liable for injury to mother attempting to rescue child from consequences of its negligence; *Liming v. Illinois C. R. Co.* 81 Iowa, 246, 47 N. W. 66, holding setting of fire, proximate cause of injury to one reasonably attempting to save another's property in path of the conflagration; *Prescott v. Connell*, 22 Can. S. C. 147, holding that city was liable for injury caused by team frightened by blast where injured person attempted to stop them.

Cited in reference note in 29 A. S. R. 559, on contributory negligence in rescuing another.

Cited in notes in 55 A. D. 676, on act in discharge of legal duty to save life or the like as contributory negligence preventing recovery for injury; 49 L.R.A. 718, on voluntarily incurring danger to save life of another person as contributory negligence.

Distinguished in *Harris v. Clinton Twp.* 64 Mich. 447, 8 A. S. R. 842, 31 N. W. 425, holding that mere illness in family, not hindering prosecution of ordinary business, not circumstance to be considered in determining prudence in attempting to pass over flooded highway; *Chattanooga Light & P. Co. v. Hodges*, 109 Tenn. 331, 97 A. S. R. 844, 60 L.R.A. 459, 70 S. W. 616, holding that em-

ployee's re-entrance into burning building to telephone alarm, after he had reached place of safety, is proximate cause of his being mortally burned.

Liability for injuries by animals.

Cited in *Graham v. Payne*, 122 Ind. 403, 24 N. E. 216, holding vicious ram not properly confined when given the freedom of a pasture lot.

Cited in note in 3 E. R. C. 118, on liability for keeping mischievous animal with knowledge of its propensities.

Burden of proof of negligence.

Cited in *Curtis v. Schlosser*, 3 Pa. Dist. R. 598, 14 Pa. Co. Ct. 600, holding that plaintiff has burden of showing negligence in action for injury by animal having dangerous propensities.

Effect of admission by party of fault.

Cited in note in 15 L.R.A.(N.S.) 1096, on probative effect of admission by party of fault or responsibility for accident.

30 AM. REP. 695, MELLEN v. MORRILL, 126 MASS. 545.

Liability of landlord for injury to third person.

Cited in *McCarthy v. York County Sav. Bank*, 74 Me. 315, 43 A. R. 591, holding landlord not liable for failure to furnish building so as to reduce possibilities of damage from tenant's negligence to absolute minimum; *Kearnes v. Cullen*, 183 Mass. 298, 67 N. E. 243, holding landlord under no obligation to tenant to keep premises in repair; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 A. R. 659, holding landlord who has created no nuisance and who is free from any wilful wrong or fraud not liable for injury to third person going upon premises during term.

Cited in reference notes in 30 A. R. 584; 1 A. S. R. 432, 490,—on landlord's liability to third person for defective condition or construction of premises.

Cited in notes in 50 A. D. 781, on lessor's liability to third person for nuisance or defect existing at time of lease; 86 A. S. R. 517, on notice to lessor as prerequisite to liability for nuisance; 86 A. S. R. 518, on wrongful acts of tenants and others for which lessor is not answerable; 5 L.R.A. 796, on when owner and landlord not liable for injury caused by defective premises.

—To guest or employee of tenant.

Cited in *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469, holding landlord not liable to tenant's guest injured by defective stairway; *Mistler v. O'Grady*, 132 Mass. 139, holding landowner not liable to customer of tenant injured by fall into ditch seventeen feet from passageway; *Baker v. Tibbetts*, 162 Mass. 468, 39 N. E. 350, holding owner of building not liable to persons whom tenant might see fit to invite there, where tenant knew precise condition of premises and appreciated the danger; *Ryan v. Wilson*, 87 N. Y. 471, 41 A. R. 384, 63 How. Pr. 172, holding landlord not liable for injury to tenant's employee from unguarded or unprotected machinery; *Fellows v. Gilhuber*, 82 Wis. 639, 17 L.R.A. 577, 52 N. W. 307, holding lessor of hotel not liable for injury to guest caused by fall of awning known to be unsafe.

Cited in notes in 92 A. S. R. 511, on lessor's liability to licensees, guests, etc., of tenant; 92 A. S. R. 519, on lessor's liability to licensees, guests, etc., of tenant, where premises are improperly used by lessees; 34 L.R.A. 610, on liability of landlord for injuries to tenant's guests, and servants from defects in premises existing when lease was given.

— **From condition of premises in possession of tenant.**

Cited in *Tomle v. Hampton*, 28 Ill. App. 142, holding landlord liable for injury resulting to third person when he leases premises with nuisance per se attached to them; *Wheeler v. Pullman Palace Car Co.* 131 Ill. App. 262, holding landlord not liable for personal injuries to one going upon demised premises when no nuisance existed on them at time of demise; *Burbank v. Bethel Steam Mill Co.* 75 Me. 373, 46 A. R. 400, holding owners of stationary steam engine not liable for injury to third person when it was not in fact nuisance when delivered to operator under contract, latter having exclusive control of it; *Abbott v. Jackson*, 84 Me. 449, 24 Atl. 900, holding lessee responsible for provision of reasonably safe driveway or means of access to his place of business over land on which such access lies; *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87, holding landlord not liable for personal injuries to third person occasioned by his falling into hole left uncovered by tenant; *Frischberg v. Hurter*, 173 Mass. 22, 52 N. E. 1086, holding landlord not liable for personal injuries to third person occasioned by falling into coal hole through neglect of tenant to fasten cover; *Coman v. Alles*, 198 Mass. 99, 18 L.R.A.(N.S.) 950, 83 N. E. 1097, holding landlord not liable for injuries to third persons by nuisance created by act of omission or commission by tenant without his authority; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620, holding lessee and lessor of defective wharf in connection with place of public resort jointly liable for injury to one occasioned by such defect; *Texas Loan Agency v. Fleming*, 92 Tex. 458, 44 L.R.A. 279, 40 S. W. 1039, holding landlord not liable for injury occasioned by negligence of tenant to make use of means furnished by which premises may be maintained in safety; *Ahern v. Steele*, 115 N. Y. 203, 12 A. S. R. 778, 5 L.R.A. 449, 22 N. E. 193 (dissenting opinion), on liability of owner of demised premises for nuisance thereon; *Taylor v. Loring*, 201 Mass. 283, 87 N. E. 469, holding that landlord was not liable to person injured by stepping into ventilator at side of vestibule entrance to building left open by tenant in possession.

— **From elevators.**

Cited in *Henson v. Beckwith*, 20 R. I. 165, 78 A. S. R. 847, 38 L.R.A. 716, 37 Atl. 702, holding tenant and not landlord one to look out for safety of one present on elevator at tenant's invitation.

Distinguished in *McIntire v. Roberts*, 149 Mass. 450, 14 A. S. R. 432, 4 L.R.A. 519, 22 N. E. 13, holding occupier of building not liable for personal injuries from unguarded elevator well near public street.

— **For injury by snow falling from roof.**

Cited in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 A. S. R. 279, 15 N. E. 84, holding landlord not liable to person injured by fall of snow from roof while traveling upon adjoining highway, where tenant might have prevented accident by use of reasonable care; *Coman v. Alles*, 198 Mass. 99, 14 L.R.A. (N.S.) 950, 83 N. E. 1097, holding that landlord is not liable to third person for injury caused by ice falling from roof negligently permitted by tenant to accumulate.

— **Liability of lessor of railroad for negligence.**

Cited in *State v. Pittsburgh, C. C. & St. L. R. Co.* 135 Ind. 578, 35 N. E. 700, holding consolidated company not liable for penalty incurred by lessee of extinguished company.

Liability of owner of vicious animal for injuries to third person while in bailee's possession.

Cited in *Lettis v. Horning*, 67 Hun, 627, 22 N. Y. Supp. 565, holding owner

of vicious bull having knowledge of its vicious propensity, liable for injury to third person while in possession of bailee.

Duty of owner to keep private way in close proximity to wall in safe condition.

Cited in *Crogan v. Schiele*, 53 Conn. 186, 55 A. R. 88, 1 Atl. 899, holding person who has so made way leading to his buildings as to invite persons to pass along way to such buildings bound to keep way clear of dangers.

30 AM. REP. 697, KELLEY v. WHITNEY, 45 WIS. 110.

Effect of taking note under suspicious circumstances.

Cited in *Davis v. Seeley*, 71 Mich. 209, 38 N. W. 901; *Bowman v. Metzger*, 27 Or. 23, 39 Pac. 3,—holding no objection to purchaser's title where negotiable paper has passed without any proof of bad faith on his part; *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71, 33 A. S. R. 618, 15 L.R.A. 386, 51 N. W. 305, holding that notice cannot be implied from mere indorsement by payee "without recourse;" *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 30 S. W. 1077, holding that mere statement of consideration in negotiable instrument does not affect its validity or negotiability; *Gutwillig v. Stumes*, 47 Wis. 428, 2 N. W. 774, holding that oral agreement by payees before negotiation of notes, to sign compromise of their entire claim including notes, would not defeat bona fide holder's right to recover whole amount; *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 309, 37 N. W. 420, holding that mere suspicious circumstance will not prevent party becoming bona fide purchaser for value.

Cited in reference note in 31 A. R. 429, on circumstances which will put purchaser of note upon notice of defects of title.

Cited in notes in 29 L.R.A.(N.S.) 378, 382, on what circumstances sufficient to put purchaser of negotiable paper on inquiry; 3 E. R. C. 678, as to what will import notice of prior equities on transfer of negotiable paper; 4 E. R. C. 434, on constructive notice of fraud in inception of negotiable paper.

Effect of notice of dishonor of first of several notes given for same consideration.

Cited in *Bank of Edgefield v. Farmers' Co-op. Mfg. Co.* 18 L.R.A. 201, 2 C. C. A. 637, 2 U. S. App. 282, 52 Fed. 98; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10,—holding knowledge that another note given for same consideration is due and that interest is unpaid not such notice as will affect bona fide purchase of former note.

Nonpayment of interest as dishonor of note or bond.

Cited in *Norton v. New Orleans & S. R. Co.* 79 Ala. 590, holding negotiable bonds not due with attached coupons past due and unpaid do not appeal dishonored on their face; *United States Nat. Bank v. Floss*, 38 Or. 68, 84 A. S. R. 752, 62 Pac. 751, holding instalment note not dishonored or rendered overdue by failure to pay interest with each instalment; *Guckian v. Newbold*, 23 R. I. 553, 51 Atl. 210, holding that mere fact of nonpayment of interest will not be regarded as dishonor of note; *Hodge v. Wallace*, 129 Wis. 84, 116 A. S. R. 938, 108 N. W. 212, holding that subsequent transferee of mature note caused by failure to pay interest takes subject to equities between original parties.

Cited in reference notes in 100 A. D. 197, on past due interest as dishonoring negotiable instrument and subjecting it to defenses in hands of bona fide holder; 30 A. R. 813, on taking promissory note after interest due; 64 A. S. R. 418, on dishonor of negotiable instruments, where interest is unpaid at time of indorse-

ment before maturity; 69 A. S. R. 368, on interest due at time of purchasing negotiable instrument.

Cited in note in 46 L.R.A. 800, on effect of dishonor as to interest, instalments, or part of series on rights of subsequent transferee.

Disapproved in *First Nat. Bank v. Forsyth*, 67 Minn. 257, 64 A. S. R. 415, 69 N. W. 909, holding that overdue and unpaid instalment of interest known to indorsee at time of purchase dishonors negotiable paper.

Rights of holder of notes secured by mortgage.

Cited in *Lewis v. Kirk*, 28 Kan. 497, 42 A. R. 173, holding that mortgage follows debt and partakes of its character; *Gilmore v. Roberts*, 79 Wis. 450, 48 N. W. 522, holding that transfer of notes carried chattel mortgage with them as mere incident to notes; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100, holding that purchaser of note need not examine into history of security mentioned therein; *Fred Miller Brewing Co. v. Manasse*, 99 Wis. 99, 67 A. S. R. 854, 74 N. W. 535, holding that mortgage passed to indorsee of note as incident of debt without any written assignment or notation of fact of record; *Boyle v. Lybrand*, 113 Wis. 79, 88 N. W. 904, holding that holder of negotiable promissory note secured by mortgage and transferred before maturity takes it discharged of existing equities; *Thorp v. Mindeman*, 123 Wis. 149, 107 A. S. R. 1003, 68 L.R.A. 146, 101 N. W. 417, holding words "secured by real estate mortgage" upon face of note insufficient to charge assignee with notice of any defense, or of terms of mortgage; *Tobin v. Tobin*, 139 Wis. 494, 121 N. W. 144, holding that mortgage securing note passes as incident upon transfer of note.

Cited in notes in 84 A. D. 404, on right of bona fide purchaser of note to enforce mortgage given for its security; 35 L.R.A. 536, on negotiability of note secured by mortgage as affected by provisions in mortgages.

Right of first mortgagee to release premises.

Cited in *Blanchette v. Farsch*, 18 S. D. 20, 99 N. W. 79, holding that first mortgagee having knowledge of subsequent mortgage on part of premises may release premises exclusively covered by his mortgage, when remaining portion sufficient to secure both mortgages.

Effect of indorsement without recourse.

Cited in notes in 87 A. D. 390, on effect of indorsement "without recourse;" 134 Am. St. Rep. 998, on indorsement without recourse; 12 L.R.A. 371, on indorsement and transfer of commercial paper without recourse.

Who are bona fide purchasers of notes.

Cited in reference notes in 29 A. S. R. 513, on who are bona fide purchasers of negotiable instruments; 27 A. S. R. 913, on who deemed bona fide purchaser of negotiable instrument.

Gross negligence as evidence of bad faith.

Cited in *Kipp v. Smith*, 137 Wis. 234, 118 N. W. 848, to the point that gross negligence is evidence from which bad faith may be inferred, but it does not constitute bad faith as matter of law.

30 AM. REP. 703, MADDEN v. BARNES, 45 WIS. 135.

Blinding effect of waiver of vendor's lien obtained by fraud.

Cited in *Franklin v. Walker*, 171 Ill. 405, 49 N. E. 556, holding waiver of vendor's lien obtained by fraud not binding; *Felton v. Smith*, 84 Ind. 485, holding no waiver of vendor's lien where vendor acting upon faith that he gets some

security gets none at all; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355, holding vendor's lien not waived where vendee fraudulently induces vendor to accept worthless property in payment.

Cited in reference note in 3 A. S. R. 721, on existence, waiver, and assignability of vendor's lien.

Cited in notes in 1 A. S. R. 256; 137 Am. St. Rep. 201,—on waiver of vendor's lien; 16 E. R. C. 97, in receipt of additional or collateral security as waiver of lien.

30 AM. REP. 706, STATE EX REL. BURFEE v. BURTON, 45 WIS. 150.

Power of board of education to adopt rules.

Cited in *Fertich v. Michener*, 111 Ind. 472, 60 A. R. 709, 11 N. E. 605, holding school boards empowered to adopt appropriate rules and regulations for government to schools under their control; *State ex rel. Dresser v. School Dist. No. 1*, 135 Wis. 619, 128 A. S. R. 1050, 16 L.R.A.(N.S.) 730, 116 N. W. 232, holding that courts will not interfere with discretion of school authorities unless it has been illegally or unreasonably exercised.

Cited in note in 6 L.R.A. 534, on rules and regulations for management and conduct of pupils in public schools.

Distinguished in *State ex rel. Stallard v. White*, 82 Ind. 278, 42 A. R. 496, holding that trustees of university cannot make membership in Greek letter fraternity disqualification for admission.

Right of school authorities to suspend or expel pupil.

Cited in *Board of Education v. Purse*, 101 Ga. 422, 65 A. S. R. 312, 41 L.R.A. 593, 28 S. E. 896, holding that child may be suspended for misconduct of parent in entering school room and using offensive language to teacher; *State ex rel. Bowe v. Board of Education*, 63 Wis. 234, 53 A. R. 282, 23 N. W. 102, holding suspension of pupil for refusal to carry in wood improper; *State ex rel. Smith v. Board of Education*, 96 Wis. 95, 71 N. W. 123, holding power of expulsion of pupil from public school in school board, exclusively; *Vermillion v. State*, 78 Neb. 107, 110 N. W. 736, 15 A. & E. Ann. Cas. 401, holding that pupil guilty of such misconduct as to interfere with discipline of school may be expelled.

Cited in notes in 65 A. S. R. 331, 332, on causes for suspension and expulsion from school; 102 A. S. R. 540, on power of teacher to suspend or expel pupil; 6 L.R.A. 535, on suspension or dismissal of pupil from public school.

Right of school teacher to punish pupil.

Cited in *Boyd v. State*, 88 Ala. 169, 16 A. S. R. 31, 7 So. 268, holding school-master criminally liable for abuse of his right to punish pupil; *Danenhoffer v. State*, 69 Ind. 295, 35 A. R. 216, holding that school teacher has right to exact obedience to his lawful commands, and punish their disobedience in reasonable manner; *People v. Green*, 155 Mich. 524, 21 L.R.A.(N.S.) 216, 119 N. W. 1087, holding that person in loco parentis is liable to indictment if he inflict cruel and unreasonably severe punishment upon child.

Cited in reference notes in 57 A. R. 818; 16 A. S. R. 38,—on right of school-teacher to punish pupils.

Cited in notes in 31 A. D. 419, on power of school-teacher to punish pupil physically or corporally; 102 A. S. R. 537, on authority of teacher to punish pupil in place of parent.

30 AM. REP. 710, OSBORN v. BAIRD, 45 WIS. 189.**Effect of repayment of borrowed money to third person.**

Cited in *Sailer v. Barnousky*, 60 Wis. 168, 18 N. W. 763, holding repayment of money borrowed to third person according to agreement discharge of liability.

30 AM. REP. 712, CORK v. BACON, 45 WIS. 192.**Presentment of check.**

Cited in notes in 17 A. S. R. 808, 810, on duty of holder of check to present it for payment within reasonable time in order to render drawer or indorser liable; 41 L. ed. U. S. 856, 857, on presentment and notice of nonpayment of check.

30 AM. REP. 717, MORGAN v. BURROWS, 45 WIS. 211.**Parol evidence as to deed or will.**

Cited in *Daugherty v. Rogers*, 119 Ind. 254, 3 L.R.A. 847, 20 N. E. 779; *Scott v. Neeves*, 77 Wis. 305, 45 N. W. 421,—holding parol evidence admissible in aid of interpretation of words in will of uncertain or doubtful meaning; *Sherwood v. Sherwood*, 45 Wis. 357, 30 A. R. 757, holding evidence of circumstances surrounding testator when he made will admissible in case of latent ambiguity or when provisions of will inconsistent; *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. 6, holding that deeds are to be construed with reference to actual rightful state of property at time of their execution; *Sherwood v. Sherwood*, 45 Wis. 357, 30 Am. Rep. 757, holding parol evidence admissible to explain will containing latent ambiguity.

Cited in reference note in 30 A. R. 762, on parol evidence to explain ambiguity in will.

Cited in notes in 82 A. D. 668, on admissibility of extrinsic evidence to explain doubtful meaning of terms of contract; 59 A. S. R. 286, 287, on extrinsic evidence to explain will; 107 A. S. R. 473, on admission of testator's declarations to aid in construction of will; 6 L.R.A. 323, on admissibility of parol testimony to remove latent ambiguities from will; 2 E. R. C. 726, on admissibility of parol evidence to explain latent ambiguity; 2 E. R. C. 739, on admissibility of testator's declarations to explain ambiguity.

— To correct description of land.

Cited in *Wheeler v. Bolton*, 66 Cal. 83, 4 Pac. 981, holding extrinsic evidence admissible to aid in identification of land described in decree of distribution; *Reinhart v. Oconto County*, 69 Wis. 352, 34 N. W. 135, holding evidence of facts surrounding sale of land for taxes admissible to correct mistake in description in certificate; *Hanley v. Kraftczyk*, 119 Wis. 352, 96 N. W. 820, holding devise not to be frustrated by mere false statement that lands are in section 21 instead of section 22.

Cited in reference note in 86 A. D. 736, on parol evidence to correct description of land in deed.

Cited in notes in 50 A. S. R. 291; 46 A. R. 72,—on admissibility of parol evidence to identify land described in devise; 16 L.R.A. 322, on parol evidence of mistake in description of land devised; 6 L.R.A.(N.S.) 959, on parol evidence to correct description of land in devise.

— To identify beneficiary.

Cited in *Gilmer v. Stone*, 120 U. S. 586, 30 L. ed. 734, 7 Sup. Ct. Rep. 689, hold-

ing latent ambiguity in will respecting object of residuary gift removable by extrinsic evidence; *Covert v. Sebern*, 73 Iowa, 564, 35 N. W. 636, holding parol evidence admissible to identify beneficiary.

—To show intention to extinguish debt from legatee.

Cited in *Brunn v. Schuett*, 59 Wis. 260, 48 A. R. 499, 18 N. W. 260, on admissibility of evidence of testator's intention to extinguish debt from legatee.

30 AM. REP. 721, MURPHY v. CHICAGO & N. W. R. CO. 45 WIS. 222.

Contributory negligence in cases of loss from fire set by railroad engines.

Cited in *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Central Branch U. P. R. Co. v. Hotham*, 22 Kan. 41,—holding that doctrine of contributory negligence applies to cases of destruction of property by fire set by railroad locomotives; *Omaha Fair & Exposition Asso. v. Missouri P. R. Co.* 42 Neb. 105, 60 N. W. 330, holding owner of property adjacent to railroad bound to take such precautionary measures for protection of his property as person of ordinary prudence would do; *Gram v. Northern P. R. Co.* 1 N. D. 252, 46 N. W. 972, holding omission of owner to establish fire-break around his premises not negligence per se; *Kimball v. Borden*, 97 Va. 477, 34 S. E. 45, holding accumulation of combustible materials on lands of owner in vicinity of railroad in orderly conduct of legitimate business, not negligence per se; *Brown v. Brooks*, 85 Wis. 200, 21 L.R.A. 255, 55 N. W. 395, holding that lack of reasonable prudence in failing to burn grass around one's stack of hay to protect it from prairie fire started by another may constitute such negligence as to prevent recovery; *Evansville & T. H. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296 (dissenting opinion), on duty of owner of property in vicinity of railroad to use ordinary care to protect it against fire.

Cited in notes in 38 A. D. 76, on contributory negligence in setting of fire by railroad; 32 A. R. 98, on what is contributory negligence respecting communication of fire by railroad company; 12 L.R.A. (N.S.) 629, on duty of abutting owner to prevent accumulation of combustible materials near railroad right of way.

Distinguished in *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661, holding fact that person's property is exposed to reach of sparks of locomotive engine no defense to action against railroad's negligent setting of fire; *Peter v. Chicago & W. M. R. Co.* 121 Mich. 324, 80 A. S. R. 500, 46 L.R.A. 224, 80 N. W. 295, holding contributory negligence not a defense to statutory liability of railroad company for fires; *Gibbons v. Wisconsin Valley R. Co.* 66 Wis. 161, 28 N. W. 170, holding that owner of lumber burned from fire set by locomotive did not assume risk incident to placing his lumber in such close proximity to ground.

Limited in *Southern R. Co. v. Patterson*, 105 Va. 6, 52 S. E. 694, 8 A. & E. Ann. Cas. 440, holding that bare location of warehouse in close proximity to right of way of railroad and storage of oil therein not negligence per se.

Liability of railroad for fires.

Cited in reference notes in 78 A. D. 185; 99 A. D. 193,—on liability of railroad company for fires started from locomotive; 1 A. S. R. 533, on liability for injuries caused by fire from locomotives.

Cited in note in 95 A. D. 508, 509, on railroad's liability for fire caused by sparks from its engine.

Negligence as question of fact or law.

Cited in reference note in 78 A. D. 186, on whether negligence is question of fact or law.

30 AM. REP. 738, HUMPHREY v. TAYLOR, 45 WIS. 251.**Exemption of tools and utensils.**

Cited in *Spikes v. Burgess*, 65 Wis. 428, 27 N. W. 184, holding hearse exempt from execution as a "wagon."

Cited in reference notes in 99 A. D. 110, on construction of exemption laws; 30 A. S. R. 334, on exemption of tools and utensils; 123 A. S. R. 142, on exemption of farming implements.

Cited in note in 21 A. D. 553, on articles which have been considered tools or implements within exemption of statute.

Sufficiency of bill of exceptions.

Cited in *Lathrop v. Humble*, 120 Wis. 331, 97 N. W. 905, holding that absence of certificate that bill of exceptions contains all evidence does not prevent review of judgment by supreme court.

Cited in notes in 99 A. D. 131, on sufficiency of bill of exceptions which contains enough to show that instruction was material; 99 A. D. 134, on necessity that error in giving or refusing instructions appear of record.

30 AM. REP. 740, BURKHAUSER v. SCHMITT, 45 WIS. 316.**Mistake of law as ground for relief.**

Cited in *Scott v. Ford*, 45 Or. 531, 68 L.R.A. 469, 78 Pac. 742, holding that money paid under mistake of law cannot be recovered; *Frederick v. Douglas County*, 96 Wis. 411, 71 N. W. 798, holding that public officers may recover money voluntarily paid for services rendered in pursuance of illegal contract.

Cited in reference notes in 2 A. S. R. 67, on mistake of attorney as to legal effect of facts on title as grounds for recovering purchase money; 12 A. S. R. 130, on mistake of law as ground for annulling contract.

Cited in note in 55 A. S. R. 500, on ignorance or mistake of law as ground for relief.

30 AM. REP. 744, SPIERING v. ANDRÆ, 45 WIS. 330.**What constitutes libel per se.**

Cited in *Brown v. Vannaman*, 85 Wis. 451, 39 A. S. R. 860, 55 N. W. 183, holding letter written by one of two rival milk dealers advising shipper of other's failure to pay for milk libelous per se as tending to injure business.

Cited in note in 28 L.R.A. 669, on libel or slander by expressing opinions or comments without misstating facts.

—Against public officer.

Cited in *Augusta Evening News v. Radford*, 91 Ga. 494, 44 A. S. R. 53, 20 L.R.A. 533, 17 S. E. 612, holding article in newspaper charging public officer with unbecoming and improper conduct merely to get fees, libelous; *Adamson v. Raymer*, 94 Wis. 243, 68 N. W. 1000, holding publication charging chief of police with dishonesty in general and in detail libelous per se; *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111, holding newspaper article referring to state senator named Buckstaff as "Bucksniff" libelous.

Cited in note in 6 L.R.A. 680, on criticism of public officer as slander.

Am. Rep. Vol. XVII.—18.

30 AM. REP. 746, MELIA v. SIMMONS, 45 WIS. 334.**Validity of grant of administration over living person's estate.**

Cited in *Lavin v. Emigrant Industrial Sav. Bank*, 1 Fed. 641; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Stevenson v. Superior Ct.* 62 Cal. 60; *Thomas v. People*, 107 Ill. 517, 47 A. R. 458; *Soule v. Hough*, 45 Mich. 418, 8 N. W. 50,—holding administration upon estate of living person void; *Carr v. Brown*, 20 R. I. 215, 78 A. S. R. 855, 38 L.R.A. 294, 38 Atl. 9, holding that to administer upon estate of living person is to deprive him of property without due process of law; *Springer v. Shavender*, 116 N. C. 12, 47 A. S. R. 791, 33 L.R.A. 772, 21 S. E. 397; *Springer v. Shavender*, 118 N. C. 33, 54 A. S. R. 708, 33 L.R.A. 775, 23 S. E. 976; *Roderigas v. East*, 76 N. Y. 316, 32 A. R. 309; *Wisconsin Trust Co. v. Wisconsin Marine & F. Ins. Co. Bank*, 105 Wis. 464, 81 N. W. 642; *Perkins v. Owen*, 123 Wis. 238, 101 N. W. 415; *Jordan v. Chicago & N. W. R. Co.* 125 Wis. 581, 110 A. S. R. 865, 1 L.R.A.(N.S.) 885, 104 N. W. 803, 4 A. & E. Ann. Cas. 1113,—holding that the only jurisdiction which county court has in respect to administration of estates is over those of dead persons; *Beam v. Copeland*, 54 Ark. 70, 14 S. W. 1094, on validity of administration proceedings over estate of living person; *D'Arusment v. Jones*, 4 Lea, 251, 40 A. R. 12, holding that administration upon estate of living person is void.

Cited in reference notes in 90 A. D. 138, on setting aside probate of will procured on erroneous report of testator's death; 15 A. S. R. 497, on invalidity of letters of administration and proceedings thereunder, issued upon estate of man represented as dead.

Cited in notes in 73 A. D. 126; 34 A. S. R. 865,—on administration on estate of living person; 40 A. R. 12; 47 A. R. 466; 18 L.R.A. 243,—on validity of administration of estate of living person; 30 A. R. 750, 752, on effect of administration on estate of living person; 81 A. S. R. 543, 544, on collateral attack on right of acting administrator where testator or intestate is not dead; 21 L.R.A. 148, on validity of acts done by executor or administrator under letters testamentary or of administration where testator or intestate subsequently proved to be alive.

Validity of judgment of court whose jurisdiction is disproved.

Cited in *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420, holding judgment of court whose jurisdiction is disproved void for all purposes.

Cited in reference note in 53 A. S. R. 146, on validity of grant of letters of administration without jurisdiction.

Conclusiveness of recital of jurisdictional facts.

Cited in reference notes in 6 A. S. R. 502, on conclusiveness of recital in judgment of service of process; 11 A. S. R. 27, on recital in record as conclusive evidence of sufficient service of process; 11 A. S. R. 256, on effect of recital of jurisdiction in judgment; 14 A. S. R. 422; 13 A. S. R. 220,—on record recitals as conclusive evidence of jurisdictional facts; 35 A. S. R. 730, on conclusiveness of judgment as to jurisdictional facts.

Cited in note in 21 L.R.A. 685, on grant of letters of administration as only prima facie evidence of death.

30 AM. REP. 752, CARHART v. HARSHAW, 45 WIS. 340.**Right of creditors to question sale or gift of exempt property.**

Cited in *Luhrs v. Hancock*, 6 Ariz. 340, 57 Pac. 605, holding that conveyance of homestead cannot be questioned by creditors as fraudulent; *Burdge v. Bolin*,

106 Ind. 175, 55 A. R. 724, 6 N. E. 140, holding wife's real estate partly paid for by exempt property of husband, given to her, not subject to execution for husband's debts; Jayne v. Hymer, 66 Neb. 785, 92 N. W. 1010, holding that creditors cannot complain that property purchased with exempt funds is transferred without consideration; Furman v. Tenny, 28 Minn. 77, 9 N. W. 172; Conner v. Hawkins, 66 Tex. 639, 2 S. W. 520,—holding that debtor may give good title to exempt property, as against his creditors; Allen v. Perry, 56 Wis. 178, 14 N. W. 3, holding bona fide gift or sale by debtor of exempt property no fraud upon creditors; Carver v. Lassalette, 57 Wis. 232, 15 N. W. 162, holding that lien of judgment does not attach on bona fide sale of homestead; Chicago Coffin Co. v. Maxwell, 70 Wis. 282, 35 N. W. 733, holding mortgage of property exempt from execution, given to secure payment of debts, not fraudulent as to other creditors; Ansoerge v. Barth, 88 Wis. 553, 43 A. S. R. 928, 60 N. W. 1055, to the point that insolvent debtor may give his son his exempt property and also his time, in carrying on and managing his son's business; Berge v. Kittleson, 133 Wis. 664, 114 N. W. 125, holding that exempt property required no selection to enforce claim of exemption if it had been transferred by debtor uncommingled with other property not exempt.

Cited in reference notes in 90 A. D. 295, as to reaching property exempt from execution in creditor's suit; 99 A. D. 152, on effect of conveyance of exempt property by insolvent; 30 A. R. 827, on effect of voluntary conveyance of exempt property; 60 A. S. R. 240, on right of owner of property exempt from execution to confer valid title by sale or gift; 4 A. S. R. 51, on right of husband whose property is less in value than amount exempted from execution to give his wife a part; 5 A. S. R. 605, on conveyance of exempt property as fraudulent against creditors.

30 AM. REP. 757, SHERWOOD v. SHERWOOD, 45 WIS. 357.

Duty of court in construing wills.

Cited in *Sturgis v. Work*, 122 Ind. 134, 17 A. S. R. 349, 22 N. E. 996; *O'Hearn v. O'Hearn*, 114 Wis. 428, 58 L.R.A. 105, 90 N. W. 450,—holding that court cannot eliminate words or phrases and supply others in order to make will conform to supposed intention of testator; *Re Paulson*, 127 Wis. 612, 5 L.R.A. (N.S.) 804, 107 N. W. 484, 7 A. & E. Ann. Cas. 652; *Bussell v. Wright*, 133 Wis. 445, 113 N. W. 644,—holding that intention of testator must govern; *Pabst v. Goodrich*, 133 Wis. 43, 113 N. W. 398, 14 A. & E. Ann. Cas. 824, holding that intention of testator as gathered from will itself must govern construction of will; *Re Bouck*, 133 Wis. 161, 111 N. W. 573 holding that intention of testator must be gathered from will itself.

Cited in reference note in 41 A. R. 493, on construction of will when there is mistake in description of land devised.

Power of equity courts to reform wills.

Cited in *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750, denying power of courts to add to or reform will on ground of mistake; *Nelson v. McDonald*, 61 Hun, 406, 16 N. Y. Supp. 273, holding that court will not reform will where two wills each signed by mistake by wrong party; *Willey v. Hodge*, 104 Wis. 81, 76 A. S. R. 852, 80 N. W. 75, holding that equity will not reform voluntary conveyance of land from father to son as testamentary disposition of property so as to make it describe land, which grantor intended, but by mistake failed to convey; *Petesich v. Hambach*, 48 Wis. 443, 4 N. W. 565, holding that mortgage

executed by husband and wife will not be reformed after death of husband so as to make it include homestead which was omitted by mistake and later devised to wife.

Cited in notes in 66 A. D. 633, 634, on reforming and correcting wills in equity; 6 L.R.A.(N.S.) 944, on judicial correction of testamentary errors in description of land.

Distinguished in *Christman v. Colbert*, 33 Minn. 509, 24 N. W. 301, holding that decree of reformation rendering devises inoperative by determining that devisors had no title to lands which they assumed to devise did not change terms of will.

Extrinsic evidence to correct mistake in description of land devised.

Cited in *Oliver v. Henderson*, 121 Ga. 836, 104 A. S. R. 185, 49 S. E. 743; *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739,—holding that alleged mistake in description of land devised cannot be corrected by admission of extrinsic evidence, unless language of will furnishes basis of correction; *Crooks v. Whitford*, 47 Mich. 283, 11 N. W. 159, holding parol evidence inadmissible to supply description of land omitted from devise; *Hanley v. Kraftczyk*, 119 Wis. 352, 96 N. W. 820, holding extrinsic evidence of rightful state of property at wills' execution admissible to aid in construction of will whose description otherwise is uncertain; *Eckford v. Eckford*, 91 Iowa, 54, 26 L.R.A. 370, 58 N. W. 1093 (dissenting opinion), on admissibility of extrinsic evidence to correct mistaken description in will.

Cited in reference notes in 34 A. R. 581, on parol evidence to explain will; 40 A. R. 292, on admissibility of parol evidence to correct erroneous description in will.

Cited in notes in 46 A. R. 72, 75, on admissibility of parol evidence to identify land described in devise; 6 L.R.A.(N.S.) 971, on correction of misdescription of land in will in cases of devises without ownership.

Conclusiveness of decree in suit by executor to have will construed.

Cited in *Faught v. Faught*, 98 Ind. 470, holding that executor may bring suit to secure construction of will and that all parties will be concluded by decree.

Conclusiveness of dimensions of lots as shown by plat.

Cited in *Madison v. Mayers*, 97 Wis. 399, 65 A. S. R. 127, 40 L.R.A. 635, 73 N. W. 43, holding that dimensions of lots as shown by plat must yield to actual conditions.

30 AM. REP. 763, CORBERT v. CLARK, 45 WIS. 403.

What constitutes bill of exchange.

Cited in *First Nat. Bank v. Lightner*, 74 Kan. 736, 118 A. S. R. 353, 8 L.R.A.(N.S.) 231, 88 Pac. 59, 11 A. & E. Ann. Cas. 596, holding that words in bill of exchange "on account of contract between you and Snyder Planing Mill Company" does not render payment conditional; *Whitney v. Eliot Nat. Bank*, 137 Mass. 351, 50 A. R. 316, holding draft for certain sum, drawn by one person upon another, payable at sight to order of bank named, and containing direction to charge to certain account, negotiable bill of exchange; *Schierl v. Baumel*, 75 Wis. 69, 43 N. W. 724, holding taking of order drawn upon third person for amount of previous indebtedness of drawer to payee prima facie payment of debt.

Cited in reference note in 33 A. R. 18, on what constitutes a bill of exchange.

Elements of absolute acceptance.

Cited in *Haseltine v. Dunbar*, 62 Wis. 162, 22 N. W. 165, holding that acceptor must be antecedently debtor to person for whom he accepts, or admits himself to be.

Defenses available to acceptor.

Cited in note in 1 A. S. R. 136, on defenses available to acceptor of negotiable paper.

Negotiability of note payable out of particular fund.

Cited in note in 35 L.R.A. 650, on negotiability of note payable absolutely out of particular fund.

30 AM. REP. 771, *TURK v. FUNK*, 68 MO. 18.**Priority of purchase money mortgages.**

Cited in reference notes in 1 A. S. R. 653, on priority of purchase-money mortgage; 20 A. S. R. 410, on purchase money mortgage; 3 A. S. R. 319, on priority of recorded purchase-money mortgage.

Cited in note in 14 L.R.A. 564, on how far mortgage for loan is regarded as for purchase money.

Distinguished in *Higgins v. Dennis*, 104 Iowa, 605, 74 N. W. 9; *Trigg v. Vermillion*, 113 Mo. 230, 20 S. W. 1047,—holding that mortgage to secure loan made on faith of clear record title takes precedence over purchase money mortgage recorded later.

—For purchase money.

Cited in *Brower v. Witmeyer*, 121 Ind. 83, 22 N. E. 975, holding that purchase money mortgage taken by vendor has priority over junior mortgage recorded before purchase money mortgage but assigned after purchase money mortgage recorded; *Ely v. Pingry*, 56 Kan. 17, 42 Pac. 330, holding grantor who takes purchase money mortgage simultaneously with execution of deed not ordinarily required to search records for incumbrances by grantee while he was stranger to title and before deed to grantor executed; *Glencoe v. Wadsworth*, 48 Minn. 442, 51 N. W. 377; *Wendler v. Lambeth*, 163 Mo. 428, 63 S. W. 684,—holding that purchase money mortgage taken by vendor has priority over prior mortgage made by same mortgagor; *Rogers v. Tucker*, 94 Mo. 346, 7 S. W. 414; *Boies v. Benham*, 127 N. Y. 620, 14 L.R.A. 55, 28 N. E. 657,—holding that purchase money mortgage taken by vendor has priority over one taken at same time by third person for money to make payment on purchase.

Jurisdiction of circuit court on appeal from justice court without jurisdiction.

Cited in *Neppo v. Chicago, R. I. & P. R. Co.* 105 Mo. App. 540, 80 S. W. 24, holding no jurisdiction conferred on circuit court by appeal where justice was without jurisdiction.

Record of conveyance as constructive notice.

Cited in *Richmond v. Ashcraft*, 137 Mo. App. 191, 117 S. W. 689, holding that record of deed gives constructive notice and prevents one taking title subsequently from being purchaser in good faith.

30 AM. REP. 773, *BARNETT v. ATLANTIC & P. R. CO.* 68 MO. 56.**Constitutionality of double damage acts.**

Cited in *Blewett v. Smith*, 74 Mo. 404, holding act allowing double damages

to party injured by another voluntarily throwing down and leaving down fence other than that leading into his own enclosure constitutional.

Cited in notes in 31 L.R.A.(N.S.) 863, on constitutionality of statutes requiring railroad to fence tracks and build cattle guards; 17 L.R.A. 75, on constitutionality of statutes giving remedy against railroad for negligently causing death.

— For stock killed by railroad.

Cited in *Cummings v. St. Louis, I. M. & S. R. Co.* 70 Mo. 570; *Spealman v. Missouri P. R. Co.* 71 Mo. 434; *Humes v. Missouri P. R. Co.* 82 Mo. 221, 52 A. R. 369; *Hines v. Missouri P. R. Co.* 86 Mo. 629; *Phillips v. Missouri P. R. Co.* 86 Mo. 540; *Hamilton v. Missouri P. R. Co.* 87 Mo. 85; *Kingsbury v. Missouri, K. & T. R. Co.* 156 Mo. 379, 57 S. W. 547,—holding act allowing double damages for killing of stock by railroad due to defective fencing of same constitutional.

Cited in notes in 14 L.R.A. 586; 52 A. R. 375,—on constitutionality of law making railroad companies liable for double damages for injuries to stock caused by failure to erect fence.

Validity of penalty in way of recovery of attorney fees.

Cited in *Terre Haute & L. R. Co. v. Salmon*, 161 Ind. 131, 67 N. E. 918, holding act authorizing recovery of attorney fees in addition to value of fence constructed by owner of land adjoining railroad track constitutional; *Perkins v. St. Louis, I. M. & S. R. Co.* 103 Mo. 52, 11 L.R.A. 426, 15 S. W. 320; *Briggs v. St. Louis & S. F. R. Co.* 111 Mo. 168, 20 S. W. 32,—holding act allowing attorney fees to plaintiff in action against railroad for killing of stock due from its failure to fence constitutional.

Constitutionality of act fixing sum recoverable from railroad for death by negligence.

Cited in *Carroll v. Missouri P. R. Co.* 88 Mo. 239, 57 A. R. 382, holding act authorizing recovery of five thousand dollars in cases of death of persons occasioned by railroads' negligence, constitutional.

Right to exemplary damages in slander suit.

Cited in *Baldwin v. Fries*, 46 Mo. App. 288, holding that jury may allow such damages in slander case as will afford wholesome example to others in way of smart money.

What acts are penal.

Cited in *Baker Wire Co. v. Chicago & N. W. R. Co.* 106 Iowa, 239, 76 N. W. 665, holding act permitting recovery in damages for excessive freight charges—penal statute; *Price v. St. Louis, K. C. & C. R. Co.* 133 Mo. App. 653, 113 S. W. 1136, to the point that statute relating to killing of stock by railroad because of failure to fence is penal.

— Statutes requiring railroads to fence right of way.

Cited in *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L.R.A. 768, 9 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370; *Boyle v. Missouri P. R. Co.* 21 Mo. App. 416,—holding statute compelling railroad to fence its right of way designed to protect passengers as well as owners of stock; *Wadsworth v. Union P. R. Co.* 18 Colo. 600, 36 A. S. R. 309, 23 L.R.A. 812, 33 Pac. 515; *Atchison, T. & S. F. R. Co. v. Tanner*, 19 Colo. 559, 36 Pac. 541; *Revelle v. St. Louis, I. M. & S. R. Co.* 74 Mo. 438,—holding statute allowing double damages to owner of stock killed on railroad through neglect of company to comply with statute penal.

Penalties required to go to school fund.

Cited in *Scott v. Missouri P. R. Co.* 38 Mo. App. 523, holding penalty given by statute to person whose property has been injured by railroad company failing to clear off and burn dead vegetation etc., on its right of way, constitutional; *State ex rel. Clay Co. v. Wabash, St. L. & P. R. Co.* 89 Mo. 562, 1 S. W. 130, holding that legislature in imposing penalties for violation of laws may give part to informer; *Emerson v. St. Louis & H. R. Co.* 111 Mo. 161, 19 S. W. 1113, holding only such penalties required to go to school fund as legislature may provide shall accrue to state; *State ex rel. Rodes v. Warner*, 197 Mo. 650, 94 S. W. 962, holding that fines authorized to be imposed for violation of Game and Fish law belong to school fund; *Craig v. Gerrish*, 58 N. H. 513, holding statute authorizing recovery of damages by person injured by dog constitutional.

What papers make up record in appeals from justice court.

Cited in *Medart v. Baker's Eureka Hot Air & Stove Burner Mfg. Co.* 51 Mo. App. 19, holding that original papers and transcript of proceedings before justice make up record in appeals from justice court; *Thomason v. St. Louis, I. M. & S. R. Co.* 74 Mo. 560, holding judgment of lower court in plaintiffs' favor reversed where record does not contain any statement of plaintiffs' cause of action.

How justice's jurisdiction is established in action for injury to stock by railroad.

Cited in *Fields v. Wabash, St. L. & P. R. Co.* 80 Mo. 203, holding justices' jurisdiction established if it appear either from statement filed or from transcript that stock was killed in township where suit was brought; *Matson v. Hannibal & St. J. R. Co.* 80 Mo. 229; *Rohland v. St. Louis & S. F. R. Co.* 80 Mo. 180, 1 S. W. 147,—holding that justice had no jurisdiction where transcript fails to show that action against railroad for killing stock was brought in township where injury occurred or in adjoining one.

Curing want of justice's jurisdiction in appellate court.

Cited in *Barhydt v. Alexander*, 59 Mo. App. 188, holding want of justices' jurisdiction not cured by amendment in circuit court; *Nenno v. Chicago, R. I. & P. R. Co.* 105 Mo. App. 540, 80 S. W. 24, holding no jurisdiction conferred on circuit court by appeal where justice was without jurisdiction.

Waiver of justice's want of jurisdiction by appearance.

Cited in *White v. Missouri, K. & T. R. Co.* 72 Mo. App. 400, holding want of jurisdiction of justice in action against railroad for killing stock not waived by defendants' appearance.

Private action for violation of statutes by railroads.

Cited in note in 9 L.R.A.(N.S.) 357, on private action for violation of statute requiring railroads to fence right of way.

36 AM. REP. 776, MATTHEWS v. ALEXANDRIA, 68 MO. 115.**Power of legislature to delegate its authority.**

Cited in *Merchants' Exch. v. Knott*, 212 Mo. 616, 111 S. W. 565, holding that general assembly cannot delegate legislative power; *State ex rel. Judah v. Fort*, 210 Mo. 512, 109 S. W. 737 (dissenting opinion), on power of legislature to delegate its authority to create criminal court.

Power of municipal corporation to delegate its legislative powers.

Cited in *Jacksonville v. Ledwith*, 26 Fla. 163, 23 A. S. R. 568, 9 L.R.A. 64, 7

So. 885, holding that municipality's power to establish and regulate markets cannot be delegated; *Macon Consol. Street R. Co. v. Macon*, 112 Ga. 782, 38 S. E. 60, holding that municipality cannot make valid contract abrogating or restricting its legislative or discretionary power; *Kinney v. Howard*, 133 Iowa, 94, 110 N. W. 282, holding that township school board cannot delegate its power to select site and award contract for construction of school house; *Topeka v. Huntoon*, 46 Kan. 634, 26 Pac. 488, holding municipal powers and trusts incapable of delegation; *Jewell Belting Co. v. Bertha*, 91 Minn. 9, 97 N. W. 424, holding that governing body of village cannot delegate to member or committee functions involving exercise of judgment or discretion; *Galbreath v. Newton*, 30 Mo. App. 380, holding that authority of aldermen to improve streets cannot be delegated to others; *McQuiddy v. Brannock*, 70 Mo. App. 535, holding that power to extend time for performing public contract in certain contingencies cannot be delegated to city engineer; *St. Louis v. Russell*, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470, holding that power of city to determine location of livery stables cannot be delegated; *Vandalia R. Co. v. State*, 166 Ind. 219, 117 A. S. R. 370, 76 N. E. 980; *St. Louis ex rel. Underground Service Co. v. Murphy*, 134 Mo. 548, 26 A. S. R. 515, 34 L.R.A. 369, 34 S. W. 51; *State ex rel. Belt v. St. Louis*, 161 Mo. 371, 61 S. W. 658,—holding that city has no authority to barter away its control over public streets; *Whitworth v. Webb City*, 204 Mo. 579, 103 S. W. 86, holding that power to locate sewer cannot be delegated to city engineer; *Edwards v. Goldsboro*, 141 N. C. 60, 4 L.R.A. (N.S.) 589, 53 S. E. 652, 8 A. & E. Ann. Cas. 479, holding governing body of city unauthorized to barter away its rights to use its judgment and discretion; *Corpus Christi v. Central Wharf & Warehouse Co.* 8 Tex. Civ. App. 94, 27 S. W. 803, holding that city cannot surrender unrestricted power of its wharves for twenty years; *Lufkin v. Galveston*, 56 Tex. 522, holding that city council cannot authorize health officer to designate lots to be filled, so as to make cost of filling lien on lots; *State ex rel. Russell v. Beattie*, 16 Mo. App. 131 (dissenting opinion), on power of city to delegate its legislative power; *Gushee v. New York*, 42 App. Div. 37, 58 N. Y. Supp. 967 (dissenting opinion), on right of municipality to barter away its legislative power.

Cited in notes in 50 A. S. R. 118, on power of municipal officers to delegate their authority; 20 L.R.A. 726, on delegation of municipal power as to tolls, wharves, and bridges.

Power of municipal corporations to erect wharves.

Cited in note in 40 L.R.A. 645, on right of municipal corporation to erect wharf.

30 AM. REP. 780, STATE v. EADES, 68 MO. 150.

What instruments are subject of forgery.

Cited in *People v. Munroe*, 100 Cal. 664, 38 A. S. R. 323, 24 L.R.A. 33, 35 Pac. 326, holding ultra vires instruments subject of forgery; *State v. Lee*, 32 Kan. 360, 4 Pac. 653, holding check or order of apparent legal validity subject of forgery; *State v. Tompkins*, 71 Mo. 613, holding it immaterial whether certificate of record forged was void or not; *State v. Jackson*, 221 Mo. 478, 133 A. S. R. 477, 120 S. W. 66, holding that bank deposit is subject of forgery.

Cited in note in 22 A. D. 319, on instrument subject to forgery.

Ultra vires defense to forgery of city warrant.

Cited in *State v. Brett*, 16 Mont. 360, 40 Pac. 873, holding no defense to prose-

cution for forgery of city warrant that city had exceeded constitutional limit of its indebtedness at time warrant was issued.

Cited in note in 24 L.R.A. 42, on necessity of apparent capacity or authority to make city warrant as requisite to forgery.

Disapproved in *Raymond v. People*, 2 Colo. App. 329, 30 Pac. 504, holding that forgery cannot be predicated upon city warrant which by reason of non-compliance with statute is void upon its face.

Sufficiency of indictment for forgery.

Cited in *State v. Rowlen*, 114 Mo. 626, 21 S. W. 729, holding that indictment for forgery need not allege intent to defraud any particular person.

30 AM. REP. 782, STATE v. SANDERS, 68 MO. 202.

Experiments of jury out of court as ground for new trial.

Cited in *Smith v. State*, 122 Ga. 154, 50 S. E. 62, holding that experiments by jury out of court without leave warranted new trial; *Hansing v. Territory*, 4 Okla. 443, 46 Pac. 509, holding that trial court had no authority to permit arms used by defendant in murder trial to be taken to jury room to be experimented with by jury in defendants' absence.

Cited in note in 134 Am. St. Rep. 1060, on experiments of jury out of court as ground for new trial.

View by jury in criminal case.

Cited in *Hatch v. Stoneman*, 68 Cal. 632, 6 Pac. 734, holding that view by jury in criminal case must be had in presence of defendant; *State v. Lewis*, 14 Mo. App. 191, holding it not error to refuse to allow jury, in sheriffs' custody, to visit place of homicide.

Cited in reference notes in 28 A. D. 631, as to when view of place of crime may be had in absence of accused; 42 L.R.A. 384, on experiments on view by jury; 42 L.R.A. 390, on nature and effect of view by jury.

Right of juror to impeach verdict.

Cited in *Sharp v. Kansas City Cable R. Co.* 114 Mo. 94, 20 S. W. 93, holding jurors not competent to impeach their own verdict.

Admissibility of affidavit of juror to show misconduct.

Cited in note in 31 L.R.A.(N.S.) 930, on admissibility of affidavit of juror to show misconduct outside jury room not inhering in verdict.

Experiments as evidence.

Cited in reference notes in 30 A. R. 72; 28 A. S. R. 935,—on footprints as evidence in criminal prosecution; 32 A. R. 595, on admissibility of evidence with regard to foot tracks made while under arrest before trial; 38 A. S. R. 150, on admissibility of comparisons of prisoner's shoe with footprints near place of crime.

Cited in notes in 49 A. R. 191, on right to put in evidence various practical tests and experiments; 53 A. S. R. 378, on experiments as evidence; 15 L.R.A. 221, on making experiments in presence of jurors as mode of adducing evidence.

30 AM. REP. 785, STATE v. DOEPKE, 68 MO. 208.

Mode of determining grade of larceny.

Cited in *Burrows v. State*, 137 Ind. 474, 45 A. S. R. 210, 37 N. E. 271, holding market value of article stolen and not its original cost true criterion by which to determine grade of larceny; *State v. Maggard*, 160 Mo. 469, 83 A.

S. R. 483, 61 S. W. 184, holding jury governed in absence of any evidence as to marketable value of articles stolen by what evidence show property to have been actually worth.

Cited in reference note in 83 A. S. R. 487, on market value of article stolen as test of grade of larceny.

Necessity of negating exceptions.

Cited in *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317, holding it needless to negative exceptions contained in subsequent section to that which defines offense.

Criterion of value of property.

Cited in *Low v. Concord R. Co.* 63 N. H. 557, 3 Atl. 739, holding value of lands appropriated for public purposes no more than they are worth in market.

Property rights in dead.

Cited in reference note in 21 A. S. R. 258, on property rights in bodies of dead persons.

Cited in note in 42 L.R.A. 736, on property rights in coffins.

30 AM. REP. 788, STATE USE OF CARROLL COUNTY v. ROBERTS, 68 MO. 234.

Effect of extension of principal's time to pay on surety's liability.

Cited in *Stilwell v. Aaron*. 69 Mo. 539, 33 A. R. 517; *White v. Smith*, 174 Mo. 186, 73 S. W. 610,—holding surety released by creditor extending time of payment of debt for definite time upon sufficient consideration.

Cited in reference note in 7 A. S. R. 372, on extension of time as discharge of surety.

Cited in note in 45 A. R. 406, on extension of tax collector's time as release of surety.

Right of legislature to enlarge contract of surety on official bond.

Cited in *Schuster v. Weiss*, 114 Mo. 158, 19 L.R.A. 182, 21 S. W. 438, holding that state cannot change contract of surety on official bond by changing or enlarging contract of principal by legislative enactment.

30 AM. REP. 793, BUTLER v. DORMAN, 68 MO. 298.

Scope of authority of selling or soliciting agent.

Cited in *Neal v. M. E. Smith & Co.* 54 C. C. A. 226, 116 Fed. 20, holding that notice to soliciting agent of vendor of retirement of member of firm will not relieve such retiring member from liability for future debts; *Friedman v. Kelly*, 126 Mo. App. 279, 102 S. W. 1066, holding that one dealing with traveling salesman cannot hold principal on ground of apparent authority where salesman assumes extraordinary authority; *Smith v. Droubay*, 20 Utah. 443, 58 Pac. 1112 (dissenting opinion), on scope of commercial traveler's authority.

—To receive payment.

Cited in *Adams v. Fraser*. 27 C. C. A. 108, 49 U. S. App. 481, 82 Fed. 211, holding that broker has no right to collect purchase price after making contract of sale; *Meyer v. Stone*, 46 Ark. 210, 55 A. R. 577, holding that usage of trade or course of business will justify one paying agent with authority to sell goods; *Simon v. Johnson*, 101 Ala. 368, 13 So. 491; *Denver, T. & G. R. Co. v. De Graff*, 1 Colo. App. 42, 29 Pac. 664; *Kane v. Barstow*, 42 Kan. 465, 16 A.

R. 490, 22 Pac. 588; *Keown v. Vogel*, 25 Mo. App. 35,—holding that authority to sell does not authorize agent to receive payment; *Clark v. Murphy*, 164 Mass. 490, 41 N. E. 674, holding that one paying agent who merely solicits orders for goods does so at his own risk; *Gentry v. Connecticut Mut. L. Ins. Co.* 15 Mo. App. 216, holding that mere insurance broker, as such has no right to receive premium from applicant for insurance; *Chambers v. Short*, 79 Mo. 204, holding that canvassing agent for sale of books by subscription has no authority to receive payment; *Hahnenfeld v. Wolff*, 15 Misc. 133, 36 N. Y. Supp. 473, holding payment to agent to sell goods or solicit orders no defense to action for purchase price in absence of proof of agent's authority to collect; *Shermerhorn v. Farley*, 68 Hun, 66, 11 N. Y. Supp. 466, holding that possession of bond and mortgage by agent affecting loan confers no authority to receive principal secured thereby before it comes due; *Crawford v. Whittaker*, 42 W. Va. 430, 26 S. E. 516, holding that travelling salesmen, who merely take orders for goods have no implied authority to receive payment or make collections; *Scarritt-Comstock Furniture Co. v. Hudspeth*, 19 Okla. 429, 91 Pac. 843, 14 A. & E. Ann. Cas. 857, holding that authority in agent to sell goods does not give authority to receive payment.

Cited in reference note in 16 A. S. R. 494, on authority of agent, empowered to sell, to receive payment.

Cited in note in 18 L.R.A. 664, on authority of traveling salesman to collect payment.

Distinction between factors and brokers.

Cited in note in 8 L.R.A.(N.S.) 474, on distinction between factors and brokers.

30 AM. REP. 799, LEMON v. CHANSLOR, 68 MO. 340.

Degree of care required of carriers of passengers.

Cited in *Kelley v. Union P. R. Co.* 16 Colo. 455, 27 Pac. 1058, holding implied obligation on part of carrier of passengers that it shall carry safely; *Buck v. People's Street R. Electric Light & P. Co.* 46 Mo. App. 555; *Madden v. Missouri P. R. Co.* 50 Mo. App. 666; *Fillingham v. St. Louis Transit Co.* 102 Mo. App. 573, 77 S. W. 314,—holding carrier of passengers liable if accident occurs because of slightest negligence on its part; *Van Cleve v. St. Louis, M. & S. E. R. Co.* 107 Mo. App. 96, 80 S. W. 706; *Klebe v. Parker Distilling Co.* 207 Mo. 480, 13 L.R.A.(N.S.) 140, 105 S. W. 1057; *Clark v. Chicago & A. R. Co.* 127 Mo. 197, 29 S. W. 1013,—holding railroad company engaged in carriage of passengers required, so far as it is capable by human care and foresight to carry them safely; *Gilson v. Jackson County Horse R. Co.* 76 Mo. 282; *Leslie v. Wabash, St. L. & P. R. Co.* 88 Mo. 50,—holding carrier not insurer against accidents; *Breeden v. Frankford M. Acci. & Plate Glass Ins. Co.* 220 Mo. 327, 119 S. W. 576, to the point that carrier of passengers is bound to exercise highest degree of care; *Gardner v. Metropolitan Street R. Co.* 223 Mo. 389, 122 S. W. 1068, 18 A. & E. Ann. Cas. 1166, holding that carrier of passengers must exercise highest degree of care in construction of vehicle; *Canaday v. United R. Cos.* 134 Mo. App. 282, 114 S. W. 88, holding that passenger injured may sue on contract or ex delicto for breach of public duty imposed by law to exercise high degree of care.

Cited in notes in 43 A. D. 355, on degree of care required of carriers of passengers; 5 L.R.A.(N.S.) 722, on degree of care owed to passenger in absence

of stipulation upon the subject; 5 L.R.A.(N.S.) 1070, on duty and liability of proprietor of public hack or cab.

— **Street railway companies.**

Cited in *Powers v. Union R. Co.* 60 Mo. App. 481, holding street railway company required to exercise highest practical care, caution and diligence to safely transport its passengers; *O'Gara v. St. Louis Transit Co.* 204 Mo. 724, 12 L.R.A. (N.S.) 840, 103 S. W. 54, 11 A. & E. Ann. Cas. 850; *Gilroy v. St. Louis Transit Co.* 117 Mo. App. 663, 92 S. W. 1152; *Redmon v. Metropolitan Street R. Co.* 185 Mo. 1, 105 A. S. R. 558, 84 S. W. 26,—holding street car companies common carriers of passengers and held to highest care and skill which prudent men would exercise in like business under like circumstances; *Kirkpatrick v. Metropolitan Street R. Co.* 211 Mo. 68, 109 S. W. 682, holding street railroad required to use utmost care, diligence and foresight which capable and faithful railroad men would use under like circumstances; *Sharp v. Kansas City Cable R. Co.* 114 Mo. 94, 20 S. W. 93, holding burden of proof upon railroad in personal injury action to establish to reasonable satisfaction of jury that it could not discover any insufficiency of grip-shanks or rail-brakes, if there was, by exercise of utmost practicable skill and human foresight.

Distinguished in *Jacquin v. Grand Ave. Cable Co.* 57 Mo. App. 320, holding carrier not required to prove to satisfaction of jury that injury was occasioned by inevitable accident where defense is that it was, not physically, but practically impossible to stop car.

— **Horse railroads.**

Cited in *Dougherty v. Missouri R. Co.* 97 Mo. 647, 8 S. W. 900, on degree of care required in operation of cars on horse railroad.

— **Towards persons riding on pass.**

Cited in *Pembroke v. Hannibal & St. J. R. Co.* 32 Mo. App. 61, holding railroad as much bound in its duty to employee riding on pass over its road bridge as if it had received pay; *Bryan v. Missouri P. R. Co.* 32 Mo. App. 228, holding railroad liable for negligence in care of passenger on free pass with exemption clause; *Chenoweth v. Pacific Exp. Co.* 93 Mo. App. 185, holding express messenger passenger on train of carrier company and entitled to recover for injuries sustained by derailment of train; *Carroll v. Missouri P. R. Co.* 88 Mo. 239, 57 A. R. 382, holding drover riding over railroad on pass passenger and that railroad cannot stipulate against liability for its negligence; *Berry v. Missouri P. R. Co.* 124 Mo. 223, 25 S. W. 229, holding that waiver of fare by common carrier of passengers does not change degree of diligence required of carrier in discharge of his duty; *McNeill v. Durham & C. R. Co.* 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765, holding gratuitous passenger not in pari delicto with common carrier under statute prohibiting free transportation.

Cited in reference note in 21 A. S. R. 652, on liability of carrier to passenger paying no fare.

Cited in notes in 61 A. S. R. 87, on free passengers; 1 L.R.A. 501, on carrier's right to be exempted by stipulations in free pass; 21 L. ed. U. S. 628, on liability of common carrier for injury to passenger carried free or riding on pass.

Presumption of negligence arising from accident.

Cited in *Dimmitt v. Hannibal & St. J. R. Co.* 40 Mo. App. 654; *Wilkerson v. Corrigan Consol. Street R. Co.* 26 Mo. App. 144; *Heyde v. St. Louis Transit*

Co. 102 Mo. App. 537, 77 S. W. 127,—holding burden on transit company in action by passenger, injured by derailment and collision, to exculpate itself from carelessness; *Estes v. Missouri P. R. Co.* 110 Mo. App. 725, 85 S. W. 627, holding burden upon carrier in personal injury action by passenger to repel presumption of negligence arising from collision; *Price v. Metropolitan Street R. Co.* 220 Mo. 435, 132 A. S. R. 588, 119 S. W. 932, holding that burden rests on carrier of passengers to show soundness and roadworthiness of vehicle which suddenly breaks down.

Cited in notes in 43 A. D. 363, on accident in transportation of passengers as prima facie evidence of negligence; 62 A. D. 682, on breaking down or overturning stagecoach as raising presumption of negligence of carrier; 113 A. S. R. 1031, on presumption of negligence from accident while traveling by stage, livery, steamboat, or the like; 15 L.R.A. 36, on presumption of negligence against carrier from breaking of running gear of railway car.

Distinguished in *Tuley v. Chicago, B. & Q. R. Co.* 41 Mo. App. 432, holding no presumption of negligence from mere fact of injury to passenger on railroad train where he is injured while in wrong part of car and would not have been had he been in his proper place.

Province of court and jury in reference to witnesses' credibility.

Cited in *Hipsley v. Kansas City, St. J. & C. B. R. Co.* 88 Mo. 348, holding province of jury to pass upon credibility of witnesses and weight to be given their evidence.

Distinction between negligence and gross negligence.

Cited in *Reed v. Western U. Teleg. Co.* 135 Mo. 661, 58 A. S. R. 609, 34 L.R.A. 492, 37 S. W. 904, holding no distinction between negligence and gross negligence.

Construction of terms "believe" and "satisfied."

Cited in *Braddy v. Kansas City, Ft. S. & M. R. Co.* 47 Mo. App. 519, holding terms "believe" and "satisfied" used interchangeably in charge to jury.

Right of party to take advantage of his own error.

Cited in *Missouri P. R. Co. v. Levy*, 17 Mo. App. 501, holding record of former recovery pleaded by defendant and introduced in evidence, before court for every legitimate purpose to which either party or court may apply it; *State v. Beaty*, 25 Mo. App. 214, holding that party cannot assign that for error which he himself has invited court to commit.

30 AM. REP. 802, REINDERS v. KOPPELMANN, 68 MO. 482, Later appeal in 94 Mo. 338, 7 S. W. 288.

Effect of power of disposal to make estate absolute.

Cited in *Redman v. Barger*, 118 Mo. 568, 24 S. W. 177, holding devise of life not enlarged to fee by subsequent implied power to sell; *Walton v. Druntra*, 152 Mo. 489, 54 S. W. 233; *Cornwell v. Wulff*, 148 Mo. 542, 45 L.R.A. 53, 50 S. W. 439,—holding absolute power of disposition in instrument conveying land carries full power in land itself; *Bramell v. Cole*, 136 Mo. 201, 58 A. S. R. 619, 37 S. W. 924, holding power of absolute disposition not implied, where life estate expressly given, from fact that devise over is of what remains at death of first taker whenever property may be diminished by life tenant; *Russell v. Eubanks*, 84 Mo. 82; *Lewis v. Pitman*, 101 Mo. 261, 14 S. W. 52; *Evans v. Folks*, 135 Mo. 397, 37 S. W. 126; *Flannagan v. Flannagan*, 8 Abb. N. C. 413,—

holding that power of sale attached to express life estate will not enlarge it to a fee; *Baumgras v. Baumbras*, 5 Misc. 8, 24 N. Y. Supp. 767, holding devise for life to wife to be owned and enjoyed by her "same as if I had never owned it" restrained by limitation over which prevents fee vesting in her; *Berry v. St. Louis, M. & S. E. R. Co.* 213 Mo. 593, 114 S. W. 27, holding that devise "to her, her heirs and assigns forever" with privilege of selling carries full estate.

Cited in notes in 39 A. R. 319, on effect of devise of property with power to use and dispose of it with provision for disposition of remainder on death of devisee; 13 L.R.A.(N.S.) 460, on right of one to whom estate is devised for life, with power to consume, to convey a good title.

Distinguished in *Bunting v. Speck*, 41 Kan. 424, 3 L.R.A. 690, 21 Pac. 288, holding that intent to create contingent remainder in devise to wife for life with remainder to legal heirs must be plain; *Cook v. Couch*, 100 Mo. 29, 13 S. W. 80, holding that devise generally with power to dispose of same by will vests fee in devisee.

Effect of subsequent words to cut down absolute bequest.

Cited in *Wead v. Gray*, 78 Mo. 59, holding that absolute power of disposal conferred by will cannot be cut down by subsequent limitation over; *Roth v. Rauschenbusch*, 173 Mo. 582, 61 L.R.A. 455, 73 S. W. 664, holding fee simple conveyed by devise to one absolutely and forever, and not cut down by subsequent words directing disposition of remainder undisposed of at devisee's death.

When devisee takes fee.

Cited in reference note in 1 A. S. R. 361, as to when devisee takes fee, remainder over being void for repugnancy.

Alienation of contingent remainders.

Cited in *White v. McPheeters*, 75 Mo. 286, holding estate in remainder liable to be taken in execution; *Godman v. Simmons*, 113 Mo. 122, 20 S. W. 972; *Sikemeier v. Galvin*, 124 Mo. 367, 27 S. W. 551,—holding contingent remainder alienable.

Estates subject to partition.

Cited in *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78, holding that contingent remainder may be partitioned during life of life tenant; *Atkinson v. Brady*, 114 Mo. 200, 35 A. S. R. 744, 21 S. W. 480, holding owner of curtesy and interest in remainder of estate entitled to maintain partition as to latter; *McQueen v. Lilly*, 131 Mo. 9, 31 S. W. 1043, holding statute stipulating against partition or sale of lands contrary to testator's intention not applicable in absence of restriction in will on right of devisees to alienate land; *Doerner v. Doerner*, 161 Mo. 399, 61 S. W. 801, holding remaindermen entitled to partition as against life tenant in possession; *Sparks v. Clay*, 185 Mo. 393, 84 S. W. 40, holding life tenant in partition suit legal representative of heirs not in esse.

Cited in notes in 32 A. S. R. 780, on right of tenant in possession to maintain partition against contingent remainderman or reversioner; 97 A. S. R. 766, on judgments in partition suits against persons not in being; 101 A. S. R. 869, as to when and how persons not in esse are bound by compulsory partition; 20 L.R.A. 625, on vested remainder as subject to partition during life of life tenant; 8 L.R.A.(N.S.) 62, on constitutionality of statute providing for partition of lands in which persons not in being may contingently be interested; 8 L.R.A.

(N.S.) 67, on partition of lands devised to life tenant with remainder over to persons not in esse.

Distinguished in *Gulick v. Huntley*, 144 Mo. 241, 46 S. W. 154, holding no right of partition among remaindermen during existence of life estate where will plainly shows contrary intention of testator.

Vesting of remainders.

Cited in reference note in 39 A. R. 688, on construction of will under rule in *Shelley's case*.

Cited in note in 10 E. R. C. 819, on contingent remainders.

Effect of adoption on descent.

Cited in *Webb v. Jackson*, 6 Colo. App. 211, 40 Pac. 467, holding right of inheritance of children adopted under statute fixed by act itself; *Humphries v. Davis*, 100 Ind. 274, 50 A. R. 788, holding that adoptive father must inherit from adopted child who dies without children property which came to it from his wife and child's adoptive money; *Fosburgh v. Rogers*, 114 Mo. 122, 19 L.R.A. 201, 21 S. W. 82, holding that inheritable right of adopted child does not conflict with statute of descents; *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962, holding adopted child capable of inheriting from adopting father in like manner as if born to him in wedlock; *Clarkson v. Hatton*, 143 Mo. 47, 65 A. S. R. 635, 39 L.R.A. 748, 44 S. W. 761, holding adopted child not deprived of his right to inherit from natural parents unless expressly so provided by law; *Hockaday v. Lynn*, 200 Mo. 456, 118 A. S. R. 672, 8 L.R.A. (N.S.) 117, 98 S. W. 585, 9 A. & E. Ann. Cas. 775, holding adopted child not entitled to inherit property from relative of its adoptive parent.

Cited in notes in 39 A. S. R. 229, on heirs of adopted child dying intestate and without wife or descendants; 17 L.R.A. 437, on inheritance from an adopted child.

Distinguished in *Heidecamp v. Jersey City, H & P. Street R. Co.* 69 N. J. L. 284, 55 Atl. 239, holding next of kin of adopted child next of kin by blood and not adopting parent.

Conclusiveness of deed of adoption.

Cited in *Re Clements*, 78 Mo. 352, holding that mother relinquished her parental rights by joining in deed of adoption of her child.

Necessity of consent of parent to deed of adoption.

Cited in *Haworth v. Haworth*, 123 Mo. App. 303, 100 S. W. 531, holding deed of adoption valid though not consented to either by child or his natural parent or guardian.

Enforceability of defective deed of adoption.

Cited in *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881, holding that writing which is insufficient as deed of adoption may operate as contract of adoption and be specifically enforced.

30 AM. REP. 807, CHOUTEAU INS. CO. v. HOLMES, 68 MO. 601.

Presumption as to regularity of call of meeting.

Cited in *Lewick v. Glazier*, 116 Mich. 493, 74 N. W. 717; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249,—holding presumption that council meeting was properly convened.

— Of directors.

Cited in *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 2 C. C. A. 174, 10 U. S.

App. 98, 51 Fed. 309, holding resolution unanimously passed by body of corporation's stockholders at their annual meeting at which two thirds of its stock was represented, presumptive evidence that meeting was legally called; *Singer v. Salt Lake Copper Mfg. Co.* 17 Utah, 143, 70 A. S. R. 773, 53 Pac. 1024, holding presumption that meetings of legally constituted board of directors were regularly called; *Pitman v. Chicago-Joplin Lead & Zinc Co.* 113 Mo. App. 513, 87 S. W. 10, holding that meeting of board of directors will be presumed to be regular if proceedings are regular on face.

Effect of want of notice to director on proceedings at directors' meeting.

Cited in *Bank of Little Rock v. McCarthy*, 55 Ark. 473, 29 A. S. R. 60, 18 S. W. 759, holding meeting of corporate directors without notice to absent director illegal when notice was not impracticable.

Cited in reference notes in 3 A. S. R. 69, on presumptive notice of meeting of corporate directors; 3 A. S. R. 70, on when, if ever, notice to corporate directors to attend special meeting may be omitted; 44 A. S. R. 460, on presumption of notice of corporate meeting; 70 A. S. R. 783, on notice of meeting of corporate directors.

Cited in note in 7 E. R. C. 353, on acts of quorum as prima facie valid in absence of proof of lack of notice to others entitled to participate.

Minutes of corporation meeting as evidence of regularity of proceedings.

Cited in *Heintzelman v. Druids' Relief Asso.* 38 Minn. 138, 36 N. W. 100, holding entry in minutes of meeting of corporation prima facie evidence that proposition declared adopted received necessary number of votes.

30 AM. REP. 811, HEARD v. DUBUQUE COUNTY BANK, 8 NEB. 10.

Negotiability of bills and notes.

Cited in *Commercial Nat. Bank v. Consumers' Brewing Co.* 16 App. D. C. 186, holding that negotiability of note is not impaired by provision for pledge of collateral security.

Cited in reference notes in 33 A. S. R. 825, as to whether collateral security affects negotiability of note; 62 A. S. R. 701, on provisions not affecting negotiability of notes.

Cited in notes in 125 A. S. R. 195, on effect of provision for retention of title to property on negotiability of note given therefor; 43 L.R.A. 279, on reservation of title to property as affecting negotiability of note for purchase price; 4 E. R. C. 194, on negotiability of bill of exchange or promissory note.

—Effect of stipulation for payment of attorney fees.

Cited in *Farmers' Nat. Bank v. Sutton Mfg. Co.* 17 L.R.A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191; *Cudahy Packing Co. v. State Nat. Bank*, 67 C. C. A. 662, 134 Fed. 538; *Montgomery v. Crossthwait*, 90 Ala. 553, 24 A. S. R. 832, 12 L.R.A. 140, 8 So. 498; *Trader v. Chidester*, 41 Ark. 242, 48 A. R. 38; *Lockwood v. Lindsey*, 6 App. D. C. 396; *Stapleton v. Louisville Bkg. Co.* 95 Ga. 802, 23 S. E. 81; *Shenandoah Nat. Bank v. Marsh*, 89 Iowa, 273, 48 A. S. R. 381, 56 N. W. 458; *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37; *Benn v. Kutzschan*, 24 Or. 28, 32 Pac. 763; *Oppenheimer v. Farmers' & M. Bank*, 97 Tenn. 19, 56 A. S. R. 778, 33 L.R.A. 767, 36 S. W. 705,—holding note not ren-

dered non-negotiable by stipulation for payment of attorney fees and costs for its collection.

Cited in note in 1 L.R.A. 547, on effect of stipulation for attorneys' fees on negotiability of note.

Nature of allowance of attorney fees.

Cited in *Rosa v. Doggett*, 8 Neb. 48; *Aultman v. Stout*, 15 Neb. 586, 19 N. W. 464; *Hand v. Phillips*, 18 Neb. 593, 53 A. R. 824, 26 N. W. 388,—holding that allowed attorney fees are in nature of costs and are to be taxed as such; *Security Co. v. Eyer*, 36 Neb. 507, 38 A. S. R. 735, 54 N. W. 838, holding allowed attorney fees no part of judgment proper; *Merrill v. Hurley*, 6 S. D. 592, 55 A. S. R. 859, 62 N. W. 958, holding negotiability of note not destroyed by president of payee writing following indorsement thereon: "For value received I hereby assign within bond, together with all our interest under mortgage securing same, . . . without recourse;" *New v. Walker*, 108 Ind. 365, 58 A. R. 40, 9 N. E. 386, holding that knowledge of purchaser as to consideration of patent right note puts him upon inquiry as to whether vendee of right had complied with law regulating sales thereof; *Halbert v. Ellwood*, 1 Kan. App. 95, 41 Pac. 67, holding negotiability of note not lost by payee indorsing it to third person in blank after guaranty of payment and waiver of protest; *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180, 95 N. W. 61, holding note otherwise negotiable not rendered non-negotiable by reference to collateral security; *Ferriss v. Tavel*, 87 Tenn. 386, 3 L.R.A. 414, 11 S. W. 93, holding statement in face of note that it was given for land insufficient to put indorsee upon inquiry.

Transfer of title to note by indorsement in form of guaranty.

Cited in *Leahy v. Haworth*, 4 L.R.A. (N.S.) 657, 73 C. C. A. 84, 141 Fed. 850, holding that written guaranty, signed by payee on back of note payable to his order, constitutes indorsement with enlarged liability; *Dunham v. Peterson*, 5 N. D. 414, 57 A. S. R. 556, 36 L.R.A. 232, 67 N. W. 293, holding purchaser of negotiable promissory note transferred by payee indorsing guaranty of payment thereon, indorsee; *Pattillo v. Alexander*, 96 Ga. 60, 29 L.R.A. 616, 22 S. E. 646, holding that written guaranty signed by payee on back of note payable to himself or order constitutes indorsement with superadded liability; *Kellogg v. Douglass County Bank*, 58 Kan. 43, 62 A. S. R. 596, 48 Pac. 587, holding that guaranty of payment on back of negotiable note, with protest waiver, signed by payee, passes title as commercial indorsement; *Lemmert v. Guthrie Bros.* 69 Neb. 499, 111 A. S. R. 561, 62 L.R.A. 954, 95 N. W. 1046, holding indorser who has made himself liable as guarantor indorser with enlarged liability; *State Nat. Bank v. Haylen*, 14 Neb. 480, 16 N. W. 754; *Helmer v. Commercial Bank*, 28 Neb. 474, 44 N. W. 482; *Buck v. Davenport Sav. Bank*, 29 Neb. 407, 26 A. S. R. 392, 45 N. W. 776; *Pollard v. Huff*, 44 Neb. 892, 63 N. W. 58; *National Exch. Bank v. McElfish Clay Mfg. Co.* 48 W. Va. 406, 37 S. E. 541,—holding written guaranty by payee on back of note guarantying payment and waiving demand, notice and protest, indorsement with enlarged liability; *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254, holding that written guaranty on back of promissory note signed by payee and another constitutes indorsement with enlarged liability; *Word v. Elwood*, 90 Tex. 130, 37 S. W. 414, to the point that guarantee of payment written on back of note operated as indorsement with enlarged liability; *Ayres v. West*, 86 Neb. 297, 125 N. W. 583, holding that cause of action against maker

Am. Rep. Vol. XVII.—19.

of note and against third person who guaranteed payment cannot be joined.

Cited in reference notes in 26 A. S. R. 394, on effect of indorsement of note guaranteeing payment, and waiving presentation, protest, and notice; 62 A. S. R. 600, on indorsement and guaranty of negotiable instrument.

Cited in note in 36 L.R.A. 233, on rights acquired on transfer of title to note by indorsement in form of guaranty.

30 AM. REP. 814, BOYER v. BARR, 8 NEB. 68.

Right to recover vindictive damages.

Cited in *Roose v. Perkins*, 9 Neb. 304, 31 A. R. 409, 2 N. W. 715; *Riewe v. McCormick*, 11 Neb. 261, 9 N. W. 88; *Boldt v. Budwig*, 19 Neb. 739, 28 N. W. 280; *Rosewater v. Hoffman*, 24 Neb. 222, 38 N. W. 857; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L.R.A. 190, 58 N. W. 84; *Bee Pub. Co. v. World Pub. Co.* 59 Neb. 713, 82 N. W. 28,—holding exemplary damages not allowed in civil actions.

Cited in notes in 8 E. R. C. 379; 50 A. D. 770, 772,—on exemplary damages for acts punishable criminally.

—For assault.

Cited in *Winkler v. Roeder*, 23 Neb. 706, 8 A. S. R. 155, 37 N. W. 607; *Atkins v. Gladwish*, 25 Neb. 390, 41 N. W. 347,—holding exemplary damages not allowable in action of assault.

30 AM. REP. 819, STATE EX REL. ABBOTT v. DODGE COUNTY, 8 NEB. 124.

Right to legislate upon any subject not inhibited by constitution.

Cited in *Shaw v. State*, 17 Neb. 334, 22 N. W. 772, holding legislature not deprived of authority to impose jury fees as part of costs against person convicted by provision of Constitution providing for raising of revenue by tax by valuation; *Magneau v. Fremont*, 30 Neb. 843, 27 A. S. R. 436, 9 L.R.A. 786, 47 N. W. 280; *Beatrice v. Brethren Church*, 41 Neb. 358, 59 N. W. 932,—holding that legislature may legislate upon any subject not inhibited by Constitution; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819, holding legislature not prohibited from conferring power to make local improvements by special assessment of property upon counties because Constitution vests it with like power in regard to municipalities; *State ex rel. Berge v. Lansing*, 46 Neb. 514, 35 L.R.A. 124, 64 N. W. 1104, holding that legislature may provide for other vacancies in office than those provided for in Constitution; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332, holding act of legislature providing for establishment of diking districts, construction and maintenance of dikes, and assessment of property benefited to pay therefor not prohibited by Constitution which seems to restrict delegation of power to authorize local assessments to municipalities; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175 (dissenting opinion), on power of legislature to legislate upon any subject not inhibited by Constitution; *Drainage Dist. No. 1 v. Richardson County*, 86 Neb. 355, 125 N. W. 796, holding constitutional provision that legislature may give authority to cities, towns, and villages to make improvements does not prohibit legislature from conferring like power on other municipalities; *Mercantile Incorporating Co. v. Junkin*, 85 Neb. 561, 123 N. W. 1055, 19 A. & E. Ann. Cas. 269, holding that taxing power of legislature is without limit except such as may be prescribed by Constitution.

Cited in note in 15 L.R.A. (N.S.) 64, on delegation of power of taxation to county or municipal authorities.

Distinction between taxes and assessments.

Cited in *Hayden v. Atlanta*, 70 Ga. 817, holding that taxes are imposed on the person while assessments are imposed on property.

30 AM. REP. 827, DERBY v. WEYRICH, 8 NEB. 174.

Conveyance of exempt property as fraudulent.

Cited in *Bates v. Callender*, 3 Dak. 256, 16 N. W. 506; *Blair v. Smith*, 114 Ind. 114, 5 A. S. R. 593, 15 N. E. 817; *Frazier v. Syas*, 10 Neb. 115, 35 A. R. 466, 4 N. W. 934; *Gillespie v. Brown*, 16 Neb. 457, 20 N. W. 632; *Bloedorn v. Jewell*, 34 Neb. 649, 52 N. W. 367,—holding exempt property not subject of fraudulent alienation; *Elliot v. Hall*, 3 Idaho, 421, 35 A. S. R. 285, 18 L.R.A. 586, 31 Pac. 796, holding that disposition of money exempt as wages could not operate as fraud upon creditors; *Furman v. Tenny*, 28 Minn. 77, 9 N. W. 172, holding that debtor may give good title to exempt property, as against creditors; *Jayne v. Hymer*, 66 Neb. 785, 92 N. W. 1019, holding that creditors cannot complain that property purchased with exempt funds is transferred without consideration; *Bridgers v. Howell*, 27 S. C. 425, 3 S. E. 790, holding no fraud in debtor putting exempt property beyond reach of ordinary process of law; *State ex rel. Tucker v. Sanford*, 12 Neb. 425, 11 N. W. 868 (dissenting opinion), as to whether exempt property may be subject of fraudulent alienation.

Cited in reference notes in 4 A. S. R. 51, on nonsusceptibility of exempt property to fraudulent alienation; 5 A. S. R. 605, on conveyance of exempt property as fraudulent against creditors; 42 A. R. 353; 50 A. S. R. 228,—on fraudulent conveyance of exempt property.

—Homestead.

Cited in *Luhrs v. Hancock*, 6 Ariz. 340, 57 Pac. 605, holding that conveyance of homestead cannot be questioned by creditors as fraudulent; *Smith v. Neufeld*, 61 Neb. 699, 85 N. W. 898, holding homestead incapable of fraudulent alienation.

Cited in reference note in 39 A. R. 1, on voluntary conveyance of homestead as fraud on creditors.

30 AM. REP. 830, POLO MFG. CO. v. PARR, 8 NEB. 379.

When memorandum part of note.

Cited in *Seymour v. Farquhar*, 93 Ala. 292, 8 So. 466, holding printed stipulation indorsed on note as to title to property for which it is given part of instrument itself; *Haddaway v. Post*, 35 Mo. App. 278, holding that written contract is to be interpreted by reading its "eight corners" and include indorsement on back outside of signature; *Grimison v. Russell*, 14 Neb. 521, 45 A. R. 126, 16 N. W. 819, holding memorandum upon note made contemporaneously with and delivered with it and intended as part of contract, substantive part of note; *Seieroe v. First Nat. Bank*, 50 Neb. 612, 70 N. W. 220, holding contemporaneous written contract connected with note by direct reference or necessary implication admissible in action on note as part of transaction involved; *Specht v. Biendorf*, 56 Neb. 553, 42 L.R.A. 429, 76 N. W. 1059, holding condition or memorandum written in or indorsed on promissory note by maker prior to its delivery substantive part of note; *Harnett v. Holdredge*, 5 Neb.

(Unof.) 114, 97 N. W. 443, holding writing words "For value received we guarantee payment of within note, and waive presentment, demand and notice of protest" over blank indorsement on back of note, material alteration; *Farmers' Nat. Bank v. McCall*, 25 Okla. 600, 26 L.R.A.(N.S.) 217, 106 Pac. 866, holding that memorandum on back of note, made by agreement of parties, is part of note.

Cited in reference notes in 34 A. R. 367, on negotiability of note bearing marginal reference; 39 A. R. 231, on effect of memorandum printed on back of note waiving presentment, protest, and notice.

Cited in notes in 127 Am. St. R. 433, 434, on effect of indorsements of memoranda on negotiable instruments at time of execution; 15 L.R.A.(N.S.) 613, on memorandum on back of note at time of execution as substantive part thereof.

NOTES

ON THE

AMERICAN REPORTS.

CASES IN 31 AM. REP.

31 AM. REP. 1, SIMPSON v. STATE, 59 ALA. 1.

Common law in force.

Cited in *Nelson v. McCrary*, 60 Ala. 301, holding that common law prevails in Alabama, so far as consistent with our institutions.

Assault with intent to murder.

Cited in *Smith v. State*, 141 Ala. 59, 37 So. 423, holding that assault with intent to murder was at common law, misdemeanor.

Cited in notes in 21 A. S. R. 155; 41 L. ed. U. S. 481, 482,—on assault with intent to kill or murder.

—Necessity of specific intent.

Cited in *Bush v. State*, 136 Ala. 85, 33 So. 878, holding charge that defendant must have specific intent to shoot person assaulted erroneous; *Smith v. State*, 83 Ala. 26, 3 So. 551; *White v. State*, 13 Tex. App. 259; *Courtney v. State*, 13 Tex. App. 502,—holding that assault to murder cannot be committed without existence of specific intent to kill; *Horton v. People*, 47 Colo. 252, 107 Pac. 257, holding that in prosecution for assault with intent to commit murder intent is of gist of offense, and is to be found by jury.

—Inference of intent.

Cited in *Walls v. State*, 90 Ala. 618, 8 So. 680; *Ray v. State*, 147 Ala. 5, 41 So. 519,—holding intent in assault to murder inferable from character of assault, weapon used and other attendant circumstances; *State v. Dolan*, 17 Wash. 499, 50 Pac. 472, holding intent not inferable as legal presumption from use of deadly weapon.

Cited in note in 11 L.R.A. 815, on inference of intent in homicide.

—Sufficiency of proof of intent.

Cited in *Territory v. Vigil*, 8 N. M. 583, 45 Pac. 1117, holding charge that proof of intent to inflict bodily injury sufficient, erroneous.

—Conviction of attempt.

Cited in *White v. State*, 107 Ala. 132, 18 So. 226, holding that on trial for assault to murder, defendant may be convicted of attempt to assault.

Cited in note in 10 L.R.A. 109, on attempt to commit crime, as crime.

What constitutes criminal intent.

Cited in note in 13 L.R.A. 135, as to what constitutes criminal intent.

Criminal liability for injury inflicted while assaulting another.

Cited in reference note in 36 A. R. 8, on criminal liability of one who while assaulting one wounds another.

Right to kill in self-defense.

Cited in *Lee v. State*, 92 Ala. 115, 25 A. S. R. 17, 9 So. 407, holding person, attacked in home, not required to retreat, to claim benefit of plea of self defense; *Bostic v. State*, 94 Ala. 45, 10 So. 602, holding that third person must be in condition to invoke doctrine of self defense, to justify killing his assailant.

Liability for injury from spring guns.

Cited in *Scheuerman v. Scharfenberg*, 163 Ala. 337, 136 A. S. R. 74, 24 L.R.A. (N.S.) 369, 50 So. 335, 19 A. & E. Ann. Cas. 937, holding owner of premises liable for injury to those lawfully thereon from spring guns intentionally or negligently suffered to exist without warning.

Cited in notes in 29 L.R.A. 155, 157, on liability for killing or injuring trespassers by means of spring guns, traps, and other dangerous instruments; 29 L.R.A. 158, on liability for killing or injuring trespassers by means of spring guns, traps, and other dangerous instruments when considered as a nuisance; 14 L.R.A.(N.S.) 347, on criminal responsibility for death caused by spring gun or other dangerous mantrap upon one's own property.

Justifiable homicide.

Cited in *Suall v. Derricott*, 161 Ala. 259, 23 L.R.A.(N.S.) 996, 49 So. 895, 18 A. & E. Ann. Cas. 636, holding that homicides committed for prevention of forcible crime are justifiable.

Cited in notes in 82 A. D. 675, on degree of force which is justifiable to defend one's property; 40 L. ed. U. S. 1052, as to when homicide in defense of property is justifiable or excusable.

What is dangerous weapon.

Cited in reference note in 11 A. S. R. 836, on what constitutes dangerous weapon.

31 AM. REP. 13, HAMMONS v. STATE, 59 ALA. 164.**Validity of instrument made on Sunday.**

Cited in *Burns v. Moore*, 76 Ala. 339, 52 A. R. 332, holding that note made on Sunday in case of necessity is not void; *Parish v. State*, 130 Ala. 92, 30 So. 474, holding warrant of arrest not void because it is issued on Sunday.

Cited in reference note in 35 A. R. 128, on legality of bail taken on Sunday.

Determination by court of issue on bail-bond.

Cited in *State v. Posey*, 79 Ala. 45, holding that liability of sureties on bail bond is to be determined by court.

Duty of sheriff on giving of bail.

Cited in *Strong v. United States*, 34 Fed. 17; *Taylor v. Smith*, 104 Ala. 537, 16 So. 629,—holding that duty of sheriff to discharge prisoner on sufficient bail is purely ministerial.

Construction of statute.

Cited in *Ledbeter v. Vinton*, 108 Ala. 644, 18 So. 692, holding that statute is to be construed so as to further right given thereby.

Signature by mark.

Cited in note in 22 L.R.A. 373, on deeds, notes, and contracts signed or attested by mark.

31 AM. REP. 15, MOBILE & M. R. CO. v. CLANTON, 59 ALA. 392.**Liability of servant to master for negligence.**

Cited in *Beard v. Horton*, 86 Ala. 202, 5 So. 207, holding bank clerk liable to bank for his mistake in collecting less than amount due on draft.

Right to set off damages.

Cited in *Horton v. Miller*, 84 Ala. 537, 4 So. 370, holding that tenant may claim recoupment of damages for failure of landlord to furnish land agreed; *Krou v. Verkentoren*, 90 Ala. 113, 7 So. 428, holding that employer may set off in action for wages, damages sustained from breach of employee's implied stipulations as to qualifications.

Cited in note in 40 A. D. 333, on recoupments in contracts for work and labor.

31 AM. REP. 20, GILLESPIE v. NABORS, 59 ALA. 441.**Estoppel of infants.**

Cited in *Hamilton v. Rathbone*, 9 App. D. C. 48, holding infant not estopped to assert title to land illegally sold by executor by acceptance of insignificant clothing bought with proceeds; *Hobbs v. Nashville, C. & St. L. R. Co.* 122 Ala. 602, 82 A. S. R. 103, 26 So. 139, holding that infant cannot retain proceeds of unauthorized sale of his property and repudiate sale; *Marx v. Clisby*, 130 Ala. 502, 30 So. 517 (former appeal in 126 Ala. 107, 28 So. 388), holding infant beneficiaries of trust in will not estopped by unauthorized act of trustee in mortgaging trust land.

Cited in note in 57 L.R.A. 686, on estoppel of infant by fraud to reassert title or demand a second payment.

Rights of unborn child.

Cited in notes in 101 A. S. R. 869, on effect of compulsory partition on child en ventre sa mere; 8 L.R.A.(N.S.) 62, on legislative power and statutory construction as to divestiture of estates of persons not in being; 8 L.R.A.(N.S.) 70, on accountings and distributions as to persons not in being; 8 L.R.A.(N.S.) 76, on divestiture of estates of persons not in being by degrees between conception and birth.

31 AM. REP. 23, DICKINSON v. BRADFORD, 59 ALA. 581.**Validity of attorney's contract for compensation.**

Cited in *Jenkins v. Bradford*, 59 Ala. 400, holding contract for half of land, if successful in partition action, void; *Kidd v. Williams*, 132 Ala. 140, 56 L.R.A. 879, 31 So. 458, holding client's age, experience and mental capacity to be considered in determining fairness of settlement.

Cited in note in 83 A. S. R. 160, 162, on contracts between attorneys and clients.

—Contract before relation begins.

Cited in *White v. Tolliver*, 110 Ala. 300, 20 So. 97, holding contract for compensation, before entering upon client's business, valid as if made by persons not occupying fiduciary relation.

—Contract after relation begins.

Cited in *Hopkinson v. Jones*, 28 Ill. App. 409; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797,—holding that agreement for compensation after fiduciary relation begins must be fair and reasonable; *Coveney v. Pattullo*, 130 Mich. 275, 89 N. W. 968, holding \$800 mortgage, given as additional compensation to procure release from jail, unconscionable; *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, holding statute, as to contract for large fees, inapplicable to agreement made after establishment of relation of attorney and client.

Presumption of unfairness from confidential relation.

Cited in *Noble v. Moses*, 81 Ala. 530, 60 A. R. 175, 1 So. 217; *Wood v. Craft*, 85 Ala. 280, 4 So. 649,—holding undue influence presumed from confidential relations.

Cited in reference note in 1 A. S. R. 280, on scrutiny by courts of contract between attorney and client.

Burden of proof as to fairness of transaction.

Cited in *Holt v. Agnew*, 67 Ala. 360; *Kyle v. Perdue*, 95 Ala. 579, 10 So. 103,—holding burden on party, in whom confidence is reposed, to show fairness of transaction.

Cited in notes in 33 A. R. 739, on burden of proof as to undue influence in gift from patient to physician; 6 E. R. C. 877, on degree of proof necessary on part of one who occupies position of trust or sustains position of legal or natural authority over another, to establish validity of gift or benefit from latter to former or any financial settlement between them.

31 AM. REP. 28, WASHINGTON v. STATE, 60 ALA. 10.

When reckless killing is murder.

Cited in *Lewis v. State*, 96 Ala. 6, 36 A. S. R. 75, 11 So. 259; *State v. Capps*, 134 N. C. 622, 46 S. E. 730,—holding reckless act, in disregard of human life, resulting in death, murder, though done without intent to kill.

Cited in reference note in 8 A. S. R. 426, on accidental killing of another while attempting to commit suicide.

Cited in notes in 90 A. S. R. 583, on unintentional homicide in shooting into crowd or house; 3 L.R.A. 645, on homicide through carelessness and negligence; 63 L.R.A. 372, on homicide in perpetration of felonious acts naturally tending to destroy life; 63 L.R.A. 375, on homicide as result of grossly improper use of firearms.

31 AM. REP. 31, COOK v. STATE, 60 ALA. 39.

Cure of verdict by re-assembling of jury.

Cited in *Allen v. State*, 85 Wis. 22, 54 N. W. 999, holding that defective verdict cannot be cured by reassembling jury and receiving new verdict.

Cited in note in 23 L.R.A. 733, on effect of discharge on right to correct verdict in criminal cases.

Discharge of jury as acquittal.

Cited in *Hawes v. State*, 88 Ala. 37, 7 So. 302, holding that discharge of jury,

because of illness of juror's wife, does not operate as acquittal; *Foster v. State*, 88 Ala. 182, 7 So. 185, holding that discharge of jury, after rendition of null verdict, amounts to acquittal; *Hayes v. State*, 107 Ala. 1, 18 So. 172; *Harris v. State*, 153 Ala. 19, 49 So. 458; *Wells v. State*, 147 Ala. 140, 41 So. 630,—holding that reception of verdict and discharge of jury in absence of accused amount to acquittal; *Maden v. Emmons*, 83 Ind. 331, holding that dispersing of jury, while deliberating, without knowledge of court, operates as acquittal.

Right of accused to be present during whole of trial.

Cited in reference notes in 37 A. R. 643, on right of prisoner to be present when jury return verdict; 2 A. S. R. 303, on right and necessity for accused to be present during whole of trial.

Cited in notes in 68 A. D. 222, on accused's right to be present during trial; 68 A. D. 225, on necessity for presence of accused's counsel at rendition of verdict; 14 L.R.A.(N.S.) 605, on right of accused to waive his presence at time of receiving verdict on trial for felony; 30 A. R. 580, on right to poll jury.

31 AM. REP. 34, CONNELLY v. STATE, 60 ALA. 89.

Constitutionality of act for waiver of jury trial in criminal case.

Cited in *Re Belt*, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987; *Schick v. United States*, 195 U. S. 65, 49 L. ed. 99, 24 Sup. Ct. Rep. 826; *Summers v. State*, 70 Ala. 16; *Reeves v. State*, 96 Ala. 33, 11 So. 296; *McClellan v. State*, 118 Ala. 122, 23 So. 750; *Lewis v. State*, 123 Ala. 84, 26 So. 516; *Frost v. State*, 124 Ala. 85, 27 So. 251; *Belt v. United States*, 4 App. D. C. 25,—holding statute, authorizing waiver of jury trial in criminal case, constitutional; *Brewster v. People*, 183 Ill. 143, 55 N. E. 640, holding statute, authorizing waiver of jury trial in case of misdemeanor punished by fine, constitutional; *Edwards v. State*, 45 N. J. L. 419, holding statute, authorizing waiver of indictment and trial by jury, by accused's written consent, constitutional; *Ex parte O'Neal*, 154 Ala. 237, 45 So. 712, to the point that under Constitution legislature may authorize trial of petit larceny before justice without jury.

Cited in note in 36 L. ed. U. S. 988, on right to waive jury trial in criminal case.

Constitutionality of act for transferring cases.

Cited in *Moore v. State*, 68 Ala. 360; *Dean v. State*, 100 Ala. 102, 14 So. 762; *Ex parte State*, 151 Ala. 574, 44 So. 635,—holding act, providing for transfer of misdemeanor cases from circuit to county court, constitutional; *Collins v. State*, 88 Ala. 212, 7 So. 260, holding act, requiring transfer from circuit to county court, providing for jury of eight men, unconstitutional.

Right to jury trial.

Cited in note in 5 L.R.A. 836, on right of trial by jury in civil cases.

31 AM. REP. 38, BIZZELL v. NIX, 60 ALA. 281.

Enforcement of vendor's lien.

Cited in reference notes in 22 A. S. R. 213, on expiration of vendor's lien; 86 A. S. R. 164, on running of limitations against vendor's lien.

Cited in note in 7 L.R.A. 35, on enforcement of vendor's lien.

—Effect of bar of action on debt.

Cited in *Flinn v. Barber*, 61 Ala. 530; *Shorter v. Frazer*, 64 Ala. 74 (dissenting opinion); *Chapman v. Lee*, 64 Ala. 483; *Ware v. Curry*, 67 Ala. 274; *Hood*

v. Hammond, 128 Ala. 569, 86 A. S. R. 159, 30 So. 540,—holding vendor's lien enforceable, though action on debt barred.

Cited in reference note in 50 A. R. 181, on renewal of vendor's lien against remote vendee by payment by first vendor after statute has run against it.

Cited in notes in 13 L.R.A. 187; 95 A. S. R. 663,—on right to vendor's lien though right to recover purchase money is barred by limitations.

Similarity of vendor's lien to other liens.

Cited in Terrell v. Cunningham, 70 Ala. 100, holding that award to equalize partition shares is in nature of vendor's lien and subject to same rule of limitations; Moses Bros. v. Johnston, 88 Ala. 517, 16 A. S. R. 58, 7 So. 146, holding that vendor under agreement to convey on payment, sustains same relation to vendee as mortgagee to mortgagor; Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. 14 N. D. 147, 116 A. S. R. 642, 70 L.R.A. 814, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160, holding action to foreclose mortgage within section, suspending limitations during absence of defendant from state.

Effect of limitation of actions.

Cited in reference note in 52 A. S. R. 515, on effect of limitation of actions.

Cited in note in 16 E. R. C. 297, on statute of limitations as affecting remedy.

— On enforcement of mortgage security.

Cited in reference notes in 35 A. R. 96; 3 A. S. R. 515,—on right to foreclose mortgage securing note barred by statute of limitations.

Consideration for promise to pay barred debt.

Cited in note in 39 A. S. R. 739, on moral obligation as consideration of promise to pay debt barred by limitation.

31 AM. REP. 42, BROWN v. LEITCH, 60 ALA. 213.

Waiver of exemption.

Cited in reference notes in 60 A. S. R. 240; 74 A. S. R. 29,—on waiver of exemptions; 33 A. R. 152, on waiver of exemption by permitting seizure of exempt property; 35 A. R. 261, on waiver of exemption by lien in lease; 20 A. S. R. 277; 62 A. S. R. 116; 87 A. S. R. 660,—on debtor's duty as to claiming exemptions.

Cited in note in 72 A. D. 742, on waiver by contract of prospective exemption from execution.

— Validity of.

Cited in Wagon v. Keenan, 77 Ala. 519, holding waiver of all exemptions in note, though inoperative as to homestead, valid as to personalty; A. G. Story Mercantile Co. v. McClellan, 145 Ala. 629, 40 So. 123, holding waiver of homestead exemption, valid.

Cited in reference note in 34 A. S. R. 133, on legality of waiver of exemption.

Distinguished in Mills v. Bennett, 94 Tenn. 651, 45 A. S. R. 763, 30 S. W. 748, holding contemporaneous and simple waiver of exemption, void; Carter v. Carter, 20 Fla. 558, 51 A. R. 618, holding that waiver of benefit of exemption contained in promissory note is inoperative.

When exemption may be claimed.

Cited in reference notes in 20 A. S. R. 685; 67 A. S. R. 910,—as to when exemption may be claimed.

31 AM. REP. 46, ALBRITTIN v. HUNTSVILLE, 60 ALA. 466.**Judicial notice of charter.**

Cited in *Selma v. Perkins*, 68 Ala. 145; *Lord v. Mobile*, 113 Ala. 360, 21 So. 366; *Arndt v. Cullman*, 132 Ala. 540, 90 A. S. R. 922, 31 So. 478,—holding that city charter is public act, of which courts take judicial notice.

Cited in notes in 89 A. D. 667, on judicial notice of acts incorporating public or municipal corporations; 108 A. S. R. 151, on liability of municipal corporations for injuries from defective public places.

Liability of city.

Cited in *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341, holding city, voluntarily supplying water, liable for burning of property from its failure to supply water.

Cited in note in 1 E. R. C. 622, on liability of municipal corporation neglecting to perform duty imposed by charter.

—For injury from defective streets.

Cited in *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630, holding city liable for defect in street, though caused by independent contractor; *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424, holding that charter exempting from liability for failure to exercise power over streets does not exempt city from liability for injuries from defects in streets; *Birmingham v. Lewis*, 92 Ala. 352, 9 So. 243; *Galveston v. Posnainsky*, 62 Tex. 118, 50 A. R. 517,—holding city liable for injury from long continued, unguarded, open ditch; *Snook v. Anaconda*, 26 Mont. 128, 66 Pac. 756, holding city liable for injury from its failure to guard and replace bridge washed away.

Cited in reference note in 2 A. S. R. 169, on obligation of municipal corporation to keep streets and highways in safe condition.

Cited in notes in 30 A. S. R. 385, on municipal liability for negligence of officers and agents as to public streets; 5 L.R.A. 253, on liability of municipal corporations for injuries resulting from defective streets, bridges, etc.; 10 L.R.A. 734, on municipal duty to keep streets and sidewalks in safe condition, and liability for failure to do so; 20 L.R.A.(N.S.) 518, 520, on liability of municipality for defects or obstruction in streets; 33 L. ed. U. S. 334, on liability of municipalities and individuals for obstructions or nuisances in street or want of repair thereof.

31 AM. REP. 52, BERNSTEIN v. HUMES, 60 ALA. 582, Later appeals in 71 Ala. 260, 72 Ala. 546, 75 Ala. 241, 78 Ala. 124.**Validity of conveyance of land held adversely.**

Cited in *Alexander v. Caldwell*, 61 Ala. 543; *Lindsey v. Veasy*, 62 Ala. 421; *Johnson v. Cook*, 73 Ala. 537; *Sharp v. Robertson*, 76 Ala. 343; *Davis v. Curry*, 85 Ala. 133, 4 So. 734; *Murray v. Hoyle*, 92 Ala. 559, 9 So. 368; *Jernigan v. Flowers*, 94 Ala. 508, 10 So. 437; *Stringfellow v. Tennessee Coal, Iron & R. Co.* 117 Ala. 250, 22 So. 997; *Jackson v. Singleton*, 122 Ala. 323, 25 So. 204; *Chevalier v. Carter*, 124 Ala. 520, 26 So. 901; *Mahan v. Smith*, 151 Ala. 482, 44 So. 375,—holding conveyance of land held adversely, void as against holder; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 A. R. 314; *Bernstein v. Humes*, 71 Ala. 260,—holding that adverse possession, to avoid deed, must be actual, not constructive; *Vandiveer v. Stickney*, 75 Ala. 225, holding mortgage by dower to stranger, during adverse possession by donee, void; *McCall v. Mash*, 89 Ala. 487, 18 A. S. R. 145, 7 So. 770, holding that conveyance by mortgagor, after

unauthorized purchase by mortgagee under power in mortgage, conveys no title to grantee.

Sufficiency of general objection or exception.

Cited in *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108, holding exception, "to each one of charges," following several charges given, sufficient reservation of separate exception to each.

—To partly erroneous matter.

Cited in *Gray v. State*, 63 Ala. 66; *Smith v. Sweeney*, 69 Ala. 524,—holding that general exception to entire charge cannot avail, unless each part of charge is erroneous; *Cherry v. State*, 68 Ala. 29, holding that general objection to evidence, part of which is inadmissible, may be overruled entirely.

Nature of plea of not guilty.

Cited in *Callan v. McDaniel*, 72 Ala. 96; *Bynum v. Gold*, 106 Ala. 427, 17 So. 667,—holding that plea of not guilty, in ejectment, is admission of possession by defendant and equivalent to consent rule at common law.

Joinder of plea of not guilty and disclaimer.

Cited in *Kirkland v. Trott*, 66 Ala. 417; *McQueen v. Lampley*, 74 Ala. 408; *Torrey v. Forbes*, 94 Ala. 135, 10 So. 320,—holding that plea of not guilty and disclaimer cannot be interposed together as defense to ejectment.

Cited in notes in 48 L.R.A. 199, on right to plead inconsistent defenses in actions pertaining to realty; 48 L.R.A. 207, on effect of inconsistency as a waiver or admission.

Waiver of disclaimer by plea of not guilty.

Cited in *Alexander v. Wheeler*, 69 Ala. 332; *Crosby v. Pridgen*, 76 Ala. 385,—holding plea of not guilty waiver of disclaimer.

Construction of written contract by court.

Cited in *Doe ex dem. Hooper v. Clayton*, 81 Ala. 391, 2 So. 24; *Davis v. Badders*, 95 Ala. 348, 10 So. 422; *Foley v. Felrath*, 98 Ala. 176, 39 A. S. R. 39, 13 So. 485,—holding construction of written contract, question of law for court, and not for jury to determine.

Refusal of misleading charge.

Cited in *Farrish v. State*, 63 Ala. 164, holding charge, without explanation, calculated to mislead jury, properly refused.

Computation of time.

Cited in *Foster v. State*, 149 Ala. 632, 43 So. 179, holding that appointment of judge on May 6 was more than six months prior to election on November 6.

—Statute of limitations.

Cited in *Allen v. Elliott*, 67 Ala. 432, holding that action brought May 27, 1872 against administrator on note, made April 10, 1861, whose maker died February 24, 1866 and letters were granted April 30, 1866, is barred.

31 AM. REP. 59, PEOPLE v. ABBOTT, 53 CAL. 284.

What constitutes larceny.

Cited in *Grin v. Shine*, 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. Rep. 98, holding subsequent conversion by clerk of check, given him to draw money from bank and forward it, prima facie embezzlement, not larceny; *Murphy v. People*, 104 Ill. 528, holding bystander in store, keeping customer's gold coin, given him to get changed, guilty of larceny; *People v. Delbos*, 146 Cal. 734, 81 Pac. 131; *People v. Martin*, 116 Mich. 446, 74 N. W. 653,—holding one,

obtaining money to buy property for giver, intending to, and converting, same, guilty of larceny.

Cited in notes in 57 A. D. 286, on what constitutes larceny; 43 A. R. 138, on larceny by retention of property lawfully taken; 88 A. S. R. 578, on larceny by bailee of goods in his possession; 2 L.R.A. (N.S.) 249, on larceny by fraudulent conversion of property by one legally in charge or custody thereof.

31 AM. REP. 62, FARMERS' & M. BANK v. DOWNEY, 53 CAL. 466.

Directors as trustees.

Cited in *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *People v. Turnbull*, 93 Cal. 630, 29 Pac. 224; *Boyd v. Mutual Fire Asso.* 116 Wis. 155, 96 A. S. R. 948, 61 L.R.A. 918, 90 N. W. 1086,—holding that directors act in fiduciary capacity and are trustees of stockholders.

Cited in reference note in 13 A. S. R. 606, on fiduciary relation of directors to the corporation.

Cited in notes in 53 A. D. 642, on liability of directors for breaches of trust, negligence, etc., of codirectors, subordinates, etc.; 17 A. S. R. 303, on transactions between director and corporation; 2 L.R.A. 534, on duty and obligation of directors on accepting trust; 7 E. R. C. 643, on relationship of directors toward stockholders.

—Accountability for private profits.

Cited in *McClure v. Law*, 161 N. Y. 78, 76 A. S. R. 262, 55 N. E. 388, holding director accountable to corporation for money received for transferring control of corporation; *D. M. Steward Mfg. Co. v. Steward*, 109 Tenn. 288, 70 S. W. 808, holding that directors will be held accountable for individual profits made by their use of corporate property.

Cited in reference note in 76 A. S. R. 265, on compelling corporate officers to account.

Withdrawal of corporate assets.

Cited in note in 57 A. S. R. 74, on withdrawal of corporate assets.

31 AM. REP. 65, MAJORS v. EVERTON, 89 ILL. 56.

Validity of deed from husband to wife.

Cited in *Johnson v. Vandervort*, 16 Neb. 144, 20 N. W. 122 (dissenting opinion), on validity of deed from husband to wife, in contemplation of divorce.

Cited in notes in 133 Am. St. Rep. 610; 12 A. S. R. 393,—on deed from husband to wife.

Cited in notes in 88 A. D. 55, on direct conveyance from husband to wife; 69 L.R.A. 377, on right of wife in property conveyed to her by husband as against the latter's heirs.

31 AM. REP. 67, BRADFORD v. ABEND, 89 ILL. 78.

Avoidance of fraudulent judgment, etc.

Cited in notes in 61 A. D. 462, on possibility of and grounds for vacating and annulling divorces; 54 A. S. R. 237, on effect of fraud in management of action on right to equitable relief against judgment, decree, or other judicial determination.

—Decree of divorce.

Cited in *Schrader v. Schrader*, 36 Fla. 502, 18 So. 672, holding that decree of divorce, obtained by fraud, will be set aside.

Cited in note in 60 L.R.A. 296, on attempt by wife to vacate decree obtained in her name without her consent.

Maintenance of divorce action by lunatic.

Cited in *Iago v. Iago*, 168 Ill. 339, 61 A. S. R. 120, 39 L.R.A. 115, 48 N. E. 30 (reversing 66 Ill. App. 462), holding that next friend of insane defendant may prosecute appeal to reverse divorce decree against him; *Mohler v. Shank*, 93 Iowa, 273, 57 A. S. R. 274, 34 L.R.A. 161, 61 N. W. 981; *Birdzell v. Birdzell*, 33 Kan. 433, 52 A. R. 539, 6 Pac. 561,—holding that guardian of insane person cannot bring action for divorce in behalf of ward.

Cited in reference note in 82 A. D. 200, on right of court to entertain a divorce action at suit of third person.

Validity of action based on lunatic's consent.

Cited in *Supreme Lodge, A. O. U. W. v. Tuhlke*, 129 Ill. 298, 21 N. W. 789, holding expulsion from benefit society of insane member upon his admission of truth of charges, invalid.

Judgments for or against insane persons.

Cited in note in 130 Am. St. Rep. 853, on judgments for or against insane persons.

Insanity as defense.

Cited in note in 34 L.R.A. 167, on defense of insanity in action for divorce.

31 AM. REP. 70, SANNER v. SMITH, 89 ILL. 123.**When contract is usurious.**

Cited in *Fowler v. Equitable Trust Co.* 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1, holding loan at highest legal rate, usurious, when broker charges borrower commissions; *Maxwell v. Jacksonville Loan & Improv. Co.* 45 Fla. 423, 34 So. 255, holding loan, discounted at 10%, imposing penalty of 10% for default and making whole amount due on default, without eliminating unearned interest, usurious; *Burke v. Raab*, 4 Ill. App. 338, holding note stipulating for payment of 15% interest, if not paid at maturity, not usurious; *Matszenbaugh v. Troup*, 36 Ill. App. 261 (dissenting opinion), on whether provision in mortgage for payment of attorney's fee in case of foreclosure is usurious.

Cited in notes in 46 A. S. R. 192, on penalty for taking usury only when agreement to pay is absolute; 49 L.R.A. 554, on usury in agreement for interest after maturity.

31 AM. REP. 71, HYPES v. GRIFFIN, 89 ILL. 134.**Personal liability of agent.**

Cited in *Merritt v. Kewanee*, 175 Ill. 537, 51 N. E. 867, holding signature to street improvement petition by husband in own name, not binding on wife, owner; *Wabash R. Co. v. People*, 202 Ill. 9, 66 N. E. 824, holding that contract for school house, signed by individual directors, is obligation of district; *Haines v. Nance*, 52 Ill. App. 406, holding that following indorsement on bill of exchange: A. B., C. D., E. F., Building Committee for M. E. Church Parsonage, is personal acceptance; *Fairbanks v. Owensboro Wagon Co.* 72 Ill. App. 530, holding bank cashier personally liable on guaranty signed by him; *Loeb v. Flannery*, 148

Ill. App. 471, holding that contract by agent with third person may be supported by consideration moving to principal.

Cited in notes in 39 A. R. 300, on effect of negotiable instrument signed by agent; 4 E. R. C. 283, on personal liability of one signing written instrument as agent.

— On note.

Cited in *New Market Sav. Bank v. Gillet*, 100 Ill. 254, 39 A. R. 39, holding that note, stating we, trustees of named society etc., with signatures bracketed opposite same words, is society's note; *Hately v. Pike*, 162 Ill. 241, 53 A. S. R. 304, 44 N. E. 441, holding that note of corporation payable to order of "A. P., President," is payable to president individually; *Graham v. Eisner*, 28 Ill. App. 269, holding person liable on note signed by business name adopted by him; *Williams v. Miami Powder Co.* 36 Ill. App. 107, holding that in absence of evidence that signers were officers and note was intended as company's, "Pres." and "Secy." are to be regarded as descriptions persons; *Miers v. Coates*, 57 Ill. App. 216, holding that note, signed "C. A. Club, A. B., President C. A. Club," is not individual obligation; *Fisk v. Carbonized Stone Co.* 67 Ill. App. 327, holding that note, signed "A. Co., B. Pres. C. Secy." is company's note; *Tenbrook v. Ellars*, 71 Ill. App. 328, holding that note, with signatures below words, "Signed by Trustees of I. O. O. F. Lodge," is signers' individual note; *Harris v. Coleman & A. White Lead Co.* 98 Ill. App. 27, holding that note signed "A. Co., per B., Sec. Co., Genl. Mangr.," is joint note of A. Co. and C.; *Neptune v. Paxton*, 15 Ind. App. 284, 43 N. E. 276, holding maker, signing name, "Trustee for Bank," not personally liable.

Cited in notes in 19 L.R.A. 680, on personal liability of officers on note made for corporation; 21 L.R.A. (N.S.) 1070, 1079, 1080, 1082, on liability of principal on negotiable paper executed by agent.

Parol evidence as to liability on contract made by agent.

Cited in *Zion Church v. Mensch*, 178 Ill. 225, 52 N. E. 858, holding that upon foreclosure of mortgage on church by trustees, equity will consider evidence of intention to bind corporation; *People v. Griesbach*, 127 Ill. App. 462, holding parol evidence incompetent to show that woman intended to sign application for liquor license as guardian.

Cited in reference note in 100 A. D. 678, on admissibility of parol evidence to show whether corporation is bound by instrument executed by officer individually.

— Note or bill of exchange.

Cited in *Southern P. Co. v. Von Schmidt Dredge Co.* 118 Cal. 268, 50 Pac. 650, holding parol evidence admissible to show that charter, signed by person as president is note of company, having his surname in title; *La Salle Nat. Bank v. Tolu Rock Rye Co.* 14 Ill. App. 141, holding parol evidence admissible to show whether principal or agent is liable, when instrument is ambiguous on its face; *Westbrook v. Howell*, 34 Ill. App. 571, holding that party to absolute written agreement to pay money cannot show by parol evidence that he was not to incur personal liability; *Scanlan v. Keith*, 102 Ill. 634, 40 A. R. 624; *Second Nat. Bank v. Midland Steel Co.* 155 Ind. 581, 52 L.R.A. 307, 58 N. E. 833,—holding that note, signed with "President" following name, may be shown by extrinsic evidence to be company's note; *Luna v. Mohr*, 3 N. M. 63, 1 Pac. 860, holding parol evidence incompetent to show that drawer of bill of exchange is defendant's agent; *Shuey v. Adair*, 18 Wash. 188, 63 A. S. R. 879, 39 L.R.A. 473, 51 Pac. 388, hold-

ing parol evidence inadmissible to exonerate maker from liability, on ground that note was executed for principal.

Cited in note in 20 L.R.A. 706, on admissibility of extrinsic evidence to show who is liable as maker of note, where promise is as agent and the signature is as agent.

31 AM. REP. 74, ROSENMUELLER v. LAMPE, 89 ILL. 212.

Judgment as bar.

Cited in *Illinois C. R. Co. v. Slater*, 139 Ill. 190, 28 N. E. 830, holding judgment, in action by father as administrator of son for his death, no bar to action for death of another son in same accident; *Skeen v. Springfield Engine & Thresher Co.* 42 Mo. App. 158, holding judgment for conversion of first and fourth of series of notes, bar to action for second and third.

Cited in reference notes in 36 A. R. 79, on recovery for one year's services as bar to recovery for following year's services due when first suit was commenced; 41 A. R. 584, on recovery of part of wages due as bar to action for balance.

Receipt as evidence.

Cited in *Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778; *O'Bannon v. Vigus*, 32 Ill. App. 473,—holding that written receipt is evidence of high character against signer; *Gage v. Hampton*, 127 Ill. 87, 2 L.R.A. 512, 20 N. E. 12 (dissenting opinion), on written opinion as evidence of highest character.

What constitutes an accord and satisfaction.

Cited in *Payne v. McLean*, 44 Ill. App. 354, holding that agreement that sum be taken in full of disputed demand is accord and satisfaction; *Ennis v. Pullman Palace Car Co.* 165 Ill. 161, 46 N. E. 439; *Earle v. Berry*, 27 R. I. 221, 1 L.R.A.(N.S.) 867, 61 Atl. 671, 8 A. & E. Ann. Cas. 875, holding that offer and acceptance as in full, when amount due is in dispute, is accord and satisfaction.

Cited in note in 100 A. S. R. 430, on distinction between liquidated and unliquidated claims as to sufficiency of consideration for accord and satisfaction.

31 AM. REP. 76, GAY v. RAINEY, 89 ILL. 221.

Place of making of contract.

Cited in *Phoenix Mut. L. Ins. Co. v. Simons*, 52 Mo. App. 357, holding that note, made by married woman, dated in Kansas, executed in Missouri and delivered in Kansas, is Kansas contract; *F. B. Hauck Clothing Co v. Sharp*, 83 Mo. App. 385, holding contract made where party, receiving offer by letter, mails acceptance; *Bascom v. Zediker*, 48 Neb. 380, 67 N. W. 148, holding that note, mailed to payee in another state, is contract of state where executed by maker; *Wells, F. & Co. v. Vansickle*, 64 Fed. 944; *New York L. Ins. Co. v. McKellar*, 68 N. H. 326, 44 Atl. 516,—holding that note, executed in one state, but payable and delivered in another state, is contract of latter state; *Haseltine v. Whitney*, 38 Pittsb. L. J. N. S. 325, holding that place where parties intend note to become subsisting obligation is place of contract.

Cited in notes in 99 A. D. 672, on where indorsements of notes or bills are deemed to have been made; 55 A. S. R. 48, on place of contract of guaranty.

—Law governing.

Cited in *Smith v. Myers*, 207 Ill. 126, 69 N. E. 858, holding that law of place where note was delivered and negotiated controls in determining liability; *McCoy v. Griswold*, 114 Ill. App. 556, holding validity and construction of contract determined by law of place where it is made.

Cited in reference note in 10 A. S. R. 33, on *lex loci contractus* as governing validity of contract.

Cited in notes in 121 A. S. R. 872, on law governing demand, protest, and notice of dishonor of bill of exchange; 121 A. S. R. 878, on law governing notice of dishonor of foreign bill; 61 L.R.A. 217, on conflict of laws as to necessity of notice of dishonor of negotiable paper.

Priority of judgments.

Cited in note in 38 L.R.A. 248, on lien of judgment from time of rendition as against conveyance made after beginning of term.

Release of endorser.

Cited in note in 18 L.R.A.(N.S.) 546, on release of indorser of note by failure to issue execution against maker.

31 AM. REP. 79, LATHAM v. SUMNER, 69 ILL. 233.

What constitutes a sale.

Cited in *Fleet v. Hertz*, 201 Ill. 594, 94 A. S. R. 192, 66 N. E. 858 (dissenting opinion), on whether accepted offer from importer to fur company for latter to handle goods for importer's account, is sale; *Hallbeck v. Stewart*, 69 Ill. App. 225, holding that contract, providing that title to property shall not pass to vendee until price is fully paid, is conditional sale; *Singer Mfg. Co. v. Ellington*, 103 Ill. App. 517, holding that agreement to rent machine for specified monthly payments for specified period is sale; *Simon v. Edmundson*, 10 Pa. Co. Ct. 315, agreement on its face a bailment held to be conditional sale.

Cited in reference notes in 34 A. R. 572, 631, on interest of one holding property under agreement that title shall pass when certain amount paid; 2 A. S. R. 579, on effect of contracts of sale or lease providing for payments in instalments; 7 A. S. R. 261, on contract for lease of pianos with provision for payment by instalments as conditional sale; 19 A. S. R. 873, as to whether contract is a sale or lease; 24 A. S. R. 499, on when contract will be construed as conditional sale.

Cited in notes in 89 A. D. 128, on contracts of sale or lease, providing for payments by instalments; 94 A. S. R. 250, on distinction between conditional sale and lease.

Retaking property under conditional sale.

Cited in *Fairbanks v. Malloy*, 16 Ill. App. 277, holding vendor, under conditional sale, entitled to recover possession, without first tendering money paid.

Cited in notes in 133 Am. St. Rep. 570, on rights and remedies of conditional seller on buyer's default in payment; 32 L.R.A. 466, on right of purchaser by conditional sale to recover payments where vendor took property from his possession on default; 3 L.R.A.(N.S.) 786, on effect of default of payment followed by rescission as forfeiture of payments already made.

31 AM. REP. 83, MCCARTHY v. LAVASCHE, 89 ILL. 270.

Estoppel.

Cited in *Saunders v. Richard*, 35 Fla. 28, 16 So. 679, holding trustee estopped to allege invalidity of appointment as defense for not accounting; *Rice v. Chicago, B. & N. R. Co.* 30 Ill. App. 481, holding town not estopped, because railroad has expended considerable sum for new road, under unauthorized agreement for exchange of roads; *Beach v. Wakefield*, 107 Iowa, 567, 76 N. W. 688,

Am. Rep. Vol. XVII.—20.

holding railroad estopped from asserting that loan exceeded statutory limit of indebtedness.

Cited in note in 11 E. R. C. 73, on estopped by deed to deny that municipal bonds are *ultra vires*.

—To deny corporate existence or authority.

Cited in *Gay v. Kohlsaat*, 80 Ill. App. 178, holding persons acting as corporation estopped to deny its existence; *Carson City Sav. Bank v. Carson City Elevator Co.* 90 Mich. 550, 30 A. S. R. 454, 51 N. W. 641, holding corporation estopped from asserting want of authority to engage in business for which it is organized.

Cited in note in 3 A. S. R. 872, on estoppels in actions to enforce statutory liability of stockholders for corporate debts.

—To assert unconstitutionality of charter.

Cited in *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120; *Building & L. Asso. v. Chamberlain*, 4 S. D. 271, 56 N. W. 897; *Georgia Southern & F. R. Co. v. Mercantile Trust & D. Co.* 94 Ga. 306, 47 A. S. R. 153, 32 L.R.A. 208, 21 S. E. 701; *Dows v. Naper*, 91 Ill. 44; *Winget v. Quincy Bldg. & Homestead Asso.* 128 Ill. 67, 21 N. E. 12; *Gardner v. Minneapolis & St. L. R. Co.* 73 Minn. 517, 76 N. W. 282,—holding stockholders estopped from asserting unconstitutionality of charter.

Cited in note in 118 A. S. R. 256, on unconstitutional law or charter as forming basis of corporation *de facto*.

Collateral attack on incorporation.

Cited in *People ex rel. Brewster v. School Trustees*, 111 Ill. 171, holding that legality of corporation cannot be attacked in collateral proceeding; *Bergeron v. Hobbs*, 96 Wis. 641, 65 A. S. R. 85, 71 N. W. 1056 (dissenting opinion), on whether existence of corporation can be questioned collaterally by creditors.

Cited in reference note in 83 A. D. 243, on collateral attack of legality of organization of railroad company.

When remedy is at law.

Cited in *Wincock v. Turpin*, 96 Ill. 135; *Helmle v. Queenan*, 18 Ill. App. 103,—holding that remedy, under statute, which does not designate forum for its enforcement, is at law.

—Against stockholders.

Cited in *Jacobson v. Allen*, 20 Blatchf. 525, 12 Fed. 454; *Eames v. Doris*, 102 Ill. 350; *Schalucky v. Field*, 124 Ill. 617, 7 A. S. R. 399, 16 N. E. 904; *Bell v. Farwell*, 176 Ill. 489, 68 A. S. R. 194, 42 L.R.A. 804, 54 N. E. 346; *Meisser v. Thompson*, 9 Ill. App. 368; *Hodgson v. Cheever*, 8 Mo. App. 318,—holding that individual creditor can sue at law individual stockholder.

Cited in notes in 43 A. D. 702, on action at law against single stockholder by corporate creditor; 3 A. S. R. 856, on method of enforcing statutory liability of stockholder for corporate debts.

Liability of stockholder.

Cited in *Zang v. Wyant*, 25 Colo. 551, 71 A. S. R. 145, 56 Pac. 565, holding bank stockholder liable for debts to double amount of his stock; *Buchanan v. Meisser*, 105 Ill. 638; *Thompson v. Meisser*, 108 Ill. 359; *Fleischer v. Rentchler*, 17 Ill. App. 402,—holding stockholder severally and individually liable to amount equal to stock, to creditor.

Cited in reference note in 29 A. S. R. 164, on joint instead of several liability of stockholders.

Cited in notes in 43 A. D. 701, on nature of stockholders' liability for corporate debts; 1 A. S. R. 784, on nature and extent of stockholder's liability; 3 A. S. R. 853, on whether statutory liability of stockholders for corporate debts is joint, several, or joint and several; 33 A. S. R. 185, on rights and liabilities of subscriber to corporation stock.

Waiver of statutory or constitutional provisions.

Cited in note in 53 A. D. 337, on right of party to waive statutory or constitutional provision in his favor.

31 AM. REP. 91, COBB v. LAVALLE, 89 ILL. 331.

Title to accretions.

Cited in *Rutz v. Kehn*, 143 Ill. 558, 29 N. E. 553, holding lessee of land bounded by river entitled to accretions thereto; *Kaskaskia v. McClure*, 167 Ill. 23, 47 N. E. 72, holding that island, formed in river by change of channel, belong to riparian owners; *Chicago v. Ward*, 169 Ill. 392, 61 A. S. R. 185, 38 L.R.A. 849, 48 N. E. 927, holding that accretions to land along lake shore, dedicated to public, belong to city; *Cobb v. Griffith & A. S. G. & Transp. Co.* 87 Mo. 90 (reversing 12 Mo. App. 130), on title of lessee to accretions.

Cited in reference note in 38 A. D. 119, on extent of grant or deed bounded by non-navigable stream.

Cited in notes in 42 L.R.A. 168, on title to land under nontidal rivers; 58 L.R.A. 201, on effect of form of conveyance on title to accretions to shore land.

River as boundary line.

Cited in *St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Piper v. Connelly*, 108 Ill. 646; *Buttenuth v. St. Louis Bridge Co.* 123 Ill. 535, 5 A. S. R. 545, 17 N. E. 439,—holding that middle of main channel is boundary line, when river is boundary.

When ejectment lies.

Cited in note in 116 A. S. R. 576, on maintenance of ejectment for accretions, made lands, tide lands, or lands under water.

—Necessity for right to possession.

Cited in *Sands v. Kagey*, 150 Ill. 109, 36 N. E. 956, holding that ejectment cannot be maintained against occupant of realty as long as he is lawfully in possession; *Austin v. Kimball*, 167 Mass. 300, 45 N. E. 627, holding that ejectment for recovery of unexpired term of lease can only be maintained by one having right of possession.

—Defense of outstanding title.

Cited in *Henderson v. Wanamaker*, 25 C. C. A. 181, 49 U. S. App. 174, 79 Fed. 736, holding that defendant in ejectment can defeat recovery by proof of outstanding title in third person; *Woods v. Soucy*, 184 Ill. 568, 56 N. E. 1015, holding that defendant in ejectment can defeat recovery by showing outstanding lease for ninety nine years; *North v. Graham*, 235 Ill. 178, 126 A. S. R. 189, 18 L.R.A. (N.S.) 624, 85 N. E. 267, holding that defendant in ejectment can set up title acquired after commencement of suit and defeat recovery.

Duty of lessor to put lessee in possession.

Cited in *Palmer v. Young*, 108 Ill. App. 253, holding no duty of landlord to put lessee in possession.

Cited in notes in 134 Am. St. Rep. 920, on landlord's duty to put tenant in possession; 9 L.R.A.(N.S.) 1127, on lessor's implied duty to put lessee in possession of leased premises.

31 AM. REP. 93, LEOPOLD v. SALKEY, 89 ILL. 412.

Justification for rescission of contract.

Cited in *Watson v. Ford*, 35 C. C. A. 345, 93 Fed. 359, holding that breach of provision for disclosure of inventions to employer justifies rescission of contract; *Union P. R. Co. v. Travelers' Ins. Co.* 28 C. C. A. 1, 49 U. S. App. 752, 83 Fed. 676, holding that agreement to stop trains for meals does not go to whole consideration of contract for station rooms and hotel; *Kauffman v. Raeder*, 54 L.R.A. 247, 47 C. C. A. 278, 108 Fed. 171, holding that breach of dependent covenant, going to entire consideration, gives injured party right to rescind contract; *Ballance v. Vanuxem*, 191 Ill. 319, 61 N. E. 85, holding that to justify rescission default need not defeat whole purpose of contract; *Jackson v. Jackson*, 222 Ill. 46, 6 L.R.A.(N.S.) 785, 78 N. E. 19, holding that equity will not ordinarily decree rescission of contract for only partial failure of consideration; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L.R.A. 33, 38 N. E. 773; *Pittenger v. Pittenger*, 208 Ill. 582, 70 N. E. 699; *Lake Shore & M. S. R. Co. v. Richards*, 40 Ill. App. 560,—holding that failure which will justify party in rescinding contract must go to very substance of contract.

Cited in note in 59 A. S. R. 277, on what authorizes rescission by employer of contract of service.

Inability as excuse for nonperformance.

Cited in *Ricardi Apartment House Co. v. Beaudet*, 64 Ill. App. 261, holding inability of contractor to perform, no legal excuse for nonperformance.

Cited in note in 1 E. R. C. 350, on vis major or inevitable accident as excusing performance of contract.

Recovery upon quantum meruit.

Cited in *Barrett v. Raleigh Coal & Coke Co.* 51 W. Va. 416, 90 A. S. R. 802, 41 S. E. 220, holding that recovery can be had upon quantum meruit, if failure to complete work is without plaintiff's fault.

Cited in reference notes in 74 A. D. 136, on servant's right to compensation in case of nonperformance of special contract; 75 A. D. 393, on recovery on quantum meruit in case of prevention of complete performance of contract; 33 A. R. 705, on right to recover under quantum meruit for part performance of contract for labor; 1 A. S. R. 468, on recovery for services rendered where special contract is not completed.

Cited in notes in 59 A. S. R. 290, 291, as to when complete performance is essential to cause of action on contract for personal services; 24 L.R.A. 231, on effect of part performance of contract for services in case of discharge for cause; 6 E. R. C. 638, on right to recover upon quantum meruit for work done under contract for an entire service.

Recovery by wrongfully discharged servant.

Cited in note in 5 L.R.A.(N.S.) 444, on readiness of wrongfully discharged servant to perform service as requisite to recovery of wages for contract period subsequent to discharge on ground of constructive service.

Distinguished in *Reiter v. Standard Scale & Supply Co.* 237 Ill. 374, 86 N. E. 745, holding that employee wrongfully discharged may recover salary though no actual services were rendered.

31 AM. REP. 104, LEUCKER v. STEILEU, 89 ILL. 545.**What constitutes seduction.**

Cited in *People v. Gibbs*, 70 Mich. 425, 38 N. W. 257, holding that intercourse, finally accomplished, after prior gifts and forcible attempts, constitutes seduction.

Cited in notes in 44 A. D. 163, on what constitutes seduction; 18 L.R.A.(N.S.) 589, on effect of fact that intercourse was accomplished by force to defeat action for seduction.

— Sufficiency of complaint.

Cited in *Peterson v. Crosier*, 29 Utah, 235, 81 Pac. 860, holding complaint alleging that defendant seduced, debauched and carnally knew plaintiff, sufficient.

— Error in charge.

Cited in *Hoggins v. Coad*, 58 Ill. App. 58, holding instruction, which assumes that seduction is not shown by evidence, erroneous.

Action by parent for seduction.

Cited in note in 76 A. S. R. 662, on civil action by parent for seduction.

Measure of damages for seduction.

Cited in note in 44 A. D. 178, on measure of damages in action for seduction.

31 AM. REP. 105, OLNEY v. HOWE, 89 ILL. 556.**Necessity of completeness of gift inter vivos.**

Cited in *Permanent Fund v. Hall*, 48 Ill. App. 536, holding that gift inter vivos is only enforced when it is completed gift.

What constitutes testamentary disposition.

Cited in *Cline v. Jones*, 111 Ill. 563; *Robinson v. Brewster*, 140 Ill. 649, 33 A. S. R. 265, 30 N. E. 683; *Noble v. Fickes*, 230 Ill. 594, 13 L.R.A.(N.S.) 1203, 82 N. E. 950, 12 A. & E. Ann. Cas. 282,—holding that any writing disposing of property after owner's death, if executed as required by statute of wills, is good testamentary disposition.

Creation of trust.

Cited in note in 34 A. S. R. 215, on declarations of trust testamentary in character.

Necessity of mutuality of contract.

Cited in *Chicago & A. R. Co. v. Jones*, 53 Ill. App. 431, holding that to constitute contract, there must be mutually obligatory promises; *Van Vlissingen v. Manning*, 105 Ill. App. 255, holding that mere offer, not assented to, does not constitute contract.

Right of married woman to contract.

Distinguished in *Casner v. Preston*, 109 Ill. 531, holding that married woman may contract for care of invalid in her home; *Jones v. Adams*, 81 Ill. App. 183, holding that married women may contract, as if unmarried.

Right of married woman to earnings.

Cited in *Overbeck v. Ahlmeier*, 106 Ill. App. 606, holding that mere fact that wife assists husband in his business does not give her interest therein.

Right to specific performance.

Cited in note in 11 L.R.A. 118, on necessity for consideration to authorize specific performance of contracts.

31 AM. REP. 110, SHINN v. STATE, 64 IND. 13.

Violence necessary to constitute robbery.

Cited in *Thomas v. State*, 91 Ala. 34, 9 So. 81, holding that obtaining gun on request to examine it and threatening to shoot owner is not robbery; *Routt v. State*, 61 Ark. 594, 34 S. W. 262, on whether snatching property and using pistol to prevent re-taking by owner, is robbery; *Simmons v. State*, 41 Fla. 316, 25 So. 881, holding that obtaining property by threats of illegal arrest does not constitute robbery; *Weidner v. Standard Life & Acci. Ins. Co.* 130 Wis. 10, 110 N. W. 246, holding that taking property and hitting owner on demand of return constitutes robbery.

Cited in notes in 70 A. D. 178, 179, on what constitutes robbery; 70 A. D. 183, on force and violence as element in crime of robbery; 70 A. D. 184, on snatching not being robbery; 135 Am. St. R. 482, 495, on nature and element of robbery; 57 L.R.A. 435, on necessity of actual force in snatching to constitute robbery where there is no resistance; 57 L.R.A. 444, on what force employed as a means of escape or to prevent a recaption of property taken without force is sufficient to constitute robbery.

31 AM. REP. 114, TAYLOR v. FICKAS, 64 IND. 167.

Actionable interference with waters.

Cited in *Weis v. Madison*, 75 Ind. 241, 39 A. R. 135; *Evansville v. Decker*, 84 Ind. 325, 43 A. R. 86,—holding injuries consequent merely upon careful street improvements, whereby surface water is thrown upon private property, not actionable; *Chambers v. Kyle*, 87 Ind. 83, holding complaint against landowner for obstructing drain upon his own land bad; *Benthall v. Seifert*, 77 Ind. 302; *Shelbyville & B. Turnp. Co. v. Green*, 99 Ind. 205,—holding injury from construction by owner of levees to protect his land from floods, not actionable; *Weddell v. Hapner*, 124 Ind. 315, 24 N. E. 368, holding concentration and discharge of surface water by drains on lower land, actionable; *Wharton v. Stevens*, 84 Iowa, 107, 35 A. S. R. 296, 15 L.R.A. 630, 50 N. W. 562, holding that interference with flow of water in natural ditch discharging into creek may be enjoined; *Jessup v. Bamford Bros. Silk Mfg. Co.* 66 N. J. L. 641, 88 A. S. R. 502, 58 L.R.A. 329, 51 Atl. 147, holding diversion of surface water by building on land over which it was accustomed to flow, not actionable; *Cass v. Dicks*, 14 Wash. 75, 53 A. S. R. 859, 44 Pac. 113, holding that erection of dikes to prevent overflow from river affords no cause of action for injury to higher adjoining owner; *Ramsdale v. Foote*, 55 Wis. 557, 13 N. W. 557, holding that action lies for flooding adjoining land by dam across ditch.

Cited in reference notes in 31 A. R. 216, on liability of owner of land for obstructing flow of surface water; 32 A. R. 274, on municipal liability for casting surface water on private lands by raising grade of street; 36 A. R. 492, on right of riparian owner to divert overflow of stream by building embankment.

Cited in notes in 97 A. D. 567, on right of landowner to protect himself from rivers and overflows by dams, levees, and other means which result injuriously to others; 35 A. R. 543, on municipal liability for flowing private lands; 85 A. S. R. 725, on right to diminish or impede flow of surface water off of one's own land; 85 A. S. R. 716, 718, on right to diminish or impede flow of surface water onto one's own land; 21 L.R.A. 599, on correlative rights as to obstruction of natural flow of surface water; 25 E. R. C. 426, on liability of landowner for changing flow of water.

—By railroad embankment.

Cited in *Gulf, C. & S. F. R. Co. v. Clark*, 41 C. C. A. 597, 101 Fed. 678, holding injury from embankment to restore stream to channel, not actionable; *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 246, 27 A. S. R. 246, 13 L.R.A. 394, 13 S. E. 489, holding deflection of natural course of river by railroad embankment, actionable; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, 38 A. R. 139; *Hill v. Cincinnati, W. & M. R. Co.* 109 Ind. 511, 10 N. E. 410; *Clay v. Pittsburgh, C. C. & St. L. R. Co.* 164 Ind. 439, 73 N. E. 904; *New Jersey, I. & I. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420; *Drake v. Chicago, R. I. & P. R. Co.* 70 Iowa, 59, 29 N. W. 804 (former appeal in 63 Iowa, 302, 50 A. R. 746, 19 N. W. 215), holding that no action lies for obstruction of surface water by railroad embankment; *Singleton v. Atchison, T. & S. F. R. Co.* 67 Kan. 284, 72 Pac. 786, holding obstruction by railroad company of flow of water through depression in river bank at time of high water, not actionable; *Norfolk & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517, holding obstruction of surface water in natural channel by railroad embankment to injury of another's land, actionable; *Chicago, R. I. & P. R. Co. v. Groves*, 20 Okla. 101, 22 L.R.A.(N.S.) 802, 93 Pac. 755, to the point that no cause of action can arise from throwing back surface waters upon land of dominant estate.

Distinguished in *Gulf, C. & S. F. R. Co. v. Clark*, 2 Ind. Terr. 319, 51 S. W. 962, holding that action lies against railroad company for changing channel of stream by building of dykes.

Ownership of waters.

Cited in *Metcalf v. Nelson*, 8 S. D. 87, 59 A. S. R. 746, 65 N. W. 911, holding that water, coming to surface in spring, belongs to owner of land; *Crescent Min. Co. v. Silver King Min. Co.* 17 Utah, 444, 70 A. S. R. 810, 54 Pac. 244, holding that percolating water, after passing into underground artificial tunnel, is not subject to appropriation by adjoining owner.

Cited in note in 64 A. D. 727, on rights in percolating waters.

What constitutes surface waters.

Cited in *Cairo, V. & C. R. Co. v. Brevoort*, 25 L.R.A. 527, 62 Fed. 129, holding that overflow waters in ordinary floods, forming one body, are not surface waters; *Jean v. Pennsylvania Co.* 9 Ind. App. 56, 36 N. E. 159; *New York, C. & St. L. R. Co. v. Speelman*, 12 Ind. App. 372, 40 N. E. 541; *Kansas City, M. & B. R. Co. v. Smith*, 72 Miss. 677, 48 A. S. R. 579, 27 L.R.A. 762, 17 So. 78; *Fordham v. Northern P. R. Co.* 30 Mont. 421, 104 A. S. R. 729, 66 L.R.A. 556, 76 Pac. 1040,—holding that flood waters of stream become surface water; *Morrissey v. Chicago, B. & Q. R. Co.* 38 Neb. 406, 56 N. W. 946, holding that water, overflowing stream, is surface water until it returns to some natural stream.

Cited in note in 25 L.R.A. 529, on definition of surface water.

Distinguished in *Uhl v. Ohio River R. Co.* 56 W. Va. 494, 107 A. S. R. 968, 68 L.R.A. 138, 49 S. E. 378, 3 A. & E. Ann. Cas. 201, holding that overflow waters of stream during freshet are not deemed surface waters.

Right to use of one's property.

Cited in *Moellering v. Evans*, 121 Ind. 195, 6 L.R.A. 449, 22 N. E. 989, holding that everyone must so enjoy his property as not to injure property of another; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L.R.A. 652, 28 N. E. 76 (dissenting opinion), on right to enjoy uninterfered use of one's land; *Giller v. West*, 162 Ind. 17, 69 N. E. 548; *Letts v. Kessler*, 54 Ohio St. 73, 40

L.R.A. 177, 42 N. E. 765,—holding shutting off light and air from neighbor's windows by fence, not actionable.

Cited in notes in 6 L.R.A. 449, on right to use and improve one's own property; 1 E. R. C. 761, on *damnum absque injuria*.

Rights of personal representative in decedent's lands.

Cited in *Kidwell v. Kidwell*, 84 Ind. 224, holding that administrator has no right to receive rents of intestate's realty.

Cited in note in 78 A. S. R. 181, on general powers of executors over personal estate.

Distinguished in *Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 97 Ind. 586, holding that executor may sue for trespass to testator's lands during his lifetime.

What constitutes stream.

Cited in *Deadwood C. R. Co. v. Barker*, 14 S. D. 558, 86 N. W. 619, holding that underground water, in gravel, with no fissure in bedrock, and no well-defined banks, is not running stream; *Schlichter v. Phillipy*, 67 Ind. 201, holding that stream must be well defined, flowing in certain direction and by regular channel; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 46 A. R. 199, holding that lake fed by streams, which in flood times find exit by rapid percolation through gravel bed, is running stream; *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230, holding that water, which has definite source in spring and takes definite course, is water-course.

Cited in note in 67 A. S. R. 670, on underground waters which are percolating.

31 AM. REP. 121, MILLNER v. EGLIN, 64 IND. 197.

Error in instructions as to weight of evidence.

Cited in *Voss v. Prier*, 71 Ind. 128; *Works v. Stevens*, 76 Ind. 181,—holding error to instruct jury that oral testimony is entitled to greater weight than depositions; *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37, 54 N. E. 1071, holding instruction, that, in determining preponderance of evidence, intelligence, candor, opportunities, conduct and disinterestedness of witnesses is to be considered, erroneous; *Woollen v. Whitacre*, 91 Ind. 502, holding error to instruct jury to consider interest, manner and inconsistency of statements of witness, in determining his credibility; *Hartford v. State*, 96 Ind. 461, 49 A. R. 185, holding instruction, to consider that witness is defendant, in weighing his evidence, error; *Duvall v. Kenton*, 127 Ind. 178, 26 N. E. 688, holding instruction, that, in judging weight of expert evidence, character and interest of witness is to be considered, erroneous; *Fulwider v. Ingels*, 87 Ind. 414; *Lewis v. Christie*, 99 Ind. 377; *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63; *Columbus v. Strasser*, 138 Ind. 301, 34 N. E. 5,—holding error for court to instruct jury as to what presumptions of fact they shall draw from evidence.

Cited in note in 72 A. D. 547, on instructions as to credibility of particular witnesses.

31 AM. REP. 123, RYAN v. CURRAN, 64 IND. 345.

Liability for contractor's negligence.

Cited in *Nyback v. Champagne Lumber Co.* 48 C. C. A. 632, 109 Fed. 732; *Vincennes Water Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747; *New Albany Forge & Rolling Mill v. Cooper*, 131 Ind. 363, 30 N. E. 294,—holding person, reserving no control over work, not liable for negligence of contractor; *Zimmerman v. Baur*, 11 Ind. App. 607, 39 N. E. 299, holding owner not liable for fall

of horse into sewer, being constructed by independent contractor; *Dehority v. Whitcomb*, 13 Ind. App. 558, 41 N. E. 1059, holding owner, having control over constructing of building by contractor, liable for failure to support roof; *Cameron v. Oberlin*, 19 Ind. App. 142, 48 N. E. 386, holding landowner liable for negligence of contractor in permitting fire to escape to adjacent lands; *Bohrer v. Dienhart Harness Co.* 19 Ind. App. 489, 49 N. E. 296 (dissenting opinion), on liability of owner for injury to adjoining building from flow of water into excavation, caused by deposit of material in gutter by contractor; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 A. R. 696, 12 N. E. 296, holding railroad not liable for negligent operation of engine by contractor, pumping out excavation; *Missouri, K. & O. R. Co. v. Ferguson*, 21 Okla. 266, 96 Pac. 755, holding that railroad might show that wire fence in which plaintiff's animal was injured, was in course of construction by independent contractor.

Cited in reference note in 79 A. D. 337, on landowner's liability for building contractor's negligence.

Cited in notes in 55 A. D. 318, on liability of employer for acts or negligence of contractor; 60 A. R. 700, on liability of employer for act of contractor claimed to be nuisance; 76 A. S. R. 385, on nonliability for negligence and other torts of independent contractors; 9 L.R.A. 604, on railroad's liability for independent contractor's negligence; 65 L.R.A. 653, on nonliability of employer for negligence of independent contractor in work done on premises adjacent to streets and highways, affecting safety thereof; 65 L.R.A. 753, on master's liability for acts of independent contractor where their performance will necessarily create nuisance; 65 L.R.A. 846, on employer's liability for injuries caused by performance of work by independent contractor in constructing area under footpath; 11 L.R.A.(N.S.) 994, on liability for failure to guard coal hole or other opening in sidewalk for commercial purposes while in use by third person.

Distinguished in *Bloomfield R. Co. v. Van Slike*, 107 Ind. 480, 8 N. E. 269, holding that receiver cannot be regarded as contractor of corporation, so as to make it not liable for his acts.

—Liability of county.

Cited in *Park v. Adams County*, 3 Ind. App. 536, 30 N. E. 147, holding county liable for failure of contractor, repairing bridge to barricade approaches.

—Liability of city.

Cited in *Logansport v. Dick*, 70 Ind. 65, 36 A. R. 166, holding city not liable for negligent blasting by contractor, constructing water-works system; *Cummins v. Seymour*, 79 Ind. 491, 41 A. R. 618, holding municipality not liable for negligence of independent contractor; *Evansville v. Senhenn*, 151 Ind. 42, 68 A. S. R. 218, 41 L.R.A. 728, 47 N. E. 634, holding city, without notice thereof, not liable for negligent piling of lumber in street by contractor, furnishing city with lumber.

Liability of municipality for acts of licensee.

Cited in *Dooley v. Sullivan*, 112 Ind. 451, 2 A. S. R. 209, 14 N. E. 566; *Wheeler v. Plymouth*, 116 Ind. 158, 9 A. S. R. 837, 18 N. E. 532; *De Agramonte v. Mt. Vernon*, 112 App. Div. 291, 98 N. Y. Supp. 454,—holding municipality not liable for acts of its licensees, unless act authorized was dangerous in itself.

Cited in note in 3 L.R.A. 257, on nonliability of municipality for acts of licensees.

Copy of writing as part of pleading.

Cited in *Sessengut v. Posey*, 67 Ind. 408, 33 A. R. 98, holding that copy of

building contract, filed with answer, is no part thereof; *Cassaday v. American Ins. Co.* 72 Ind. 95, holding that copies of application, policy and insurance laws, filed with complaint as exhibits, are not part thereof; *Logansport v. La Rose*, 99 Ind. 117, holding that copy of annexation proceedings, filed with complaint as exhibit, is not part thereof; *Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414, holding that filing of copy of judgment with complaint will not make it part of record.

Who is independent contractor.

Cited in note in 65 L.R.A. 464, on inference of independence of contract of persons undertaking construction of entire buildings or specific portions thereof.

Liability for employee's negligence.

Cited in note in 81 A. D. 696, on employer's liability for employee's negligence

Liability for defective or dangerous sidewalk.

Cited in reference note in 1 A. S. R. 433, on liability of landowner for defective or dangerous condition of sidewalk.

31 AM. REP. 131, NOLL v. SMITH, 64 IND. 511.

Alteration invalidating note.

Cited in *Mater v. American Nat. Bank*, 8 Colo. App. 325, 46 Pac. 221, holding that unnoticeable detachment of condition from foot of note does not invalidate note in hands of bona fide holder; *Marshall v. Drescher*, 68 Ind. 359, holding that insertion by payee bank where payable in blank left therefor does not invalidate note in hands of endorsee; *Cronkhite v. Nebeker*, 81 Ind. 319, 42 A. R. 127, holding that insertion of words of negotiability in blank space in non-negotiable note invalidates it in hands of bona fide purchaser; *Baldwin v. Barrows*, 86 Ind. 351, holding that one executing note without reading it, upon representation that it is order, liable to bona fide holder; *Palmer v. Poor*, 121 Ind. 135, 6 L.R.A. 469, 22 N. E. 984, holding that fraudulent addition of figure "8" before words "per cent interest" renders note invalid in hands of bona fide holder; *Young v. Baker*, 29 Ind. App. 130, 64 N. E. 54 (dissenting opinion), on whether unauthorized insertion, of bank where payable, by payee, renders note invalid in hands of bona fide holder.

Cited in notes in 86 A. S. R. 83, on unauthorized alteration of written instruments; 86 A. S. R. 120, on effect upon rights of parties of alteration of instrument facilitated by negligence of maker; 22 L.R.A. (N.S.) 265, on effect of detachment of paper modifying terms bill or note upon rights of subsequent bona fide purchaser.

Negotiability of instrument.

Cited in notes in 11 L.R.A. 748, on negotiability of note payable on or before a certain date; 125 A. S. R. 203, on effect of provision for payment on contingency on negotiability of instrument; 4 E. R. C. 193, on negotiability of bill of exchange or promissory note.

31 AM. REP. 135, WILLIAMS v. STATE, 64 IND. 553.

What is a "public place."

Cited in *State v. Moriarity*, 74 Ind. 103, holding that in indictment words "in public street" charge commission of offense in public place.

Cited in reference note in 19 A. S. R. 857, as to definition of public place or public house.

Judicial notice.

Cited in *Stout v. Grant County*, 107 Ind. 343, 8 N. E. 222, holding that courts take judicial notice of history, topography and general condition of country; *State ex rel. Schumacher v. Gramelapacher*, 126 Ind. 398, 26 N. E. 81, holding that courts take judicial notice of acts of Congress; *Hartford F. Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42; *State ex rel. Beedle v. Schoonover*, 135 Ind. 526, 21 L.R.A. 767, 35 N. E. 119,—holding that courts take judicial notice of historical facts; *Jackson County v. State*, 147 Ind. 476, 46 N. E. 908, holding that courts take judicial notice of area and boundaries of county.

Cited in notes in 82 A. S. R. 439, on judicial notice of localities and boundaries; 124 A. S. R. 35, on judicial notice of historical facts; 4 L.R.A. 39, on judicial notice of geographical and topographical facts.

31 AM. REP. 140, IOWA LUMBER CO. v. FOSTER, 49 IOWA, 25.**Right of corporation to purchase its own stock.**

Cited in *Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94, holding that in absence of statute corporation may purchase its own stock; *Calumet Paper Co. v. Stotts Invest. Co.* 96 Iowa, 147, 59 A. S. R. 362, 64 N. W. 782; *Western Improv. Co. v. Des Moines Nat. Bank*, 103 Iowa, 455, 72 N. W. 657; *State ex rel. Higby v. Higby Co.* 130 Iowa, 69, 114 A. S. R. 409, 106 N. W. 382,—holding that corporation may purchase its own stock; *Rollins v. Shaver Wagon & Carriage Co.* 80 Iowa, 380, 20 A. S. R. 427, 45 N. W. 1037; *West v. Averill Grocery Co.* 109 Iowa, 488, 80 N. W. 555; *Wisconsin Lumber Co. v. Greene & W. Teleph. Co.* 127 Iowa, 350, 109 A. S. R. 387, 69 L.R.A. 968, 101 N. W. 742; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376,—holding that corporation, when not prohibited by charter or statute, may buy its own stock; *Howe Grain & Mercantile Co. v. Jones*, 21 Tex. Civ. App. 198, 51 S. W. 24, holding corporation not prohibited by common law or statute from purchasing its own stock.

Cited in notes in 33 A. S. R. 342, on power of corporation to purchase its own capital stock; 18 L.R.A. 254, on power of corporation to deal in its own stock; 61 L.R.A. 630, on statutory grant of power to corporation to purchase its own shares of stock.

Estoppel to assert ultra vires.

Cited in *White v. G. W. Marquardt & Sons*, 105 Iowa, 145, 74 N. W. 950; *Traer v. Lucas Prospecting Co.* 124 Iowa, 107, 99 N. W. 290; *Garrison Canning Co. v. Stanley*, 133 Iowa, 57, 110 N. W. 171,—holding corporation estopped from asserting ultra vires.

31 AM. REP. 143, STATE v. DEAN, 49 IOWA, 73.**Larceny of lost articles.**

Cited in *State v. Hayes*, 98 Iowa, 619, 60 A. S. R. 219, 37 L.R.A. 116, 67 N. W. 673 (dissenting opinion), on whether finder of pocketbook, containing papers showing owner, guilty of larceny.

Cited in notes in 57 A. D. 283, on larceny by finders of lost goods or estrays; 34 A. R. 734; 88 A. S. R. 592, 593,—on larceny of lost property; 37 L.R.A. 126, on statutory rights and liabilities of finder of property.

31 AM. REP. 145, BURLINGTON v. BURLINGTON STREET R. CO. 49 IOWA, 144.**Impairment of franchise.**

Cited in *Levis v. Newton*, 75 Fed. 884, holding that gas franchise cannot be modified by city, in absence of reservation, or constitutional or statutory provision, therefor; *Hot Springs Electric Light Co. v. Hot Springs*, 70 Ark. 300, 67 S. W. 761, holding that city cannot impair electric light franchise by requiring company to pay rental for ground for poles; *Quincy v. Bull*, 106 Ill. 337, holding that grant to lay water pipes in all streets cannot be limited to streets indicated from time to time by city; *Metropolis Gas Co. v. Hyde Park*, 27 Ill. App. 361, holding that village, after grant of franchise, cannot prevent company from laying gas pipes in streets; *Rushville v. Rushville Natural Gas Co.* 164 Ind. 162, 73 N. E. 87, 3 A. & E. Ann. Cas. 86; *Northwestern Teleph. Exch. Co. v. Minneapolis*, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527; *Plattsburgh v. Nebraska Teleph. Co.* 80 Neb. 460, 127 A. S. R. 779, 14 L.R.A.(N.S.) 654, 114 N. W. 588,—holding that city cannot arbitrarily, subsequent to grant of franchise, impose unreasonable, additional burdens.

Cited in reference note in 5 A. S. R. 353, on implied contract not to reassert right granted by franchise by municipal corporation.

Cited in notes in 7 A. S. R. 726, on contract implied by grant of franchise by municipal corporation as agent of state; 34 A. D. 636, on invalidity of municipal ordinances in contravention of common or private rights; 50 L.R.A. 144, on privilege of using streets for railway as a contract within constitutional provision against impairing obligation of contracts.

—Railroad franchise.

Cited in *Baltimore Trust & G. Co. v. Baltimore*, 64 Fed. 153, holding that city cannot revoke provision of franchise authorizing double tracks; *Mercantile Trust & D. Co. v. Collins Park & Belt R. Co.* 99 Fed. 812, holding that city cannot impair franchise by authorizing another railroad to condemn parts of its track; *Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 5 A. S. R. 342, 4 So. 106, holding that city cannot impair railroad franchise by prohibiting loading and unloading of cars in streets; *Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co.* 73 Iowa, 513, 33 N. W. 610, holding that city, after grant of exclusive franchise, cannot permit operation of road by rival company; *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226 (affirming 76 Iowa, 742, 39 N. W. 498), holding that city can impose additional burden of paving one foot outside rails; *Snouffer v. Cedar Rapids & M. C. R. Co.* 118 Iowa, 287, 92 N. W. 79, holding that city may require removal of tracks to grade to middle of street and paving of portion of street; *Kalamazoo v. Michigan Traction Co.* 126 Mich. 525, 85 N. W. 1067, holding that city can require change to rail suitable to pavement; *Houghton County Street R. Co. v. Laurium*, 135 Mich. 614, 98 N. W. 393, holding that municipality, after grant of franchise to construct road inside and outside village, cannot forbid connection thereof; *Pawcatuck Valley Street R. Co. v. Westerly*, 22 R. I. 307, 47 Atl. 691, holding that municipality may order change of form of rail and paving of portion of street; *Houston v. Houston City Street R. Co.* 83 Tex. 548, 29 A. S. R. 679, 19 S. W. 127, holding that grant of franchise, followed by large expenditures, cannot be impaired by city; *Mason v. Ohio River R. Co.* 51 W. Va. 183, 41 S. E. 418, holding that municipality may compel removal of side track, rendering part of street assigned for public passage too narrow.

Cited in note in 104 A. S. R. 649, on municipal limitation of street railway company to a single track for protection of the public.

Distinguished in *Brooklyn v. Nassau*, 20 App. Div. 31, 46 N. Y. Supp. 651, holding that grant of franchise cannot prevent regulation of speed of street cars; *Eastern Wisconsin R. & Light Co. v. Winnebago Traction Co.* 126 Wis. 179, 105 N. W. 571, holding that railway, laying single track under franchise for single or double track, cannot afterwards lay double track.

31 AM. REP. 148, STATE v. FITZGERALD, 49 IOWA. 260.

Crime of causing abortion.

Cited in reference note in 39 A. R. 227, on necessity for quickening to common-law crime of abortion.

Cited in notes in 66 A. D. 83, on crime of causing abortion; 66 A. D. 84, on what constitutes crime of causing abortion.

— Use of impotent drug as defense.

Cited in *State v. Watson*, 30 Kan. 281, 1 Pac. 770; *State v. Crews*, 128 N. C. 581, 38 S. E. 293,—holding no defense to abortion that drug used would not produce miscarriage.

Cited in reference note in 31 A. R. 165, on harmlessness of drug administered with intent to procure abortion as a defense.

Presumption of coercion by husband.

Cited in *State v. Kelly*, 74 Iowa, 589, 38 N. W. 503; *State v. Harvey*, 130 Iowa, 394, 106 N. W. 938,—holding that law presumes that participation of wife in husband's crime is result of his coercion.

Duress as excuse for crime.

Cited in note in 19 L.R.A. 359, on duress of wife by husband as an excuse for crime.

Sufficiency of indictment.

Cited in reference note in 32 A. R. 247, on necessity that indictment show criminal intent.

Cited in note in 66 A. D. 87, on necessity of alleging name, quality, or quantity of drug used in causing abortion.

Error in instruction as to good character.

Cited in *State v. Gustafson*, 50 Iowa, 194, holding instruction, that, if evidence is conclusive as to defendant's guilt, his good character cannot be considered, erroneous; *State v. Jones*, 52 Iowa, 150, 2 N. W. 1060, holding instruction, that "good character affects nothing as against established facts," erroneous.

Private assistant to district attorney.

Cited in *United States v. Rosenthal*, 121 Fed. 862; *State v. Kent*, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631; *Thalheim v. State*, 38 Fla. 169, 20 So. 938; *State v. Montgomery*, 65 Iowa, 483, 22 N. W. 639; *State v. Shreves*, 81 Iowa, 615, 47 N. W. 899; *State v. Crafton*, 89 Iowa, 109, 56 N. W. 257, holding that private counsel may be employed to assist district attorney; *Reed v. State*, 2 Okla. Crim. Rep. 589, 103 Pac. 1042, holding that assistance of private counsel in prosecution of criminal cases is not prohibited; *State v. Tyler*, 122 Iowa, 125, 97 N. W. 983, holding that court may appoint assistant to prosecuting attorney.

Cited in note in 24 L.R.A.(N.S.) 565, on right to complain because prosecution is conducted or assisted by unofficial member of bar.

Distinguished in *Maloney v. Traverse*, 87 Iowa, 306, 54 N. W. 155, holding

that citizen may employ private counsel in enjoining liquor nuisance, to act independently of county attorney; *Cuming County v. Tate*, 10 Neb. 193, 4 N. W. 1044, holding county not liable for services of attorney assisting district attorney.

31 AM. REP. 150, LIVINGSTON v. MOINGONA COAL CO. 49 IOWA, 369.

Liability for injury to surface from mining.

Cited in *Western Indiana Coal Co. v. Brown*, 36 Ind. App. 44, 114 A. S. R. 367, 74 N. E. 1027, holding that contract to mine without liability does not relieve miner from damages from failure to leave support for surface; *Burgner v. Humphrey*, 41 Ohio St. 340, holding lessee of coal liable for damages from removal of whole coal without leaving sufficient support for surface; *McDade v. Spencer*, 6 Lack. Leg. News, 84, holding no liability for injury to surface, when right of support is excepted from grant; *Griffin v. Fairmont Coal Co.* 59 W. Va. 480, 2 L.R.A.(N.S.) 1115, 53 S. E. 24 (dissenting opinion), on liability of party, having right to mine coal, for injury to surface from removal of coal; *Seitz v. Coal Valley Min. Co.* 149 Ill. App. 85, holding that conveyance of right to take underlying minerals implies that in removing them sufficient support for surface will be left; *Collins v. Gleason Coal Co.* 140 Iowa, 114, 18 L.R.A.(N.S.) 736, 115 N. W. 497, holding that reservation of underlying mineral in deed of land implies that in removing mineral sufficient support of surface will be left.

Cited in reference notes in 6 A. S. R. 724; 34 A. R. 242,—on duty of one mining on land of another to leave support for soil.

Cited in notes in 24 A. S. R. 556, on right of owner of surface to support as against owner of subjacent mine; 135 Am. St. Rep. 138, 149, 152, on rights of owner of surface as against owner of minerals thereunder; 68 L.R.A. 677, on right to subjacent support of land in its natural condition under specific provisions; 68 L.R.A. 692, on right to substitute supports for land; 68 L.R.A. 693, on negligence as an element in liability for removal of lateral or subjacent support of land; 17 E. R. C. 421, on duty of miner to leave sufficient support to uphold surface.

Distinguished in *Kuhn v. Fairmont Coal Co.* 102 C. C. A. 457, 179 Fed. 191, holding that deed of "all coal and mining privileges necessary together with right to enter on land and remove all coal" does not by implication reserve right of subjacent support.

31 AM. REP. 153, FIRST NAT. BANK v. HENDRIE, 49 IOWA, 403.

Validity of contract.

Cited in note in 66 A. D. 514, on contracts for services void as against public policy.

— To induce building of railroad.

Cited in *McCowen v. Pew*, 153 Cal. 735, 21 L.R.A.(N.S.) 800, 96 Pac. 893, holding option to purchase land as inducement to location of road over particular proposed route, valid; *Cobb v. Wm. Kenefick Co.* 23 Okla. 440, 100 Pac. 545; *Farrington v. Stuckey*, 7 Ind. Terr. 364, 104 S. W. 647,—holding that contract made by railroad to construct road through town in consideration of bonus is valid; *Lyman v. Suburban R. Co.* 190 Ill. 320, 52 L.R.A. 645, 60 N. E. 515; *Louisville, N. A. & C. R. Co. v. Sumner*, 106 Ind. 55, 55 A. R. 719, 5 N. E. 404.—holding conveyance in consideration of location of depot at certain place, valid; *Williamson v. Chicago, R. I. & P. R. Co.* 53 Iowa, 126, 36 A. R. 206, 4

N. W. 870, holding conveyance upon consideration that railroad build only depots at specified place in city, void; *Missouri P. R. Co. v. Tygard*, 84 Mo. 263, 54 A. R. 97, holding note as donation to induce railroad to building road to specified town, valid; *Piper v. Choctaw Northern Townsite & Improv. Co.* 16 Okla. 436, 85 Pac. 965, holding note, to induce building of railroad to certain point and maintenance of depot there, valid; *McGuffin v. Coyle*, 16 Okla. 648, 6 L.R.A. (N.S.) 524, 85 Pac. 954, holding note, payable to director personally, to have railroad built to certain point, void.

Cited in notes in 36 A. R. 215, on validity of contracts whereby railroads agree to locate tracks or stations only at certain places; 21 L.R.A. (N.S.) 802, on validity of contract made to influence location of railroad.

51 AM. REP. 155, STATE v. PRIZER, 49 IOWA, 531.

Seduction upon promises.

Cited in *State v. Hughes*, 106 Iowa, 125, 68 A. S. R. 288, 76 N. W. 520, holding defendant guilty of seduction, where intercourse was permitted upon promise that no conception would result and of marriage.

Cited in reference note in 11 A. S. R. 829, on definition of crime of seduction.

— Previous chaste character.

Cited in *State v. Carr*, 60 Iowa, 453, 15 N. W. 271; *People v. Nelson*, 153 N. Y. 90, 60 A. S. R. 592, 46 N. E. 1040, 12 N. Y. Crim. Rep. 368, holding seduction, only when committed upon woman of previous chaste character, meaning actual personal virtue.

Cited in reference note in 39 A. R. 610, on necessity for proof of good repute for chastity in prosecution for seduction.

Cited in notes in 87 A. D. 407, on chastity of the woman as element of crime of seduction; 76 A. S. R. 680, on previous chaste character as element in crime of seduction; 14 L.R.A. (N.S.) 729, 730, on evidence of specific instances to prove character of female seduced.

Admissibility of reputation as to chastity.

Cited in *State v. Lenihan*, 88 Iowa, 670, 56 N. W. 292, holding that state may introduce witnesses as to prosecutrix's chastity in rebuttal of defendant's attack thereon; *State v. Reinheimer*, 109 Iowa, 624, 80 N. W. 669, holding that defense cannot prove general reputation of prosecutrix as to chastity; *State v. Henm*, 82 Iowa, 609, 48 N. W. 971; *State v. Hummer*, 128 Iowa, 505, 104 N. W. 722, holding general good reputation of prosecutrix for morality inadmissible in rebuttal of specific acts of unchastity; *State v. Lockerby*, 50 Minn. 363, 36 A. S. R. 656, 52 N. W. 958, holding general reputation for chastity admissible in corroboration of evidence of chastity; *Woodruff v. State*, 72 Neb. 815, 101 N. W. 1114, holding evidence of general repute of prosecutrix inadmissible to prove prior unchastity; *Leedam v. State*, 81 Neb. 585, 116 N. W. 496, holding that in prosecution for rape evidence as to good reputation of prosecutrix is not admissible in first instance; *Marshall v. Territory*, 2 Okla. Crim. Rep. 136, 101 Pac. 139, holding that "character" of female mentioned in statute defining rape is that condition actually existing as contradistinguished from character by reputation.

Cited in reference note in 36 A. S. R. 659, on evidence of general reputation for chastity in prosecution for seduction.

31 AM. REP. 156, HODGES v. KIMBALL, 49 IOWA, 577.

Priority of rights in consigned goods.

Cited in *Ruhl v. Corner*, 63 Md. 179, holding that delivery to carrier of goods, shipped under agreement to repay advances to consignor, gives consignee lien thereon.

Cited in note in 22 L.R.A. 419, on passing of title of consignment for sale by delivery to carrier for transportation.

Distinguished in *Barnes v. Thuet Bros.* 116 Iowa, 359, 89 N. W. 1085, holding that equity will impress proceeds of shipment purchased with discount of dishonored advance draft with trust.

Amendment of partnership action.

Cited in *York v. Nash*, 42 Or. 321, 71 Pac. 59, holding that court may amend complaint before trial by striking out one party and averments of partnership.

31 AM. REP. 165, DUDLEY v. SAUTBINE, 49 IOWA, 650.

Liability for illegal sale of liquors by agent.

Cited in *Mathre v. Story City Drug Co.* 130 Iowa, 111, 106 N. W. 368, 8 A. & E. Ann. Cas. 275, holding firm and each partner liable for illegal sale by member of firm; *O'Donnell v. Com.* 108 Va. 882, 62 S. E. 373; *State ex rel. Conlin v. Wausau*, 137 Wis. 311, 118 N. W. 810; *Paducah v. Jones*, 126 Ky. 809, 104 S. W. 971,—holding employer liable for act of clerk or agent in selling liquor in violation of law; *Ollre v. State*, 57 Tex. Crim. Rep. 520, 123 S. W. 1116 (dissenting opinion), on liability of employer for act of clerk in selling liquor in violation of statute.

Cited in note in 41 L.R.A. 669, on criminal and penal liability for sale of liquor to habitual drunkard by partner, servant, or agent.

— **In violation of instructions.**

Cited in *State v. Kittelle*, 110 N. C. 560, 28 A. S. R. 698, 15 L.R.A. 694. 15 S. E. 103; *State v. Gilmore*, 80 Vt. 514, 16 L.R.A.(N.S.) 786, 68 Atl. 658, 13 A. & E. Ann. Cas. 321,—holding saloonkeeper liable for illegal sale by bartender against his express instructions; *State v. Denoon*, 31 W. Va. 122, 5 S. E. 315, holding druggist liable for sale of liquors, in violation of statute, by his clerk, though made contrary to his instructions.

— **Ignorance as defense.**

Cited in *State v. Thompson*, 74 Iowa, 119, 37 N. W. 104, holding that ignorance that persons are minors is no defense to illegal sale; *State ex rel. McClory v. Donovan*, 10 N. D. 203, 86 N. W. 709; *State v. Ward*, 75 Iowa, 637, 36 N. W. 765, holding that ignorance of habit of person of becoming intoxicated is no defense to illegal sale; *Furley v. Chicago, M. & St. P. R. Co.* 90 Iowa, 146, 23 L.R.A. 73, 57 N. W. 719 (dissenting opinion), on liability of carrier ignorantly, illegally transporting infected cattle; *State v. Valure*, 95 Iowa, 401, 64 N. W. 280, holding that ignorance that liquor is intoxicating is no defense to illegal sale.

Cited in reference note in 31 A. R. 149, on unintentional commission of offense.

— **Effect of intent.**

Cited in *Lehman v. District of Columbia*, 19 App. D. C. 217; *Hammond v. King*, 137 Iowa, 548, 114 N. W. 1062,—holding that intent is not element of offense involved in violation of liquor law; *Johnston v. Robuck*, 104 Iowa, 523,

73 N. W. 1062; *Rizer v. Tapper*, 133 Iowa, 628, 110 N. W. 1038,—holding that good faith is no defense to illegal sale of liquor.

Wife's action under civil damage acts.

Cited in note in 7 L.R.A. 301, on wife's action under civil damage acts.

31 AM. REP. 171, FRANKHOUSER v. ELLETT, 22 KAN. 127.

Followed without discussion in *Martin v. Steele*, 23 Kan. 255.

Validity of chattel mortgage.

Cited in *Hausner v. Leebick*, 51 Kan. 591, 33 Pac. 375, holding that delivery of property renders unrecorded mortgage valid as to persons, not then having specific lien; *Reichert v. Simons*, 6 Dak. 239, 42 N. W. 657, holding retention of possession, of itself, no evidence of fraud, when mortgage duly filed.

Cited in reference notes in 34 A. R. 265, on effect of mortgage of stock in trade as to creditors; 6 A. S. R. 34, on validity as to subsequent attaching creditors of chattel mortgage authorizing mortgagor to obtain possession of property; 55 A. S. R. 39, on effect of subsequent agreement on chattel mortgage.

Cited in notes in 15 A. S. R. 913, on validity of chattel mortgage permitting mortgagor to retain and sell the property; 18 L.R.A. 609, on effect upon validity of mortgage of merchandise of extraneous agreement; 18 L.R.A. 616, on analysis of law as to validity of mortgage of merchandise giving mortgagor possession with power of sale; 22 L. ed. U. S. 759, as to whether or not chattel mortgage allowing possession and sale of goods is void; 5 E. R. C. 40, on want of change of possession of chattels sold as badge of fraud; 18 E. R. C. 67, on retention of chattels by mortgagor or assignor so as to render transaction fraudulent within statute, 13 Eliz. chap. 5.

—Effect of sale by mortgagor.

Cited in *Muse v. Lehman*, 30 Kan. 514, 1 Pac. 804, holding that harvesting, selling wheat on credit and applying proceeds to mortgage did not make it void; *Standard Improv. Co. v. Schultz*, 45 Kan. 52, 25 Pac. 625 (dissenting opinion), as to whether mortgage is fraudulent, when mortgagor sells goods and applies proceeds at his discretion; *Cameron v. Marvin*, 26 Kan. 612; *Benninghoff v. Cubbison*, 45 Kan. 621, 26 Pac. 14; *Frick Co. v. Western Star Mill Co.* 51 Kan. 370, 32 Pac. 1103; *Standard Implement Co. v. Parlin & O. Co.* 51 Kan. 632, 33 Pac. 362,—holding permission to sell mortgaged goods not conclusive of fraud; *Leser v. Glaser*, 32 Kan. 546, 4 Pac. 1026; *Rathbun v. Berry*, 49 Kan. 735, 33 A. S. R. 389, 31 Pac. 679; *Lorie v. Adams*, 51 Kan. 692, 33 Pac. 599.—holding that permission to sell stock in course of trade, without agreement as to disposition of proceeds, renders mortgage void; *Rosenthal v. Vernon*, 79 Wis. 245, 48 N. W. 485, holding permission to mortgagor to retail goods is not in itself conclusive of fraud.

Distinguished in *Richardson v. Jones*, 56 Kan. 501, 54 A. S. R. 594, 43 Pac. 1127, holding that power to sell stallions, proceeds to be applied on mortgage, renders mortgage void.

—Effect of retention of part of proceeds by mortgagor.

Cited in *Fuller v. Miller*, 32 Kan. 130, 4 Pac. 175; *Bliss v. Couch*, 46 Kan. 490, 26 Pac. 706; *Gleason v. Wilson*, 48 Kan. 500, 29 Pac. 698.—holding mortgage not fraudulent, because mortgagor is authorized to sell and receive compensation as mortgagee's agent; *Howard v. Rohlfing*, 36 Kan. 357, 12 Pac. 566; *Sedgwick City Bank v. Wichita Mercantile Co.* 45 Kan. 346, 25 Pac. 888.—holding that permission to retail goods and apply part of proceeds on mort-

Am. Rep. Vol. XVII.—21.

gage does not render it void; *Connor v. Hardwick*, 53 Kan. 60, 35 Pac. 777, holding mortgage, permitting application of part of proceeds of sale to replenishment of stock, valid; *Atchison Saddlery Co. v. Gray*, 63 Kan. 79, 64 Pac. 987, holding that provision for application of proceeds to payment of prior mortgage does not render mortgage void; *Whitson v. Griffis*, 39 Kan. 211, 7 A. S. R. 546, 17 Pac. 801; *Williams v. Mitchell*, 9 Kan. App. 627, 58 Pac. 1025; *Noyes v. Ross*, 23 Mont. 425, 75 A. S. R. 543, 37 L.R.A. 400, 59 Pac. 367,—holding permission to retain living expenses from sale of goods does not render mortgage fraudulent; *Ephraim v. Kelleher*, 4 Wash. 243, 18 L.R.A. 605, 29 Pac. 985, holding mortgage, permitting mortgagor to replenish stock and pay current expenses from proceeds of chattels, not fraudulent.

Grounds for attachment.

Cited in notes in 30 L.R.A. 480, on mortgaging or pledging of property as ground for attachment; 30 L.R.A. 466, on what intent to defraud will sustain an attachment.

31 AM. REP. 161, CHALLISS v. McCRUM, 22 KAN. 157, Reaffirmed on later appeal in 28 Kan. 122.

Liability of transferer without recourse.

Cited in *Meyer v. Richards*, 163 U. S. 385, 41 L. ed. 199, 16 Sup. Ct. Rep. 1148, holding that vendor of commercial paper without indorsement impliedly warrants that it is what it purports to be; *New York Secur. & T. Co. v. Lombard Invest. Co.* 65 Fed. 271, holding that indorser without recourse of past due note impliedly warrants that it is genuine; *Smith v. Corege*, 53 Ark. 295, 14 S. W. 93, holding that transferer without indorsement impliedly warrants that he assigns good title and that note is genuine; *May v. Dyer*, 57 Ark. 441, 21 S. W. 1064, holding that transferer of note without indorsement becomes liable, not as indorser, but as vendor merely; *Drennan v. Bunn*, 124 Ill. 175, 7 A. S. R. 354, 16 N. E. 100, holding indorser without recourse liable on implied warranty that note is valid obligation for amount stated; *Bevan v. Fitzsimmons*, 40 Ill. App. 109, holding that assignment without recourse leaves assignor liable as vendor, engaging that note is what it purports to be.

Cited in notes in 87 A. D. 390, 391, on effect of indorsement "without recourse;" 7 A. S. R. 366, on duties and liabilities of indorser without recourse; 134 Am. St. Rep. 996, 997, on indorsement without recourse.

Warranty of signatures.

Cited in note in 50 A. D. 606, on liability of seller of forged note.

31 AM. REP. 186, ABBOTT v. COLEMAN, 22 KAN. 250.

Admissibility of comparison of handwriting.

Cited in *Ort v. Fowler*, 31 Kan. 478, 47 A. R. 501, 2 Pac. 580; *Gaunt v. Harkness*, 53 Kan. 405, 42 A. S. R. 297, 36 Pac. 739,—holding expert evidence as to genuineness of signatures from comparison of handwriting, admissible.

Cited in notes in 66 A. D. 241, on points respecting which handwriting experts may testify; 12 L.R.A. 458, on expert and opinion testimony as to hand writing; 62 L.R.A. 842, on comparison of handwriting; 20 L. ed. U. S. 418, on evidence of handwriting or signature.

—Genuineness of lost signature.

Cited in *Hammond v. Wolf*, 78 Iowa, 227, 42 N. W. 778, holding evidence as to genuineness of lost signature, based upon comparison of recollection with

genuine signature, admissible; *Re Burbank*, 104 App. Div. 312, 93 N. Y. Supp. 866, 34 N. Y. Civ. Proc. Rep. 247 (dissenting opinion), on competency of testimony as to genuineness of signature of witness to lost will.

Cited in note in 62 L.R.A. 874, on comparison of handwriting of lost instruments.

Necessity of specification of objection.

Cited in *Daugherty v. Fowler*, 44 Kan. 628, 10 L.R.A. 314, 25 Pac. 40, holding that objection to evidence must specify ground that sufficient preliminary proof had not been offered; *Roark v. Greene*, 61 Kan. 299, 59 Pac. 655, holding that objection that hypothetical question assumes unproven facts must specify such facts; *Priest v. Robinson*, 64 Kan. 416, 67 Pac. 850, holding that objection to evidence must be specific.

31 AM. REP. 190, KANSAS C. R. CO. v. ALLEN, 22 KAN. 285, Later appeal in 24 Kan. 33.

View of premises in condemnation proceedings.

Cited in *Coughlen v. Chicago, I. & K. R. Co.* 36 Kan. 422, 13 Pac. 813, holding that order to allow jury to view premises is discretionary with court.

Cited in note in 92 A. D. 343, on inspection by court or jury of property or place in dispute and effect.

Right acquired by railroad by condemnation.

Cited in *Chicago & E. I. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223; *Quick v. Taylor*, 113 Ind. 540, 16 N. E. 588,—holding that right, acquired by railroad in condemnation proceedings, is generally only easement; *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 621, 69 A. S. R. 385, 52 N. E. 1008, holding that right to construct railroad includes subsidiary right to make necessary changes in roadbed and culverts; *Earlywine v. Topeka, S. & W. R. Co.* 43 Kan. 746, 23 Pac. 940, holding that railroad has right to remove only so much of soil as is necessary for construction and repair of road; *St. Onge v. Day*, 11 Colo. 368, 18 Pac. 278; *Illinois C. R. Co. v. Houghton*, 128 Ill. 233, 9 A. S. R. 581, 1 L.R.A. 213, 18 N. E. 301; *Missouri P. R. Co. v. Manson*, 31 Kan. 337, 2 Pac. 800; *Kansas C. R. Co. v. Jackson County*, 45 Kan. 716, 26 Pac. 394; *Atchison, T. & S. F. R. Co. v. Spaulding*, 69 Kan. 431, 105 A. S. R. 175, 66 L.R.A. 587, 77 Pac. 106, 2 A. & E. Ann. Cas. 546,—holding that railroad is entitled to uninterrupted and exclusive possession of all of its right of way; *Harvey v. Crane*, 85 Mich. 316, 12 L.R.A. 601, 48 N. W. 582, holding that rights of owner of easement are paramount to those of owner of land; *Canton v. Canton Cotton Warehouse Co.* 84 Miss. 268, 105 A. S. R. 428, 65 L.R.A. 561, 36 So. 260, holding that railroad has right to lay conduits under right of way; *Uhl v. Ohio River R. Co.* 51 W. Va. 106, 41 S. E. 340 (dissenting opinion), on whether grant of right of way passes fee, or easement only.

Cited in reference note in 93 A. D. 729, on interest acquired by condemnation of right of way.

Cited in notes in 1 L.R.A. 215, on right of way of railroad; 66 L.R.A. 38, as to whether railroad right of way is real estate or personal property; 66 L.R.A. 587, on right of railroad to keep trespassers from track or right of way.

Rights of owner of land condemned.

Cited in *Dillon v. Kansas City, Ft. S. & M. R. Co.* 67 Kan. 687, 74 Pac. 251, holding that owner has no concurrent right of possession with railroad of that portion of land in actual use by company; *Missouri, K. & N. W. R. Co. v.*

Schmuck, 69 Kan. 272, 76 Pac. 836, holding that owner of fee can take all minerals under right of way, except such as are necessary for surface support; Union P. R. Co. v. Kindred, 43 Kan. 134, 23 Pac. 112; Missouri, K. & T. R. Co. v. Watson, 74 Kan. 494, 14 L.R.A. (N.S.) 592, 87 Pac. 687,—holding that private individuals cannot acquire title by adverse possession to any portion of right of way, granted by government; Platt v. Pennsylvania Co. 43 Ohio St. 228, 1 N. E. 420, holding that owner, when easement only is taken, retains every right in land not inconsistent with railroad's paramount right; Beacon v. Pittsburgh, Y. & A. R. Co. 1 Pa. Dist. R. 618, holding that owner can conduct water from spring on right of way; Southern R. Co. v. Beaudrot, 63 S. C. 266, 41 S. E. 299, holding that owner has right to use right of way for any purpose not incompatible with easement; East Tennessee, V. & G. R. Co. v. Telford, 89 Tenn. 293, 10 L.R.A. 855, 14 S. W. 776, holding that owner may use land alongside track for agricultural purposes, so long as it is not required for railroad purposes; Northern Counties Invest. v. Enyard, 24 Wash. 366, 64 Pac. 516, holding that mere occupation of portion of right of way by owner of servient estate is not inconsistent with easement.

Cited in reference note in 105 A. S. R. 652, as to whether fee or easement is acquired in condemnation proceedings.

Cited in notes in 5 L.R.A. 373, on right of owners of abutting lots to enjoin use of street for railroad purposes; 8 L.R.A. 473, on easement and ownership of soil in highway.

— To crossing.

Cited in Atchison, T. & S. F. R. Co. v. Conlon, 62 Kan. 416, 53 L.R.A. 781, 63 Pac. 432, holding that owner is not entitled to crossing, when railroad acquires fee; Kansas City & E. R. Co. v. Kregelo, 32 Kan. 608, 5 Pac. 15; Atchison, T. & S. F. R. Co. v. Davenport, 65 Kan. 206, 69 Pac. 195; Missouri P. R. Co. v. Pfrang, 7 Kan. App. 1, 51 Pac. 911; Atchison, T. & S. F. R. Co. v. Conlon, 9 Kan. App. 116, 57 Pac. 1063; Atchison, T. & S. F. R. Co. v. Conlon, 8 Kan. App. 338, 61 Pac. 321; St. Louis, K. & N. W. R. Co. v. Clark, 121 Mo. 169, 26 L.R.A. 751, 25 S. W. 192; Gratz v. Lake Erie & W. R. Co. 76 Ohio St. 230, 81 N. E. 239,—holding that owner on both sides of track may maintain crossing, if done without interference with railroad's paramount right; Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82, 69 Pac. 1050, holding that use of crossing necessitating rearrangement of side-tracks, is inconsistent with use of easement by railroad; Watts v. Norfolk & W. R. Co. 39 W. Va. 196, 45 A. S. R. 894, 23 L.R.A. 674, 19 S. E. 521, holding that land owner may cross over or under railroad when railroad takes easement only.

Cited in note in 26 L.R.A. 754, on owner as entitled to crossing over railroad right of way.

Liability for injury from use of one's property.

Cited in Loveland v. Gardner, 79 Cal. 317, 4 L.R.A. 395, 21 Pac. 766, holding person liable for injury from negligent use of his property, though used for lawful purpose.

31 AM. REP. 194, ABELES v. COCHRAN, 22 KAN. 405.

Variation of written contract.

Cited in McMullen v. Carson, 48 Kan. 263, 29 Pac. 317, holding that court will not infer different agreement, when parties have reduced agreement to written contract.

Liability of officer on ultra vires contract.

Cited in *Watson v. Rickard*, 25 Kan. 662, holding that school director, making unauthorized purchase is not personally liable; *Merchants & P. Co. v. Streuby*, 91 Miss. 211, 124 A. S. R. 651, 44 So. 791, holding officer of corporation not personally liable on ultra vires contract made by him for corporation.

Cited in notes in 48 A. S. R. 916, on personal liability to third persons of officers of a corporation on an ultra vires contract; 6 L.R.A.(N.S.) 1005, on personal liability of officers or stockholders to other party to act or transaction in excess of corporate powers or in violation of law.

—Of bank.

Cited in *Thilmany v. Iowa Paper Bag Co.* 108 Iowa, 351, 75 A. S. R. 259, 79 N. W. 261, holding vice president not personally liable on guaranty by bank in excess of its powers; *Holt v. Winfield Bank*, 25 Fed. 812; *First Nat. Bank v. Commercial Nat. Bank*, 99 Tex. 118, 87 S. W. 1032,—holding that president without misrepresentation, performing act, which bank has no power to perform, is not personally liable.

Purchase of own stock by corporation.

Cited in *Fitzpatrick v. McGregor*, 133 Ga. 332, 25 L.R.A.(N.S.) 50, 65 S. E. 859, to the point that corporation cannot purchase its own stock.

Cited in notes in 33 A. S. R. 345, on corporation's power to purchase its own stock as affected by creditors' rights; 61 L.R.A. 626, on right of corporation to purchase its own shares of stock in absence of statutory authority.

Liability of directors for misconduct.

Cited in note in 53 A. D. 650, on right of creditors and others to enforce liability of directors for misconduct.

31 AM. REP. 198, EIKENBERRY v. BAZAAR TWP. 22 KAN. 556.**Liability of municipality, in absence of statute.**

Cited in *Rock Island Lumber & Mfg. Co. v. Elliott*, 59 Kan. 42, 51 Pac. 894, holding board of education not liable, in absence of statute, for breach of duty by officer; *Silver v. Clay County*, 76 Kan. 228, 91 Pac. 55; *Kearney County v. Williams*, 8 Kan. App. 850, 60 Pac. 1045, holding county not liable for negligence of its officers, in absence of statute.

—For injury by defective highways.

Cited in *Vail v. Amenia*, 4 N. D. 239, 59 N. W. 1092, holding township not liable, in absence of statute, for defective bridge; *Abbott v. Johnson County*, 114 Ind. 61, 16 N. E. 127; *Marion County v. Riggs*, 24 Kan. 255,—holding county not liable, in absence of statute, for injury from defective bridge; *Quincy Twp. v. Sheehan*, 48 Kan. 620, 29 Pac. 1084; *Reading Twp. v. Telfer*, 57 Kan. 798, 57 A. S. R. 355, 48 Pac. 134; *Cunningham v. Clay Twp.* 69 Kan. 373, 76 Pac. 907; *James v. Wellston Twp.* 18 Okla. 56, 13 L.R.A.(N.S.) 1219, 90 Pac. 100, 11 A. & E. Ann. Cas. 938,—holding township not liable for injuries from defective highways in absence of statute; *Shawnee County v. Jacobs*, 79 Kan. 76, 21 L.R.A.(N.S.) 209, 99 Pac. 817, holding county not liable for injury caused by negligent performance of work of constructing bridge.

Cited in notes in 10 L.R.A. 735, on municipal duty to keep streets and sidewalks in safe condition, and liability for failure to do so; 13 L.R.A.(N.S.) 1221, on common-law liability of townships for defects in highways.

Distinction between municipal corporations and quasi corporations.

Cited in *Travelers' Ins. Co. v. Oswego Twp.* 7 C. C. A. 669, 19 U. S. App. 321, 59 Fed. 58, holding constitutional provision, that legislature shall pass no special act conferring corporate powers, inapplicable to townships; *Freeland v. Stillman*, 49 Kan. 197, 30 Pac. 235, holding that term "municipal corporation" does not embrace school districts; *Rathbone v. Hopper*, 57 Kan. 240, 34 L.R.A. 674, 45 Pac. 610, holding that term "municipal corporation" includes townships.

31 AM. REP. 200, MOURIQUAND v. HART, 22 KAN. 594.**What constitutes part of homestead.**

Cited in *Linn v. Ziegler*, 68 Kan. 528, 75 Pac. 489, holding that anything to be part of homestead must be used in connection therewith.

Cited in reference note in 38 A. S. R. 510, on exemption as homestead of public gristmill adjoining owner's farm.

Cited in note in 70 A. D. 351, on extension of homestead right to adjacent or noncontiguous premises.

31 AM. REP. 203, KANSAS C. R. CO. v. FITZSIMMONS, 22 KAN. 686.**Who are trespassers.**

Cited in *Battishill v. Humphreys*, 64 Mich. 404, 31 N. W. 894, holding that girl, three years old, cannot be trespasser.

Liability for dangerous premises.

Cited in reference notes in 55 A. S. R. 287, on owner's duty and liability as to safety of buildings and walls; 56 A. R. 320, on liability of owner to licensee for injury from dangerous premises.

Cited in note in 59 A. R. 25, on recovery for injuries received by defendant's maintenance of dangerous machinery on premises.

Liability to trespasser.

Cited in *Wilmot v. McPadden*, 79 Conn. 367, 19 L.R.A.(N.S.) 1101, 65 Atl. 157, holding owner not liable for injury to child, playing in house that is being torn down; *O'Leary v. Brooks Elevator Co.* 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919, holding elevator company not liable for injury to boy from shaft running from engine house to elevator; *Central Branch Union P. R. Co. v. Henigh*, 23 Kan. 347, 33 A. R. 167, holding railroad not liable for injury to boy, unfastening brake on car standing on down grade; *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655, 59 A. R. 596, 14 Pac. 172, holding railroad liable for injury to boy, jumping off moving freight train at command of brakeman; *Indianapolis, P. & C. R. Co.* 109 Ind. 179, 58 A. R. 387, 6 N. E. 310; *Kansas P. R. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730,—holding railroad liable, where boy was discovered on track in time to prevent running over him; *Atchison, T. & S. F. R. Co. v. Plackett*, 47 Kan. 107, 26 Pac. 401, holding railroad not liable for injury to boy, climbing over freight train on crossing; *Gay v. Essex Electric Street R. Co.* 159 Mass. 238, 38 A. S. R. 415, 21 L.R.A. 448, 34 N. E. 186, holding railway not liable for injury, from unfastened brake, to boy, playing on cars standing in street; *Ryan v. Towar*, 128 Mich. 463, 92 A. S. R. 481, 55 L.R.A. 310, 87 N. W. 644, holding owner not liable for injury to infant from water-wheel, in rescuing her sister; *Schmidt v. Cook*, 4 Misc. 85, 23 N. Y. Supp. 799, 30 Abb. N. C. 285, holding owner liable for injury to child, playing

on dangerous rock; *Uthermohlen v. Bogg's Run Min. & Mfg. Co.* 50 W. Va. 457, 88 A. S. R. 884, 55 L.R.A. 911, 40 S. E. 410, holding mine owner not liable for injury to infant trespasser from cable, used to haul cars; *Johnson v. Paducah Laundry Co.* 122 Ky. 369, 5 L.R.A.(N.S.) 733, 92 S. W. 330 (dissenting opinion), on liability of land owner for injury to trespassers.

Cited in notes in 31 A. R. 210, on liability of owner of dangerous machinery for injury to trespassing child attracted thereby; 38 A. R. 637, on railroad's responsibility for negligence to trespasser; 49 A. S. R. 406, on contributory negligence of infant trespasser; 49 A. S. R. 418, on duty of owner of premises, to infant trespassing thereon; 49 A. S. R. 419, on liability for injury to child by dangerous machinery; 49 A. S. R. 415, on necessity for negligence on part of defendant in infant's action for injury; 19 L.R.A.(N.S.) 1116, on basis of liability for attractive nuisance.

Distinguished in *Chicago, K. & W. R. Co. v. Bockoven*, 53 Kan. 270, 36 Pac. 322, holding railroad not liable for injury to child, swinging on inside defective gate.

—For injury on turntable.

Cited in *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880, holding railroad liable for injury to child of foreman living on right of way, accustomed to play on turntable; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 26 A. S. R. 253, 13 L.R.A. 248, 28 N. E. 283; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 68 A. S. R. 727, 41 L.R.A. 831, 40 Atl. 682,—holding railroad not liable for injury to child on unprotected turntable near street; *Barrett v. Southern P. Co.* 91 Cal. 296, 25 A. S. R. 186, 27 Pac. 666; *York v. Pacific & N. R. Co.* 8 Idaho, 574, 69 Pac. 1042; *Chicago & E. R. Co. v. Fox*, 38 Ind. App. 268, 70 N. E. 81; *Edington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95; *Evansich v. Gulf, C. & S. F. R. Co.* 57 Tex. 123,—holding railroad liable for injury to child on unguarded, unfastened turn-table in public place near street.

Cited in reference note in 42 A. R. 418, on liability for injury to infant on turntable.

Cited in notes in 40 A. R. 668, on railroad's duty to children respecting turntables; 14 L.R.A. 783, on when liability of railways for injuries to children trespassing on turntables is recognized; 4 L.R.A.(N.S.) 81, on liability of railroad companies for injury to children playing on turntables.

Disapproved in *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 235, 122 A. S. R. 503, 19 L.R.A.(N.S.) 1136, 83 N. E. 66, 11 A. & E. Ann. Cas. 981, holding railroad not liable for injury to infant trespasser, playing, without its knowledge, on turntable; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 45 A. S. R. 615, 27 L.R.A. 724, 39 N. E. 1068, holding railroad not liable for injury to child on turntable near foot path used by public.

—For injury in excavation.

Cited in *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 54 L.R.A. 314, 39 S. E. 82, holding railroad not liable for drowning of boy in excavation for water-tank; *Pekin v. McMahon*, 154 Ill. 141, 45 A. S. R. 114, 27 L.R.A. 206, 39 N. E. 484 (affirming 53 Ill. App. 189), holding city liable for drowning of boy in uninclosed pond; *Price v. Atchison Water Co.* 58 Kan. 551, 62 A. S. R. 625, 50 Pac. 450, holding water-works company liable for drowning of boy in reservoir, resorted to by boys with company's permission; *Clark v. Richmond*, 83 Va. 355, 5 A. S. R. 281, 5 S. E. 369, holding municipality not liable for in-

jury to child from unguarded excavation, accessible only by leaving highway and trespassing on another's premises.

Negligence of infant as bar to recovery.

Cited in notes in 14 A. S. R. 595, on negligence of infant as bar to recovery for personal injuries; 21 L. ed. U. S. 745, on degree of care required from infants to avoid injury.

Imputed negligence.

Cited in note in 57 A. R. 478, on imputation of parent's negligence to child.

When negligence is a question for jury.

Cited in Illinois C. R. Co. v. Jones, 37 C. C. A. 106, 95 Fed. 370, holding that negligence of boy, driving over familiar crossing with view obstructed by cars, is question for jury; Krenzer v. Pittsburg, C. C. & St. L. R. Co. 151 Ind. 587, 68 A. S. R. 252, 52 N. E. 220 (dissenting opinion), on whether negligence of boy in sleeping off track is question for jury; Cincinnati & H. Spring Co. v. Brown, 32 Ind. App. 58, 69 N. E. 197, holding that negligence is question for jury, where child at play ran into barbed-wire fence; Atchison, T. & S. F. R. Co. v. Smith, 28 Kan. 541 (former appeal in 25 Kan. 738), holding railroad not liable, as matter of law, for injury to boy by coal car running down side track; Atchison, T. & S. F. R. Co. v. Townsend, 39 Kan. 115, 17 Pac. 804, holding that negligence of traveler, who stopped looking when he was seventy feet from crossing, is question for jury; Atchison, T. & S. F. R. Co. v. Calvert, 52 Kan. 547, 34 Pac. 976, holding that negligence of mother of child, wandering on track, is question for jury; Roach v. St. Joseph & I. R. Co. 55 Kan. 654, 41 Pac. 964 (dissenting opinion), on whether contributory negligence of person, driving on track, without looking, when train is due, is question for jury; Kinchlow v. Midland Elevator Co. 57 Kan. 374, 46 Pac. 703, holding that negligence is question for jury, where ten year old boy is scalded by falling into steam-exhaust barrel; Biggs v. Consolidated Barb-Wire Co. 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4, holding that contributory negligence of boy fourteen years old injured on shaft is question for jury; Kansas City, Ft. S. & M. R. Co. v. Campbell, 6 Kan. App. 417, 49 Pac. 817, holding that negligence is question for jury, where two loaded cars are sent unattended by brakeman, down steep grade against passenger cars.

Cited in notes in 17 L.R.A. 79; 3 L.R.A. 386,—on negligence of infant as question for jury.

31 AM. REP. 213, McBRATNEY v. CHANDLER, 22 KAN. 692.

Validity of contract.

Cited in Goodrich v. Tenney, 144 Ill. 422, 36 A. S. R. 459, 19 L.R.A. 371, 33 N. E. 44, holding that contract to procure for creditor's attorney affidavits that sale by debtor was fraudulent is void; Barber Asphalt Paving Co. v. Botsford, 56 Kan. 532, 44 Pac. 3, holding that employment of attorneys by paving company to convince city council and property owners is legal; William Deering & Co. v. Cunningham, 63 Kan. 174, 54 L.R.A. 410, 65 Pac. 263, holding agreement to withdraw opposition to, and to exercise influence to procure, pardon, void; Falk v. Ferd. Heim Brewing Co. 10 Kan. App. 248, 62 Pac. 716, holding contract for sale of liquor in violation of statute, void; Sweeney v. McLeod, 15 Or. 330, 15 Pac. 275, holding contract for lobby service void.

Cited in notes in 83 A. S. R. 185, on legal contracts between attorneys and clients; 117 A. S. R. 518, on enforceability of contracts tending to improperly

influence legislative bodies; 117 A. S. R. 520, on enforceability of contracts for services of one in close relations with officials; 30 L.R.A. 742, on validity of contract to procure legislation.

— **Partially illegal consideration.**

Cited in *Gerlach v. Skinner*, 34 Kan. 86, 55 A. R. 240, 8 Pac. 257, holding that entire contract is void, where it is indivisible and part of consideration is illegal; *Stroemer v. Van Orsdel*, 74 Neb. 132, 121 A. S. R. 713, 4 L.R.A. (N.S.) 212, 103 N. W. 1053, holding contract by attorney not necessarily void, because part of services is procurement of legislative action.

Cited in note in 4 L.R.A. 157, on divisibility of contracts partly valid and partly invalid.

Burden of proof as to legality of contract.

Cited in *Washer v. Bond*, 40 Kan. 84, 19 Pac. 323; *Merriman v. Cover*, 104 Va. 428, 51 S. E. 817,—holding burden upon person, seeking to avoid contract, to establish its illegality; *Houlton v. Nichol*, 93 Wis. 393, 57 A. S. R. 928, 33 L.R.A. 166, 67 N. W. 715, holding presumption that contract to procure opening of public lands to settlement is valid.

31 AM. REP. 216, ATCHISON, T. & S. F. R. CO. v. HAMMER, 22 KAN. 763.

Liability for obstruction of surface waters.

Cited in *Carroll v. Rye Twp.* 13 N. D. 458, 101 N. W. 894, holding township not liable for increased flow of surface water from improvement of highway; *Missouri P. R. Co. v. Keyes*, 55 Kan. 205, 49 A. S. R. 249, 40 Pac. 275, holding that landowner may obstruct flow of surface waters; *Singleton v. Atchison, T. & S. F. R. Co.* 67 Kan. 284, 72 Pac. 786, holding that obstruction of flow of water from river at flood times in depression in bank is *damnum absque injuria*; *Baldwin v. Ohio Twp.* 70 Kan. 102, 109 A. S. R. 414, 67 L.R.A. 642, 78 Pac. 424, holding that owner may divert surface water into stream without becoming liable to lower riparian owner; *Stith v. Louisville & N. R. Co.* 109 Ky. 168, 58 S. W. 600 (dissenting opinion), on liability of railroad for interrupting natural drainage of surface water by failing to keep culvert open; *Walker v. New Mexico & S. P. R. Co.* 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421; *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 621, 69 A. S. R. 385, 52 N. E. 1008; *Kansas City & E. R. Co. v. Riley*, 33 Kan. 374, 6 Pac. 581; *Chicago, K. & N. R. Co. v. Steck*, 51 Kan. 737, 33 Pac. 601; *Egener v. New York & R. B. R. Co.* 3 App. Div. 157, 38 N. Y. Supp. 319,—holding railroad not liable for injury from overflow of surface waters from obstruction by roadbed; *Norfolk & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517,—holding landowner liable for interference with flow of surface water in natural channel to injury of another's land; *Jordan v. Benwood*, 42 W. Va. 312, 57 A. S. R. 859, 36 L.R.A. 519, 26 S. E. 266, holding city not liable for diversion of surface water by change of grade of street; *Foreman v. Midland Valley R. Co.* 7 Ind. Terr. 478, 104 S. W. 806, holding railroad not liable because surface water flooded another's land on account of construction of its road; *Paola v. Garman*, 80 Kan. 702, 103 Pac. 83, to the point that owner of land may prevent surface water from coming on his premises.

Cited in reference note in 36 A. R. 492, on right of riparian owner to divert overflow of stream by building embankment.

Cited in notes in 85 A. S. R. 716-718, on right to diminish or impede flow

of surface water onto one's own land; 21 L.R.A. 601, on correlative rights as to obstruction of natural flow of surface water by improvements; 22 L.R.A.(N.S.) 794, on right of owner of lower as against upper landowner to obstruct surface water in natural channel; 41 L. ed. U. S. 840, on drainage of surface water.

31 AM. REP. 218, ELLERMAN v. McMAINS, 30 LA. ANN. 190.

Right of municipality over wharves.

Cited in *Ellerman v. Morgan's L. & T. R. & S. S. Co.* 34 La. Ann. 698, holding that city can claim compensation only when wharves used are her own property; *Watson v. Turnbull*, 34 La. Ann. 856, holding that city may place posts along river front to facilitate landing, fastening, etc., of boats; *Shreveport v. Red River & Coast Line*, 37 La. Ann. 562, 55 A. R. 504, holding charge for wharfage facilities, constitutional; *Louisiana Constr. & Improv. Co. v. Illinois C. R. Co.* 49 La. Ann. 527, 37 L.R.A. 661, 21 So. 891, holding ordinance, granting railroad exclusive use of wharves for ninety-nine years, unconstitutional.

Cited in note in 70 L.R.A. 200, 205, on rights of municipality to wharfage.

Legislative interference with property and franchises of municipalities.

Cited in note in 48 L.R.A. 490, on power of legislature as to property and franchises of municipalities.

31 AM. REP. 221, O'NEILL v. NEW ORLEANS, 30 LA. ANN. 220.

Liability of municipality for neglect of duty.

Cited in *Lemzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341, holding city liable for burning of property because of its failure to supply water.

Cited in note in 1 E. R. C. 622, on liability of municipal corporation neglecting to perform duty imposed by charter.

—As to highways.

Cited in *Aucoin v. New Orleans*, 105 La. 271, 29 So. 502, holding city under duty to keep sidewalks in safe condition, liable for injury to pedestrian, tripping over loose planks; *Cline v. Crescent City R. Co.* 41 La. Ann. 1031, 6 So. 851, holding municipality liable for injuries resulting from neglect to keep highways in safe condition; *Dotton v. Albion*, 50 Mich. 129, 15 N. W. 46, holding village liable for stumbling of woman, at night, in gap in cross-walk, while running for assistance in sickness; *Galveston v. Posmainsky*, 62 Tex. 118, 50 A. R. 517, holding city liable for fall of child into unguarded ditch along defective sidewalk.

Cited in reference notes in 2 A. S. R. 169, on obligation of municipal corporation to keep streets and highways in safe condition; 48 A. S. R. 857, on liability of municipal corporation for defective street.

Cited in notes in 30 A. S. R. 385, on municipal liability for negligence of officers and agents as to public streets; 108 A. S. R. 151,—on liability of municipal corporations for injuries from defective public places; 10 L.R.A. 731, on municipal duty to keep streets and sidewalks in safe condition, and liability for failure to do so; 20 L.R.A.(N.S.) 519, on liability of municipality for defects or obstructions in streets; 33 L. ed. U. S. 334, on liability of municipalities and individuals for obstructions or nuisances in street or want of repair thereof.

31 AM. REP. 224, FIRST PRESBY. CHURCH v. NEW ORLEANS, 30 LA. ANN. 259.

Exemption from taxation.

Cited in *Broadway Christian Church v. Com.* 112 Ky. 448, 66 S. W. 32, hold-

ing that church parsonage, which is rented, is not exempt from taxation; State v. American Sugar Ref. Co. 108 La. 603, 32 So. 965, holding sugar refiner exempt from license taxation; State ex rel. Board of Admrs. v. Board of Assessors, 35 La. Ann. 668, holding property used for revenue not exempt although revenue is to be applied wholly to support of college; State ex rel. Cunningham v. Orleans, 52 La. Ann. 223, 26 So. 872, holding institutions organized exclusively for charitable purposes, exempt from taxation.

Cited in note in 19 L.R.A. 290, on effect of secular use of property of religious association upon its right to exemption from taxation.

Validity of assessment.

Cited in Youngstown Bridge Co. v. Kentucky & I. Bridge Co. 64 Fed. 441, holding assessment not void, because board, by mistake, included property in adjoining state.

Recovery of money paid under compulsion.

Cited in notes in 45 A. D. 157, on kind of compulsion which will justify recovery of money paid under compulsion; 52 A. D. 638, on suits for money paid on judgments where defenses were concealed.

31 AM. REP. 226, McKNIGHT v. GRANT, 30 LA. ANN. 361.

Property subject to mechanic's lien.

Cited in reference note in 30 A. S. R. 308, on what property is subject to mechanics' lien.

—On public buildings.

Cited in Johnson v. Weinstock, 31 La. Ann. 698, holding that contractor can enforce lien, though soil owned partly by another than one contracted with; Schwartz v. Saiter, 40 La. Ann. 264, 4 So. 77, holding that contractor can assert lien on building constructed in public street; Pullis Bros. Iron Co. v. Natchitoches, 51 La. Ann. 1377, 26 So. 402, holding that materialmen can assert lien on courthouse; Lessard v. Revere, 171 Mass. 294, 50 N. E. 533, holding no lien for labor upon town school house.

Cited in reference notes in 78 A. D. 697; 72 A. S. R. 420,—on mechanics' liens on public buildings; 32 A. R. 136, on enforcement of mechanics' lien against county bridge; 33 A. R. 116, on right to mechanics' lien on public schoolhouse.

Cited in note in 35 L.R.A. 145, on mechanics' lien on public property.

31 AM. REP. 228, NEW ORLEANS v. DAVIDSON, 30 LA. ANN. 541.

Offset against claim of government.

Cited in Schmidt v. New Orleans, 33 La. Ann. 17, holding that sureties of sheriff not accounting for taxes collected by him, cannot set off judgment obtained by them against city; Moore v. Tate, 87 Tenn. 725, 10 A. S. R. 712, 11 S. W. 935, holding that unpaid coupons on state bonds cannot be set off against claim by state.

Nature of taxes.

Cited in Morris v. Lalaurie, 39 La. Ann. 47, 1 So. 659; Reed v. His Creditors, 39 La. Ann. 115, 1 So. 784, holding that taxes are not debts in ordinary acceptance of term, but contribution required from citizen for government.

31 AM. REP. 229, MONATT v. PARKER, 30 LA. ANN. 585.

Recovery of property given for immoral consideration.

Cited in Phelan v. Wilson, 114 La. 813, 38 So. 570, holding that grantor of

property in consideration of withdrawal of criminal prosecution, cannot recover property from grantee of grantee; *Platt v. Elias*, 186 N. Y. 374, 116 A. S. R. 558, 11 L.R.A.(N.S.) 554, 70 N. E. 1, 9 A. & E. Ann. Cas. 780, holding that money paid in consideration of illicit sexual intercourse cannot be recovered.

31 AM. REP. 232, NEW ORLEANS v. MECHANICS' & T. INS. CO. 30 LA. ANN. 876.

Property subject to taxation.

Cited in *San Francisco v. Spring Valley Waterworks*, 63 Cal. 524, holding that corporation is not liable for taxes upon its capital stock, when all its stock is owned by third persons; *State ex rel. Da Ponte v. Board of Assessors*, 35 La. Ann. 651 (dissenting opinion), on whether municipal bonds are taxable; *State ex rel. Mechanics' & T. Ins. Co. v. Board of Assessors*, 47 La. Ann. 1498, 18 So. 462, holding that stock of manufacturing corporation owned by insurance company is taxable; *State v. Carson City Sav. Bank*, 17 Nev. 146, 30 Pac. 703, holding that money at interest, secured by mortgage, is taxable; *Fishburn v. Londershausen*, 50 Or. 363, 14 L.R.A.(N.S.) 1234, 92 Pac. 1060, 15 A. & E. Ann. Cas. 975, holding that "property" means anything of exchangeable value and includes chattels, things in action, and evidence of debt.

31 AM. REP. 234, STATE v. ROLLE, 30 LA. ANN. 991.

Uniformity of taxation.

Cited in *Amador County v. Kennedy*, 70 Cal. 458, 11 Pac. 757, holding that ordinance is not invalid because it fixes less rate of license for watering place than for city; *Plaquemines v. Bowman*, 30 La. Ann. 1403, holding that different license taxes on different classes and occupations are not unconstitutional; *Pleuler v. State*, 11 Neb. 547, 10 N. W. 481, holding that rule of uniformity is satisfied if duly observed as to each jurisdiction for whose use particular taxes are levied.

Cited in notes in 4 L.R.A. 809, on rule of uniformity as to taxation; 30 L.R.A. 419, on constitutional provisions requiring equality and uniformity in license fees.

License fee as tax.

Cited in note in 4 L.R.A. 810, as to whether license fees are taxes.

31 AM. REP. 236, STATE v. TILMAN, 30 LA. ANN. 1249.

What constitutes rape of young child.

Cited in *Coates v. State*, 50 Ark. 330, 7 S. W. 304; *State v. Miller*, 42 La. Ann. 1186, 21 A. S. R. 418, 8 So. 309; *State v. Mehojovich*, 118 La. 1013, 43 So. 600,—holding that carnal knowledge of female under age of twelve years constitutes rape.

Cited in reference note in 21 A. S. R. 421, on rape of girl under age of consent.

Cited in note in 80 A. D. 374, on carnal knowledge of young children.

31 AM. REP. 238, WHITE v. HEFFNER, 30 LA. ANN. 1280.

Exemption of partnership property from levy.

Cited in *Porch v. Arkansas Mill. Co.* 65 Ark. 40, 67 A. S. R. 895, 45 S. W. 51, holding that partner cannot, while partnership continues, claim as exempt

to him property belonging to firm; *Cowan v. Their Creditors*, 77 Cal. 403, 11 A. S. R. 294, 19 Pac. 755, holding no part of partnership property not exempt from sale on execution.

Cited in reference notes in 38 A. R. 232, on partner's right to exemption where levy is made of partnership goods; 1 A. S. R. 593, on partners' right to claim benefit of exemption law as to partnership property; 11 A. S. R. 297, on exemptions of partnership property.

Cited in note in 1 A. S. R. 594, on exemption from execution of property of partners and cotenants, including both personal and homestead exemptions.

31 AM. REP. 240, PERRET v. KING, 30 LA. ANN. 1368.

Contribution between wrongdoers.

Cited in Townshend, *Slander and Libel*, 4th ed. p. 536, on right to contribution between parties guilty of libel.

31 AM. REP. 243, ALLEN v. MERCHANTS' MUT. INS. CO. 30 LA. ANN. 1386.

Avoidance of policy by subsequent insurance.

Cited in *Phœnix Ins. Co. v. Copeland*, 90 Ala. 386, 8 So. 48, holding policy avoided by other insurance, which requires resort to extrinsic evidence to show its invalidity; *American Ins. Co. v. Replogle*, 114 Ind. 1, 15 N. E. 810, holding that subsequent policy void on its face does not avoid prior policy; *Commercial Union Assur. Co. v. Norwood*, 57 Kan. 610, 47 Pac. 529, holding that procuring additional insurance in excess of amount authorized avoids policy; *Sweeting v. Mutual F. Ins. Co.* 83 Md. 63, 32 L.R.A. 570, 34 Atl. 826, holding policy not avoided by subsequent invalid insurance; *Turner v. Meridan F. Ins. Co.* 16 Fed. 454; *Donogh v. Farmers' F. Ins. Co.* 104 Mich. 503, 62 N. W. 721; *Funke v. Minnesota Farmers' Mut. F. Ins. Asso.* 29 Minn. 347, 43 A. R. 216, 13 N. E. 164,—holding policy avoided by subsequent invalid insurance; *Royal Ins. Co. v. McCrea*, 8 Lea, 531, 41 A. R. 656, holding policy avoided by subsequent insurance, though policies, contemporaneous with first, also avoided, reducing amount within additional insurance allowed by first.

Cited in reference notes in 35 A. R. 601, on applicability of condition against other insurance to subsequent insurance voidable for breach of condition; 4 A. S. R. 123, as to whether subsequent void insurance is breach of condition against further insurance.

Cited in notes in 28 A. D. 125 on liabilities of successive insurers; 43 A. R. 221, on what constitutes other insurance within condition in insurance policy; 14 E. R. C. 29, on rules of construction of contracts of insurance.

31 AM. REP. 246, PARSHLEY v. HEATH, 69 ME. 90.

Waiver by indorsers of demand and notice.

Cited in *Portsmouth Sav. Bank v. Wilson*, 5 App. D. C. 8; *Johnson v. Parker*, 86 Mo. App. 660,—holding indorsers, after indorsement by payee under waiver of demand and notice, bound by waiver.

Cited in note in 29 L.R.A. 315, on effect of statute on waiver of failure to give notice of dishonor.

Effect of indorsement in blank.

Cited in reference note in 57 A. S. R. 256, on effect of indorsement of note in blank.

31 AM. REP. 248, BERRY v. PULLEN, 69 ME. 101.**Validity of extension of time of payment.**

Cited in *Foster v. Furlong*, 8 N. D. 282, 78 N. W. 986, holding that payment cannot be extended by oral agreement, based entirely upon debtor's oral promise to pay consideration therefor at some future time.

Discharge of surety.

Cited in note in 55 A. S. R. 875, on release of surety.

— By extension of time of payment.

Cited in *Lemmon v. Whitman*, 75 Ind. 318, 39 A. R. 150, holding that agreement of extension in consideration of payment of usurious interest releases surety; *Turner v. Williams*, 73 Me. 466, holding that parol agreement of extension in consideration of payment of eight per cent interest does not discharge surety; *National Bank v. Dow*, 79 Me. 275, 9 Atl. 730, holding that promise to carry overdue note thirty to sixty days is not contract of extension discharging sureties; *Thorn v. Pinkham*, 84 Me. 101, 30 A. S. R. 335, 24 Atl. 718, holding surety not discharged by agreement to give time on condition to be performed by principal unless condition is performed; *Smith v. Bibber*, 82 Me. 34, 17 A. S. R. 464, 19 Atl. 89; *Soule v. Michigan State Ins. Co.* 51 Mich. 312, 16 N. W. 662,—holding that discharge of surety results from contract for extension and not merely from forbearance to collect debt; *Bank of British Columbia v. Jeffs*, 15 Wash. 230, 46 Pac. 247, holding surety not released by agreement for extension too indefinite to be enforceable.

Cited in reference note in 35 A. R. 585, on surety's discharge by indulgence to principal.

Cited in note in 53 L.R.A. 321, 323, on effect of contract to pay usury in consideration of extension of time to principal on surety's liability.

Setting aside verdict as against law.

Cited in *Pierce v. Rodcliff*, 95 Me. 346, 50 Atl. 32, holding that verdict may be set aside as against law, upon motion, for erroneous charge, though no exception is taken.

31 AM. REP. 251, BELL v. PACKARD, 69 ME. 105.**Law governing contracts.**

Cited in *Howard Ins. Co. v. Silverberg*, 36 C. C. A. 549, 94 Fed. 921 (affirming 89 Fed. 168), denying validity of appeal bond, under statute concerning foreign instruments, signed in California, but filed in New York; *Emerson Co. v. Proctor*, 97 Me. 360, 54 Atl. 849, denying validity of contract signed and mailed, by corporation, in Maine, for failure to record as required by statute; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102, sustaining validity, under Louisiana statute, of undertaking, on appeal bond signed there, executed and delivered in New York where void; *Ross v. Ross*, 129 Mass. 243, 37 A. R. 321, allowing inheritance to child legally adopted under Pennsylvania statute similar to Massachusetts except as to consent of mother required by latter.

Cited in reference note in 34 A. R. 635, on *lex loci contractus* as governing agreement.

Cited in notes in 46 A. S. R. 448, 449, on law of place of contract; 73 A. S. R. 752, on conflict of laws as to usury in loan by building and loan associations; 5 E. R. C. 867, on universal validity of contract valid where made.

—Notes generally.

Cited in *McGarry v. Nicklin*, 110 Ala. 559, 55 Am. St. Rep. 40, 17 So. 726, holding valid renewal note dated and signed by resident, void, by altering conditions, under Tennessee statute where payable; *United States Sav. & L. Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006, holding resident liable on note to foreign corporation failing to comply with required local statutory regulation.

Cited in reference note in 27 A. S. R. 782, on place of contract of negotiable instrument.

—Notes of married woman.

Cited in *Bowles v. Field*, 78 Fed. 742, sustaining validity of notes signed as surety by wife in Ohio, where statute permits, although domiciled in Indiana where statute prohibits; *Haseltine v. Whitney*, 38 Pittsb. L. J. N. S. 325, holding liability of married woman as accommodation maker of note, endorsed delivered and discounted in another state, governed by laws of such state; *Garrigue v. Keller*, 164 Ind. 676, 108 A. S. R. 324, 69 L.R.A. 870, 74 N. E. 523, holding that note executed by wife as surety in state where valid, payable in another state where void, is governed by laws of former state; *Voight v. Brown*, 42 Hun, 394, sustaining liability of resident wife authorizing signature to note while in Connecticut where disqualified and payable there and discounted in New York; *Robison v. Pease*, 28 Ind. App. 670, 63 N. E. 479, holding married woman liable as surety on note executed in Indiana, where prohibited, given in payment of bond on which she was surety received by principal in Ohio, where she would be liable; *Union Nat. Bank v. Chapman*, 52 App. Div. 57, 64 N. Y. Supp. 1053, 169 N. Y. 538, 88 A. S. R. 614, 57 L.R.A. 513, 62 N. E. 672, holding married woman liable, as surety on note invalid in Alabama, where signed and delivered with assumed knowledge of its discount by maker in Illinois where valid; *F. B. Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 385, sustaining validity of note signed by resident married woman in Missouri for accommodation of son in Indiana where invalid, indorsed to and credited by Missouri firm, where valid; *First Nat. Bank v. Shaw*, 109 Tenn. 237, 97 A. S. R. 840, 59 L.R.A. 498, 70 S. W. 807, denying liability of wife on note, payable and delivered in Ohio where she would be liable, on ground of repugnance to Tennessee statute, allowing coverture as defense.

—Contracts of married woman generally.

Cited in *First Nat. Bank v. Mitchell*, 34 C. C. A. 542, 92 Fed. 565 (reversing 84 Fed. 90), sustaining liability of wife living and signing guaranty in Connecticut, where disqualified, dated and previously signed by other, and for use at, Chicago where she qualified; *Walling v. Christian & C. Grocery Co.* 41 Fla. 479, 47 L.R.A. 608, 27 So. 46, denying application of laws of Alabama constituting married woman a free dealer to her real estate in Florida after moving there.

Cited in notes in 85 A. S. R. 567, 571; 57 L.R.A. 513, 514; 26 L.R.A.(N.S.) 772,—on conflict of laws as to capacity of married women to contract.

Place of contract.

Cited in notes in 99 A. D. 699, on place where assent to proposal is mailed as place of contract; 99 A. D. 672, on where negotiable instruments are deemed to have been made; 55 A. S. R. 47, on place of contract made by letters and telegrams; 55 A. S. R. 48, on place of contract of guaranty.

31 AM. REP. 253, DAVIDSON v. PORTLAND, 69 ME. 116.**Violation of statute as defense to negligence.**

Cited in *Reed v. Missouri P. R. Co.* 50 Mo. App. 504, holding stacking of hay in violation of statute, no defense to negligent burning thereof.

Cited in reference notes in 4 A. S. R. 361, on violation of law directly contributing to injury as bar to recovery; 11 A. S. R. 620, on recovery of damages for negligence by one who was violating law when injured.

— Violation of Sunday law.

Cited in *Sullivan v. Maine C. R. Co.* 82 Me. 196, 8 L.R.A. 427, 19 Atl. 169, holding riding on Sunday for exercise, no defense to action for injury from defective track; *Cleveland v. Bangor*, 87 Me. 259, 47 A. S. R. 326, 32 Atl. 892, holding walking on Sunday to promote health, no defense to action for injury from defective trolley pole; *Beachem v. Portsmouth Bridge*, 68 N. H. 382, 73 A. S. R. 607, 40 Atl. 1066, holding that person, traveling for pleasure on Lord's day, cannot recover for injuries from defective highway.

Cited in reference note in 35 A. R. 402, on owner's liability for vicious act of dog to injury of person traveling on Sunday.

Cited in notes in 47 A. S. R. 335, on injury on Sunday by defective highway; 21 L.R.A.(N.S.) 670, on violation of law as affecting municipal liability for defects and obstructions in streets.

Application of Sunday laws.

Cited in reference note in 30 A. S. R. 28, on what work may be done on Sunday.

Cited in note in 30 L.R.A.(N.S.) 469, on amusements prohibited by Sunday laws.

31 AM. REP. 255, GILMORE v. WOODCOCK, 69 ME. 118, Later appeal in 70 Me. 494.**Recovery of money given for illegal purpose.**

Cited in *Brown v. Tuttle*, 80 Me. 162, 13 Atl. 583, holding money, given by woman towards expenses of living with man without prior marriage, not recoverable.

Cited in note in 6 E. R. C. 490, on right of party to recover money paid under an illegal contract

— From stakeholder.

Cited in *Turner v. Thompson*, 107 Ky. 647, 55 S. W. 210, holding stake recoverable from stakeholder who was notified before delivering to winner not to pay it over; *Dauler v. Hartley*, 178 Pa. 23, 35 Atl. 857, holding that stake can be recovered from stakeholder before payment to winner.

Cited in reference note in 26 A. S. R. 420, on recovery of wager from stakeholder.

Cited in notes in 18 L.R.A. 863, on liability of stakeholders; 37 A. S. R. 700, on validity and enforceability of wagers.

31 AM. REP. 257, STATE v. GILMAN, 69 ME. 163.**What constitutes assault with intent to murder.**

Cited in *Peterson v. State*, 41 Fla. 285, 26 So. 709, holding person shooting toward captain of boat, refusing to stop, guilty of assault with intent to murder.

Cited in reference notes in 31 A. S. R. 576; 51 A. R. 686; 120 A. S. R. 681,—on assault with intent to kill by unlawfully firing at one person and hitting another.

Cited in notes in 7 L.R.A.(N.S.) 631, on charging assault with intent to kill when actual intent is directed against another; 41 L. ed. U. S. 481, on assault with intent to kill or murder.

Responsibility for natural consequences of one's acts.

Cited in Pittsburgh, C. C. & St. L. R. Co. Ferrell, 39 Ind. App. 515, 78 N. E. 988 (dissenting opinion), on responsibility for death resulting from reckless running of locomotive; State v. Lang, 65 N. H. 284, 23 Atl. 432, holding person committing assault, responsible for natural and probable consequences.

Cited in reference notes in 36 A. R. 8, on criminal liability of one who while assaulting one wounds another; 52 A. R. 209, on criminal liability for intending to injure one and injuring another.

Cited in note in 3 L.R.A. 645, on homicide through carelessness and negligence.

Presumption that natural consequences of act were intended.

Cited in State v. Baldes, 133 Iowa, 158, 110 N. W. 440, holding presumption that accused intended death resulting from assault upon one afflicted with heart trouble; State v. Hersom, 90 Me. 273, 38 Atl. 160, holding presumption that person intends natural consequences of his act inapplicable, where accused threw rock at complainant and missed him.

Cited in note in 11 L.R.A. 811, on presumption as to natural consequences of acts to establish intent to commit crime.

31 AM. REP. 262, PARKER v. PORTLAND PUB. CO. 69 ME. 173.

Liability for negligent injury.

Cited in reference note in 96 A. D. 456, on duty of owners of business places to keep them and passageways thereto safe; 31 A. R. 350, on liability of owner of dangerous premises; 48 A. R. 727, on liability for excavation adjoining street; 8 A. S. R. 615, on duty of person seeking access to a place of business to use ordinary care.

Cited in notes in 87 A. D. 662, on liability of owner for injuries to persons coming on his premises; 87 A. D. 663, 664, on liability of owner for injuries to others from defective approaches; 87 A. D. 665, on liability of owner of building for injury to others from elevators; 34 A. R. 236, on liability for injury through dangerous premises; 5 L.R.A. 581, on liability of owner of private premises for neglect to keep them in repair; 24 L.R.A.(N.S.) 246, on negligence in walking through doorway leading to place of danger.

—To licensee.

Cited in Grundel v. Union Iron Works, 141 Cal. 564, 75 Pac. 184, holding owner of vessel not liable for injury to licensee from slipping of gang plank; Crane Co. v. Sobkowicz, 131 Ill. App. 211, holding owner not liable to person invited to come for employment, for injury from sudden jerk of elevator; Woodruff v. Bowen, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113, holding owner not liable to firemen for collapse of building; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369, holding that licensee cannot recover for fall into open hole in earth, at night; Glaser v. Rothschild, 221 Mo. 180, 22 L.R.A.(N.S.) 1045, 120 S. W. 1, 17 A. & E. Ann. Cas. 576, holding that licensee to invitee does not give him right to roam at will to out-of-way places, in no way pertaining.

Am. Rep. Vol. XVII.—22.

ing to business; *Cusick v. Adams*, 115 N. Y. 55, 12 A. S. R. 772, 21 N. E. 673, holding owner not liable for injury to licensee from defective private bridge to highway; *Beehler v. Daniels*, 18 R. I. 563, 49 A. S. R. 790, 27 L.R.A. 512, 29 Atl. 6, holding owner not liable to member of fire department for injury from falling into unguarded elevator well; *Peake v. Buell*, 90 Wis. 508, 48 A. S. R. 946, 63 N. W. 1053, holding owner not liable to invited person for injury from elevator while looking through unguarded open window into elevator shaft; *Barowski v. Schulz*, 112 Wis. 415, 88 N. W. 236, holding defendant liable to repairer for injury from falling through open, unguarded hatchway.

Cited in reference notes in 1 A. S. R. 490, on liability of landowner for injuries to persons coming on premises; 15 A. S. R. 375, on liability of owner of premises for injury to persons lawfully thereon.

Cited in note in 19 E. R. C. 101, on duty of owner or occupant of premises to warn guest of danger to be avoided.

Distinguished in *Call v. Portsmouth, K. & Y. Street R. Co.* 69 N. H. 562, 45 Atl. 405, holding negligence of railroad in selecting unsuitable place for reception of passenger question for jury.

— To trespasser.

Cited in *Means v. Southern California R. Co.* 144 Cal. 473, 77 Pac. 1001, 1 A. & E. Ann. Cas. 206, holding railroad not liable for injury to boy having no business in freight depot, from bursting of sulphuric acid tank; *North Chicago Street R. Co. v. Thurston*, 43 Ill. App. 587, holding that newsboy injured while clinging upon front platform, from car running off track, cannot recover; *Gwynn v. Duffield*, 68 Iowa, 708, 55 A. R. 286, 24 N. W. 523, holding druggist not liable to one helping himself to medicine and by mistake taking poison; *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761, holding owner not liable for fall into uncovered tank of person calling to see employee; *McClain v. Caribou Nat. Bank*, 100 Me. 437, 62 Atl. 144, holding bank not liable for injury upon its rollway to person going to fire at night; *Metcalf v. Cunard S. S. Co.* 147 Mass. 66, 16 N. E. 701, holding that person, going on ship in search of surgeon, cannot recover for injury from being struck by merchandise being loaded on vessel; *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 31 A. S. R. 520, 14 L.R.A. 276, 28 N. E. 1133, holding that pedestrian taking short cut across station platform cannot recover for fall into unguarded hole; *Plummer v. Dill*, 156 Mass. 526, 32 A. S. R. 463, 31 N. E. 128, holding that woman entering building to make inquiries cannot recover for striking head on projecting sign; *Shaw v. Goldman*, 116 Mo. App. 332, 92 S. W. 165, holding that customer, going through private room where he fell into elevator shaft, cannot recover; *Grant v. Hass*, 31 Tex. Civ. App. 688, 75 S. W. 342, holding owner liable to trespasser for injury from spring gun; *Woolwine v. Chesapeake & O. R. Co.* 36 W. Va. 329, 32 A. S. R. 859, 16 L.R.A. 271, 15 S. E. 81, holding that railroad owes no duty to visitor, without invitation, calling upon telegraph operator to keep premises safe.

Cited in reference note in 73 A. S. R. 303, on duty towards passengers of keeping premises safe.

Cited in note in 87 A. D. 667, on liability of owner of land for injuries to trespassers and licensees.

— Contributory negligence.

Cited in *Onderdonk v. Smith*, 23 Blatchf. 562, 27 Fed. 874, holding barge,

remaining in slip five hours after loading, cannot recover for being punctured by spile in bottom of slip; *Campbell v. Lunsford*, 83 Ala. 512, 3 So. 522, holding that licensee cannot recover for injury from falling of brick wall, caused by his stepping on supporting timber; *Schmidt v. Bauer*, 80 Cal. 565, 5 L.R.A. 580, 22 Pac. 256, holding customer of saloon unnecessarily going through private apartments to urinal guilty of contributory negligence; *Dailey v. Distler*, 115 App. Div. 102, 100 N. Y. Supp. 679, holding hotel guest, groping along dark hallway, guilty of contributory negligence.

Cited in note in 9 L.R.A. 643, on contributory negligence as defeating recovery.

Admissibility of evidence of collateral facts.

Cited in *Golden Reward Min. Co. v. Buxton Min. Co.* 38 C. C. A. 228, 97 Fed. 413, holding evidence tending to confuse jury and protect trial by raising collateral issues, inadmissible; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 3 A. S. R. 245, 3 S. W. 808, holding that evidence of defect must be confined to time, place and circumstances of injury; *Peoria & P. U. R. Co. v. Clayberg*, 107 Ill. 644; *Damren v. Traak*, 102 Me. 39, 65 Atl. 513,—holding that negligence on certain other specified occasions has no legitimate bearing upon negligence in controversy; *Bryant v. Great Northern Paper Co.* 103 Me. 32, 68 Atl. 379, holding evidence of witnesses that they failed to observe change made in direction of motion of shaft in admissible in action for injury therefrom; *Stoher v. St. Louis, I. M. & S. R. Co.* 91 Mo. 509, 4 S. W. 389, holding that evidence as to condition of roadbed one, two, and three years after accident, is too remote, *Lipscomb v. Seegers*, 22 S. C. 407, holding evidence admissible to show negligence by defendant during time convicts were in his possession, but not at other times, in action for their escape; *Snowden v. Pleasant Valley Coal Co.* 16 Utah, 366, 52 Pac. 599, holding evidence of defendant's negligence at another time and place inadmissible in action for injury in mine; *Provencher v. Moore*, 105 Me. 87, 72 Atl. 880, holding that answers to collateral inquiries on cross examination cannot be contradicted by party inquiring.

Cited in note in 11 E. R. C. 244, on admissibility of facts collateral to the issue.

—Similar occurrences.

Cited in *Holy Cross Gold Min. & Mill. Co. v. O'Sullivan*, 27 Colo. 237, 60 Pac. 570, holding incompetent to show that in other mines missed shots had always been detected and removed without explosion; *Savannah, F. & W. R. Co. v. Flannagan*, 82 Ga. 579, 14 A. S. R. 183, 9 S. E. 471, holding that reception of evidence of habitual high speed of same engine at same place, though of doubtful admissibility, is not error; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 A. R. 692, 13 N. W. 735, holding evidence of former accident at same place incompetent in action for defective railroad crossing; *Burbank v. Bethel Steam Mill Co.* 75 Me. 373, 46 A. R. 400, holding inadmissible in action for burning of property to show that it caught fire in prior year; *Branch v. Libbey*, 78 Me. 321, 57 A. R. 810, 5 Atl. 71, holding evidence inadmissible to prove that other persons passed safely over alleged defect; *Agulino v. New York, N. H. & H. R. Co.* 21 R. I. 203, 43 Atl. 63, holding evidence of similar experiences of other passengers inadmissible, in action for injury from sudden movement of train; *Sullivan v. Salt Lake City*, 13 Utah, 122, 44 Pac. 1039, holding evidence that cars crushed against gravel bank before inadmissible, in

action for injury so received; *Phillips v. Willow*, 70 Wis. 6, 5 A. S. R. 114, 34 N. W. 731, holding evidence of similar accidents inadmissible in action for overturning of cutter by stone in highway.

Cited in reference notes in 40 A. R. 614, on admissibility of evidence of other accidents from same cause; 1 A. S. R. 632; 21 A. S. R. 332,—on evidence of previous accidents.

31 AM. REP. 268, BOYD v. CARLTON, 69 ME. 200.

Assignment of dower.

Cited in *Skolfield v. Skolfield*, 88 Me. 258, 34 Atl. 27, holding that dower must be assigned of such portion of each separate parcel as will produce one-third of net income of whole.

Cited in notes in 39 A. S. R. 37, on assignment of dower out of lands which husband has alienated; 34 L. ed. U. S. 827, on right to dower.

31 AM. REP. 273, KELLOGG v. CURTIS, 69 ME. 212.

Notice of defects in note.

Cited in *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316, holding that question is whether indorsee in fact knew fraud or acted in bad faith in abstaining from inquiry; *Cooper v. Merchants' & M. Nat. Bank*, 25 Ind. App. 341, 57 N. E. 569 (dissenting opinion), to the point that notice must be actual notice; *Knapp v. Bailey*, 79 Me. 195, 1 A. S. R. 295, 9 Atl. 122, holding higher grade of evidence necessary to prove actual notice appertaining to commercial paper than to conveyances; *Pape v. Hartwig*, 23 Ind. App. 333, 55 N. E. 271; *Redlon v. Churchill*, 73 Me. 146, 40 A. R. 345; *Breckenridge v. Lewis*, 84 Me. 349, 30 A. S. R. 353, 24 Atl. 864,—holding it insufficient that facts would put prudent man on his guard, if holder had no actual knowledge of fraud.

Cited in reference note in 3 A. S. R. 245, on possession of note as evidence of bona fide holding.

Cited in note in 29 L.R.A.(N.S.) 391, on what circumstances sufficient to put purchaser of negotiable paper on inquiry.

—Burden of proof as to.

Cited in *Market & F. Nat. Bank v. Sargent*, 85 Me. 349, 35 A. S. R. 376, 27 Atl. 192, holding that burden is prima facie sustained by proof that note was discounted in usual course of business; *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867; *Wood v. McKean*, 64 Iowa, 16, 19 N. W. 817; *Hobart v. Penny*, 70 Me. 248; *Wing v. Ford*, 89 Me. 140, 35 Atl. 1023,—holding that burden is prima facie sustained by proof of indorsement for value before maturity; *American Exch. Nat. Bank v. Oregon Pottery Co.* 55 Fed. 265; *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454, 3 A. S. R. 241, 3 S. W. 805; *Jordan v. Grover*, 99 Cal. 194, 33 Pac. 889; *Owens v. Snell*, 29 Or. 483, 44 Pac. 827,—holding that burden is upon indorsee to show that he is bona fide holder, if maker proves fraud.

Cited in reference notes in 63 A. D. 634, on when holder is put to proof of bona fides; 17 A. S. R. 590, on burden of proof as against bona fide holder, in cases where fraud is shown; 11 A. S. R. 324, on burden of proof as to bona fide ownership of negotiable instrument.

Transfer in usual course of business.

Cited in *Evans v. Speer Hardware Co.* 65 Ark. 204, 67 A. S. R. 919, 45 S. W. 370, holding that indorsement without recourse of accommodation note by

payee is in ordinary course of business; *Christianson v. Farmers' Warehouse Asso.* 5 N. D. 438, 32 L.R.A. 730, 67 N. W. 300, holding that purchase of note before maturity for value is in ordinary course of business.

31 AM. REP. 276, PEARSON v. PORTLAND, 69 ME. 278.

Equal protection of laws.

Cited in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, holding act allowing attorney's fee to successful claimant against railroad unconstitutional; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609 (dissenting opinion), on constitutionality of allowance of attorney's fee to successful plaintiff in action against railroad for damages by fire; *Railroad Tax Cases*, 8 Sawy. 238, 13 Fed. 722, holding that "equal protection of laws" forbids unequal taxation; *State v. Haun*, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340, holding scrip law unconstitutional; *State v. Montgomery*, 94 Me. 192, 80 A. S. R. 386, 47 Atl. 165, holding peddlers' Act, restricting license to citizens, unconstitutional; *State v. Mitchell*, 97 Me. 66, 94 A. S. R. 481, 53 Atl. 887, holding discrimination in peddlers' act as to license fees, based on amount of taxes paid, unconstitutional; *Com. v. Hand*, 195 Mass. 262, 122 A. S. R. 251, 11 L.R.A.(N.S.) 799, 81 N. E. 149, 11 A. & E. Ann. Cas. 514, holding that statute restricting pedler's license to person who is, or has declared intention to become, a citizen, is constitutional.

Cited in reference note in 78 A. S. R. 34, on unjust discrimination.

31 AM. REP. 278, BLAISDELL v. HIGHT, 69 ME. 306.

Construction of will.

Cited in *Chapman v. Chick*, 81 Me. 109, 16 Atl. 407, holding that word "property" may include real estate; *Young v. Quimby*, 98 Me. 167, 56 Atl. 656, holding that title of heir must prevail if it is uncertain whether testator intended to devise realty.

Distinguished in *Grant v. Bodwell*, 78 Me. 460, 7 Atl. 12, holding that residuary clause passes money recovered on claim after testator's death.

31 AM. REP. 281, RANDALL v. MARBLE, 69 ME. 310.

Validity of condition subsequent.

Cited in *Kennedy v. Alexander*, 21 App. D. C. 424, holding that condition in restraint of marriage, without limitation over, is void; *Wakefield v. Van Tassel*, 202 Ill. 41, 95 A. S. R. 207, 65 L.R.A. 511, 66 N. E. 830, holding condition that no grain elevator shall be built on lots valid; *Mann v. Jackson*, 84 Me. 400, 30 A. S. R. 358, 16 L.R.A. 707, 24 Atl. 886, holding condition in restraint of marriage valid when there is valid limitation over; *Smith v. Barrie*, 56 Mich. 314, 56 A. R. 391, 22 N. W. 816, holding that condition defeating conveyance if liquor is sold on premises is valid; *Portland v. Terwilliger*, 16 Or. 465, 19 Pac. 90, holding that condition that part of land be used as cemetery, when such use is prohibited by ordinance, is void; *Webster v. Morris*, 66 Wis. 366, 57 A. R. 278, 28 N. W. 353, holding condition that legatee learn useful trade and be of good moral character, valid.

Cited in notes in 44 A. R. 745, on illegality or impossibility of performance of conditions subsequent as excuse for waiver of performance; 95 A. S. R. 217, on validity of restrictions in restraint of alienation; 70 A. S. R. 833, on im-

possibility of performance of condition in deed; 25 E. R. C. 637, on validity of condition in restraint of marriage.

Validity of limitation over to heirs.

Cited in *Buck v. Paine*, 75 Me. 582, holding rule that limitation over to heirs is void, inapplicable where devise over is to heirs of testator's grandchild.

Words creating condition subsequent.

Cited in note in 79 A. S. R. 768, on what words create condition subsequent.

Distinction between covenants and conditions in deed.

Cited in note in 1 L.R.A. 381, on distinctions between covenants and conditions in deeds.

31 AM. REP. 384, CUMBERLAND v. PENNELL, 69 ME. 357.

Liability on official bond.

Cited in *Strout v. Pennell*, 74 Me. 260, holding that sheriff who is not negligent in erroneously certifying that appraisers were disinterested is not liable; *Maloy v. Bernalillo County*, 10 N. H. 638, 52 L.R.A. 126, 62 Pac. 1106, holding that county treasurer's responsibility is absolute, to extent of obligation of bond; *Roberts v. Laramie County*, 8 Wyo. 177, 56 Pac. 915 (dissenting opinion), to point that fact that loss occurred without county treasurer's fault is defense to action on bond.

Cited in reference note in 91 A. S. R. 344, on liability of public officer for funds coming into his possession.

Cited in notes in 67 A. D. 372, on extent of liability of officers having custody of public moneys; 67 A. D. 367, on ground of liability of public officials for funds placed in their hands; 91 A. S. R. 517, on liability of sureties on official bonds for loss of funds without fault; 91 A.S.R. 525, 526, on liability of sureties on official bonds for loss by negligence only; 91 A. S. R. 541, on liability of sureties on bonds of sheriffs, constables, etc., for injury to property in custody; 91 A. S. R. 543, on liability of sureties on bonds of sheriffs, constables, etc., for escape.

— For theft of funds.

Cited in *State v. Houston*, 78 Ala. 576, 56 A. R. 59, holding that robbery of money from tax collector is defense to action on his bond; *Healdsburg v. Mulligan*, 113 Cal. 205, 33 L.R.A. 461, 45 Pac. 337, holding no defense to action on city treasurer's bond that money was stolen.

Cited in reference note in 3 A. S. R. 881, on liability of public treasurer or collector on official bond for money stolen without his fault.

Cited in notes in 56 A. R. 69, on liability of public officer for loss of public funds by larceny; 22 L.R.A. 450, on liability on official bond for loss by theft or bank failure.

Distinguished in *Coe v. Foree*, 20 Tex. Civ. App. 550, 50 S. W. 616, holding robbery without fault of county treasurer no defense to action on bond.

Disapproved in *State v. Nevin*, 19 Nev. 162, 3 A. S. R. 873, 7 Pac. 650, holding county treasurer and sureties liable for money stolen.

— For failure of bank.

Cited in *Johnson v. Fleming*, 116 Ky. 680, 50 S. W. 855, holding receiver liable only for negligence in selection of bank, when court fails to select bank; *Livingston v. Woods*, 20 Mont. 91, 49 Pac. 437, holding city treasurer, required

to keep funds on deposit, not liable for loss from failure of bank; *Tillinghast v. Merrill*, 77 Hun, 481, 28 N. Y. Supp. 1089 (dissenting opinion), on deposit of school moneys with bankers who failed as defense to action on supervisor's bond; *Swift v. Trustees of Schools*, 91 Ill. App. 221; *Van Trees v. Territory*, 7 Okla. 353, 54 Pac. 495,—holding failure of bank no defense to action on county or township treasurer's bond; *State use of Overton County v. Copeland*, 96 Tenn. 296, 54 A. S. R. 840, 31 L.R.A. 844, 34 S. W. 427, holding sureties of county trustee for school funds not liable for loss from failure of bank; dissenting opinions in *Gartley v. People*, 24 Colo. 155, 49 Pac. 272; *Fairchild v. Hedges*, 14 Wash. 117, 31 L.R.A. 851, 44 Pac. 125,—on liability of county treasurer carefully selecting bank for loss from its failure; *State v. Gramm*, 7 Wyo. 329, 40 L.R.A. 690, 52 Pac. 533 (dissenting opinion), on liability of state treasurer and sureties for loss without his fault from failure of bank.

Cited in reference note in 33 A. R. 114, on liability of county treasurer for loss of public moneys by failure of depository.

Distinguished in *People ex rel. Nash v. Faulkner*, 38 Hun, 607, holding failure of bank no defense to action on surrogate's bond.

31 AM. REP. 296, LEACH v. FRENCH, 69 ME. 389.

Warranty of horse by liveryman.

Cited in *Copeland v. Draper*, 157 Mass. 558, 34 A. S. R. 314, 19 L.R.A. 283, 32 N. E. 944, holding that liveryman does not warrant that horse is free from defects, unknown and undiscoverable by him.

Presumption of negligence.

Cited in *Dyer v. Maine C. R. Co.* 99 Me. 195, 67 L.R.A. 416, 58 Atl. 994, 2 A. & E. Ann. Cas. 457 (dissenting opinion), on presumption of negligence from communication of fire to adjoining property by sparks from locomotive.

Proper party defendant.

Cited in *Dryden v. Sewell*, 2 Alaska, 182, holding that for breach of contract person to be sued is person who has promised.

31 AM. REP. 299, SMALL v. ROBINSON, 69 ME. 425.

Right to lien.

Cited in reference note in 38 A. S. R. 305, on lien of agisters and livery-stable keepers.

Cited in notes in 25 L.R.A.(N.S.) 776, on right of one leaving chattels in another's possession as against latter's vendees or creditors; 16 E. R. C. 112, on lien of bailee for labor.

—Lien for work without owner's consent.

Cited in *Glover v. Ames*, 8 Fed. 351, holding that person has no lien for repairs to vessel, made by order of unauthorized agent of owner; *Lowe v. Woods*, 100 Cal. 408, 38 A. S. R. 301, 34 Pac. 959, holding that liveryman has no lien for feeding of horse, left by one having possession under conditional sale; *Denison v. Shuler*, 47 Mich. 598, 41 A. R. 734, 11 N. W. 402, holding that lien for repairs, made to engine without mortgagee's consent, is subordinate to mortgage; *Chapman v. First Nat. Bank*, 98 Ala. 528, 13 So. 374; *Stone v. Kelley*, 59 Mo. App. 214; *Lazarus v. Moran*, 64 Mo. App. 239,—holding that lien for keeping horse without mortgagee's consent is subordinate to mortgage; *Gluckman v. Kleiman*, 3 Misc. 97, 22 N. Y. Supp. 549, holding that tailor employed without owner's knowledge has no lien for work on coats; *Scott v. Scott*, 68 Tex. 302, 4

S. W. 494, holding that liveryman has no lien for care of horse, placed in stable by one not the owner.

Cited in reference note in 43 A. S. R. 347, on mechanic's lien against articles of wife repaired at request of husband.

Absolute sale by bailee.

Cited in note in 66 A. D. 759, on power of bailees to make absolute sale of property bailed.

31 AM. REP. 301, EDWARDS v. ALLOUEZ MIN. CO. 38 MICH. 46.

Granting of injunction.

Cited in *Commerford v. Thompson*, 1 Fed. 417, denying injunction against detention by postmistress of lottery letters; *Continental Paper Bag Co. v. Eastern Paper Bag Co.* 80 C. C. A. 407, 150 Fed. 741 (dissenting opinion), on injunction against infringement of patent; *Henderson v. Sullivan*, 16 L.R.A.(N.S.) 691, 86 C. C. A. 236, 14 A. & E. Ann. Cas. 590, 159 Fed. 46, granting injunction against storage of dynamite in such quantity as to create danger to complainant; *Perrin v. Crescent City Stockyard & Slaughterhouse Co.* 119 La. 183, 43 So. 938, 12 A. & E. Ann. Cas. 903, enjoining fertilizer and tallow plant; *Ives v. Edison*, 124 Mich. 402, 83 A. S. R. 329, 50 L.R.A. 134, 83 N. W. 120 (dissenting opinion), on granting of injunction against removal of stairway, in which complainant has easement; *Washington Lodge, No. 54, I. O. O. F. v. Frelinghuysen*, 138 Mich. 350, 101 N. W. 569, denying injunction at suit of adjoining owner, against construction by hotel of passageway fourteen feet above alley; *Detroit Realty Co. v. Barnett Detroit Realty Co. v. Oppenheim*, 156 Mich. 385, 21 L.R.A.(N.S.) 585, 120 N. W. 804, holding that equity has jurisdiction to abate saloon if private nuisance where adjoining owners are specially injured by its existence; *Campau v. National Film Co.* 159 Mich. 169, 123 N. W. 606, holding that injunction will be withheld if it is likely to inflict greater injury than grievance complained of; *Dow v. Northern R. Co.* 67 N. H. 1, 36 Atl. 510, granting injunction in suit by minority stockholders, against operation of railroad under lease; *Ladd v. Ramsby*, 10 Or. 207, refusing injunction against execution on void judgment; *Bliss v. Anaconda Copper Min. Co.* 167 Fed. 342, to point that party must show equity which requires summary interference by injunction to be only adequate means of obtaining justice; *Stock v. Hillsdale*, 155 Mich. 375, 119 N. W. 435, holding that on bill for injunction court will consider damage which will result to defendant as well as question of delay in bringing proceedings.

Cited in note in 31 L.R.A.(N.S.) 886, 887, on doctrine of comparative injury in suit to enjoin nuisance.

Distinguished in *Offley v. Garlinger*, 161 Mich. 351, 126 N. W. 434, holding that injunction lies to prevent artificial drainage of water from swamp upon complainant's land.

—As to water rights.

Cited in *McFarland v. Alaska Perseverance Min. Co.* 3 Alaska, 308, holding that injunction did not lie to prevent diversion of water from stream flowing across placer mine of nominal value, where greater part of placer claim was in conflict with prior claim belonging to defendant; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674, holding riparian owner entitled to injunction against threatened unlawful diversion of stream; *Ronayne v. Loranger*, 66 Mich. 373, 33 N. W. 840, denying injunction against maintenance of milldam; *Turner v. Hart*, 71 Mich.

128, 15 A. S. R. 243, 38 N. W. 890, enjoining flooding of land by maintenance of dam at unlawful height; *Carley v. Gitchell*, 105 Mich. 38, 55 A. S. R. 428, 62 N. W. 1003 (dissenting opinion), on injunction against interference with dam; *McKee v. Grand Rapids*, 137 Mich. 200, 100 N. W. 580, holding that riparian owner cannot enjoin obstruction of stream after expensive improvements are completed.

Cited in note in 24 L.R.A. 66, on refusal of injunction on pollution of stream for mining purposes.

Malice as rendering lawful act unlawful.

Cited in note in 25 E. R. C. 84, on whether lawful act becomes unlawful by reason of malice.

31 AM. REP. 306, GRAND RAPIDS & I. R. CO. v. HEISEL, 38 MICH. 62, Reaffirmed on later appeal in 47 Mich. 393, 11 N. W. 212.

Power of municipality to authorize structure in highway.

Cited in *Detroit v. Detroit City R. Co.* 56 Fed. 867 (dissenting opinion), on power of city to grant vested right to operate street railway for thirty years; *O'Brien v. Baltimore Belt R. Co.* 74 Md. 363, 13 L.R.A. 126, 22 Atl. 141, holding that city can authorize right to construct railroad in tunnel through streets; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007, holding that city can authorize construction of electric railway without compensation to abutting owners; *Nichols v. Ann Arbor & Y. Street R. Co.* 87 Mich. 361, 16 L.R.A. 371, 49 N. W. 538, holding that township cannot authorize railroad, along side of highway, made by means of cuts and fills; *People ex rel. Kunze v. Ft. Wayne & E. R. Co.* 92 Mich. 522, 16 L.R.A. 752, 52 N. W. 1010, holding that ordinance giving right to construct ordinary single track railway in center of fifty foot street, is not unreasonable; *Scovel v. Detroit*, 146 Mich. 93, 109 N. W. 20, holding that legislature may authorize park commissioner to set apart part of boulevard for speedway; *Atty. Gen. ex rel. Brotherton v. Detroit*, 148 Mich. 71, 111 N. W. 860 (dissenting opinion), on power of city to lay tracks in streets for purpose of leasing them to private street railway company; *Harrisburg City Pass. R. Co. v. Harrisburg*, 2 Chester Co. Rep. 333, 2 Dauphin Co. Rep. 187, 7 Pa. Co. Ct. 588, holding that city may authorize street railway in street without compensation to abutting owners; *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, 46 S. W. 288, holding that city cannot authorize individual to close any part of public highway.

Distinguished in *Fuller v. Grand Rapids*, 105 Mich. 529, 63 N. W. 530, holding that city can direct paving contractor to remove structure, placed on street by abutting owner.

What constitutes additional servitude in street.

Cited in *Kinsey v. Union Traction Co.* 169 Ind. 563, 81 N. E. 922, holding that operation of interurban railroad over tracks of city street railway is not additional servitude; *Pierce v. Drew*, 136 Mass. 75, 49 A. R. 7 (dissenting opinion), as to whether telegraph line imposes new servitude; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; *Detroit, Ft. W. & B. I. v. Railroad Comrs.* 127 Mich. 219, 62 L.R.A. 149, 86 N. W. 842; *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.* 113 Mo. 308, 35 A. S. R. 706, 18 L.R.A. 339, 20 S. W. 658,—holding that construction of railroad in street under municipal authority is not new use requiring compensation to abutting owners; *Ecorse Twp. v. Jackson, A. A. & D. R. Co.* 153 Mich. 393, 117

N. W. 89, holding that street railways do not impose additional burden for which abutting owners are entitled to compensation.

Cited in notes in 37 A. R. 228, on compensation to adjoining owners for using highway for railroad; 106 A. S. R. 238, on rights of abutting owners with respect to streets and highways; 106 A. S. R. 244, on street railways as additional servitudes; 17 L.R.A. 476, on what use of street or highway constitutes an additional burden.

Recovery of damages from use of highway.

Cited in *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L.R.A. 544, 42 Fed. 273, holding that company making lawful use of franchise not liable for incidental damages; *Cabbell v. Williams*, 127 Ala. 320, 28 So. 405, holding that material interference with access is special damage different from that suffered by general public; *Crawford Co. v. Hathaway*, 67 Neb. 325, 108 A. S. R. 647, 60 L.R.A. 889, 93 N. W. 781, holding that riparian owner can recover damages from appropriation of stream for irrigation, same as abutting owner for construction of railroad.

Cited in notes in 4 L.R.A. 624, on rights of abutters on streets; 5 L.R.A. 372, on *damnum absque injuria*.

— Construction and operation of railroad.

Cited in *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 542, 59 A. R. 225, 11 N. E. 467, holding that abutting owner cannot recover for railroad embankment on opposite side of street; *Decker v. Evansville Suburban & N. R. Co.* 133 Ind. 493, 33 N. E. 349, holding that abutting owner cannot recover, when damages are similar to those suffered by community in general; *Dantzger v. Indianapolis Union R. Co.* 141 Ind. 604, 50 A. S. R. 343, 34 L.R.A. 769, 39 N. E. 223, holding that abutting owner cannot recover damages for obstruction rendering access to street merely inconvenient; *Pittsburgh, C. C. & St. L. R. Co. v. Noftager*, 148 Ind. 101, 47 N. E. 332, holding that abutting owner can recover damages for interruption of access to highway by railroad switch; *Garrett v. Lake Roland Elev. R. Co.* 79 Md. 277, 24 L.R.A. 396, 29 Atl. 830, holding that abutting owner has no right to compensation for erection of elevated railroad; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 12 A. S. R. 644, 1 L.R.A. 493, 39 N. W. 629, holding that abutting owner can recover damages from pollution of air by smoke, dust, cinders, etc.; *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, holding railroad not responsible for incidental damages to abutting owner from careful operation of cars; *Columbus, H. V. & T. R. Co. v. Stockley*, 45 Ohio St. 309, 13 N. E. 69, holding that abutting owner may recover for injury from smoke, noise, and sparks; *Smith v. East End Street R. Co.* 87 Tenn. 626, 11 S. W. 709, holding street railway not liable to abutting owner, having merely easement in street, for damages from lawful construction of track; *Missouri, K. & T. R. Co. v. Hopson*, 15 Tex. Civ. App. 126, 39 S. W. 384, holding that abutting owner cannot recover damages for occasional packing of cars in front of his premises.

Cited in notes in 4 A. S. R. 402, on damages for establishing railroad on highway where fee of highway is in the public; 3 L.R.A. 175, on abutter's right to compensation for use of street for railway; 7 L.R.A. 289, on benefits as considered on assessment of damages to abutter from construction of elevated railroad; 1 L.R.A.(N.S.) 64, on railroad charter as conferring no immunity from liability for private nuisance.

Distinguished in *Marquette & S. E. R. Co. v. Longyear*, 133 Mich. 94, 94 N. W.

670, holding abutting owner, on opposite side of street from that in which road is to be laid, entitled to compensation.

Measure of damages from operation of railroad.

Cited in *Hoffman v. Flint & P. R. R. Co.* 114 Mich. 316, 72 N. W. 167, holding that measure of damages is depreciation in rental value because of occupancy of street by railroad; *Harmon v. Louisville, N. O. & T. R. Co.* 87 Tenn. 614, 11 S. W. 703, holding that measure of damages is impairment of value of use of property during continuance of railroad nuisance.

Distinction between street railroad and general railroads.

Cited in *Mason v. Lansing & J. R. Co.* 157 Mich. 1, 121 N. W. 466 (dissenting opinion), on distinction between street railways and general railroads.

Conveyance of title to highway.

Cited in *Florida Southern R. Co. v. Brown*, 23 Fla. 104, 1 So. 512, holding that grantee takes title to center, when street is mentioned in deed as boundary; *Jacksonville, T. & K. W. R. Co. v. Griffin*, 33 Fla. 573, 15 So. 327, holding that description, bounding land by highway, conveys to center, when grantor has title thereto; *Betcher v. Chicago, M. & St. P. R. Co.* 110 Minn. 228, 124 N. W. 1096, holding that no title to street passes, where deed makes nearer external line of street boundary line of tract conveyed; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 4 L.R.A. 622, 11 S. W. 705, holding that deed calling for side of street, excludes fee of highway; *Clayton v. County Ct.* 58 W. Va. 253, 2 L.R.A.(N.S.) 598, 52 S. E. 103, holding that deed, calling for line of private road as boundary, does not pass title in fee to road.

Municipal control over public nuisances.

Cited in note in 39 L.R.A. 610, on municipal control over public nuisances on public streets and highways created by street railroads.

What constitutes nuisance.

Cited in *Middelkamp v. Bessemer Irrigating Co.* 46 Colo. 102, 23 L.R.A.(N.S.) 795, 103 Pac. 280, holding that what is authorized by law is not nuisance.

What is taking for public use.

Cited in note in 16 A. S. R. 613, on what is a taking of property for public use.

31 AM. REP. 314, JONES v. DETROIT CHAIR CO. 38 MICH. 92.

What are fixtures.

Cited in *Wheeler v. Bedell*, 40 Mich. 693, holding machinery, mortgaged as chattel, after mortgage had been given on premises, held personally; *Ferris v. Quimby*, 41 Mich. 202, 2 N. W. 9, holding machinery, owned by tenants in mortgaged building and sold with building by separate bill of sale, held personally; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899, holding that placing chattel mortgage on machinery makes it personal property; *Studley v. Ann Arbor Sav. Bank*, 112 Mich. 181, 70 N. W. 426, holding that machinery, included in mortgage on land, will be treated as fixtures covered by mortgage.

Cited in reference notes in 1 A. S. R. 379, on what are fixtures as between mortgagor and mortgagee; 32 A. R. 259, on title to fixtures as between lessee and mortgagee.

31 AM. REP. 316, BEECHER v. PEOPLE, 38 MICH. 289.**Trial of question of title.**

Cited in *People v. Stott*, 90 Mich. 343, 51 N. W. 509; *People v. Wolverine Mfg. Co.* 141 Mich. 455, 113 A. S. R. 544, 104 N. W. 725,—holding that title to lands cannot be tried in prosecution in city recorder's court for obstructing street.

Alley as street.

Cited in *Dodge v. Hart*, 113 Iowa, 685, 83 N. W. 1063; *Face v. Ionia*, 90 Mich. 104, 51 N. W. 184; *Horton v. Williams*, 99 Mich. 423, 58 N. W. 369,—holding that alley is not meant primarily as substitute for street, but only as local accommodation to limited neighborhood.

Obstruction of highway.

Cited in *Cahill v. Layton*, 57 Wis. 600, 46 A. R. 46, 16 N. W. 1, on platform above roadway as obstruction.

Cited in notes in 54 A. R. 293, on abutter's right to injunction against overhanging obstructions and poles in street; 125 A. S. R. 347, on right of city to authorize private bridge or passageway over public street.

Obstruction of alley as nuisance.

Cited in reference notes in 38 A. R. 192, on platform in alley at rear of store as nuisance; 47 A. S. R. 629, on obstruction of alley as nuisance.

31 AM. REP. 319, COVERT v. ROGERS, 38 MICH. 363.**Right of corporation to make assignment.**

Cited in *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. 680; *Hawkins v. Hubbard*, 2 S. D. 596, 51 N. W. 774; *Boynton v. Roe*, 114 Mich. 401, 72 N. W. 257,—holding that insolvent corporation, unless prohibited by charter or statute, can make general assignment; *Adams & W. Co. v. Deyetts*, 8 S. D. 149, 59 A. S. R. 751, 31 L.R.A. 497, 65 N. W. 471 (dissenting opinion), on right of insolvent corporation to make assignment.

Cited in reference note in 37 A. S. R. 610, on corporate power to make assignment for creditors.

Cited in note in 22 L.R.A. 802, on preference among creditors by insolvent corporations.

Sufficiency of notice to directors.

Cited in *Bank of Little Rock v. McCarthy*, 55 Ark. 473, 29 A. S. R. 60, 18 S. W. 759, holding written notice to director, left at residence during temporary absence of family, insufficient.

Validity of mortgage executed without notice to directors.

Cited in *Doyle v. Mizner*, 42 Mich. 332, 3 N. W. 968, holding that resolution by two directors, third not being notified, will not authorize mortgage; *Broughton v. Jones*, 120 Mich. 462, 79 N. W. 691, holding chattel mortgage, executed under authority given at special meeting, of which one-half of directors were not notified, invalid.

Who may be receiver of corporation.

Cited in *Moran v. Wayne Circuit Judge*, 125 Mich. 6, 83 N. W. 1004, holding that creditor, stockholder, or officer may be appointed receiver of corporation; *Boatmen's Bank Appeal*, 74 Mo. App. 60, holding former connection with bank, relationship to directors and refusal to let creditors examine books, insufficient ground for removal of assignee.

Admissibility of evidence of intention of director.

Cited in *National Bank v. George M. Scott & Co.* 18 Utah, 400, 55 Pac. 374, holding it proper for director to testify as to intention in voting for assignment contested for fraud.

Cited in note in 23 L.R.A.(N.S.) 401, on right of one to testify as to his intent. **What is necessary to bind corporation.**

Cited in note in 7 E. R. C. 353, on necessity of regular action by corporate members or directors in order to bind corporation.

31 AM. REP. 321, GRAND RAPIDS & I. R. CO. v. HUNTLEY, 38 MICH. 537.

Liability for negligent injury.

Cited in *Klanowski v. Grand Trunk R. Co.* 57 Mich. 525, 24 N. W. 801, holding forty miles per hour at crossing, negligent speed; *Emry v. Raleigh & G. R. Co.* 109 N. C. 589, 15 L.R.A. 332, 14 S. E. 352 (dissenting opinion), on care to be observed by railroad in reference to roadway and rolling stock; *The Olympia*, 52 Fed. 985, holding steamer not liable for injury to other vessel due to breaking of tiller rope, purchased from reputable makers, and thoroughly inspected; *Jenkins v. St. Paul City R. Co.* 105 Minn. 504, 20 L.R.A.(N.S.) 401, 117 N. W. 928, holding that electric passenger carrier fulfils duty, so far as controller of car is concerned, if it is of standard character, made by reputable firm, in good condition, and reasonably inspected.

Cited in reference note in 33 A. R. 57, on care required of master in providing safe machinery.

Cited in notes in 64 A. D. 527, 528, on responsibility of carrier for negligence of manufacturer; 5 E. R. C. 462, on duty of carrier to use due care as to safety of line.

—To passenger on train.

Cited in *Pingree v. Detroit, L. & N. R. Co.* 66 Mich. 143, 11 A. S. R. 479, 33 N. W. 298 (dissenting opinion), on carrier's liability from failure to make safe carriage and delivery; *Moore v. Saginaw, T. & H. R. Co.* 115 Mich. 103, 72 N. W. 1112, holding carriers of passengers not insurers, but only liable for negligence; *Frelsen v. Southern P. R. Co.* 42 La. Ann. 673, 7 So. 800, holding railroad not negligent, when appliance is bought from reputable manufacturer; *Littlejohn v. Fitchburg R. Co.* 148 Mass. 478, 2 L.R.A. 502, 20 N. E. 103, holding railroad liable for defects in appliances, discovered at time of their purchase.

Cited in reference notes in 16 A. S. R. 702, on insurance by passenger carrier of safety of vehicle; 50 A. S. R. 146, on duty of carrier to furnish proper vehicle.

Cited in notes in 43 A. D. 361, on degree of care required of carriers of passengers; 43 A. D. 362, on liability of carrier of passengers for defect in vehicles, roadbed, and other appliances; 15 L.R.A.(N.S.) 790, on liability of railroad company for injury to passenger by latent defect in car.

—To elevator passenger.

Cited in *Treadwell v. Whittier*, 80 Cal. 574, 13 A. S. R. 175, 5 L.R.A. 498, 22 Pac. 266; *Burgess v. Stowe*, 134 Mich. 204, 96 N. W. 29,—holding operator of elevator only bound to use care required of ordinarily prudent person.

—To employee.

Cited in *Noe v. Rapid R. Co.* 133 Mich. 152, 94 N. W. 743 (dissenting opin-

ion), on liability for injury to employee of electric railway conforming to general custom as to use of switch locks; *Smith v. Potter*, 46 Mich. 258, 41 A. R. 161, 9 N. W. 273, holding railroad only liable for failure to use such precautions as diligent prudence and foresight require; *Illick v. Flint & P. M. R. Co.* 67 Mich. 632, 35 N. W. 708, holding railroad not obliged to use latest improvements; *Siegel v. United Electric Heating Co.* 143 Mich. 484, 106 N. W. 1127, holding that to require more than knowledge possessed by ordinarily well-informed user would require more than ordinary care; *Mason v. Fourteen Min. Co.* 82 Mo. App. 367, holding that person only bound to furnish and use appliances in customary manner, generally found and believed to be safe; *Reynolds v. Merchants' Woolen Co.* 168 Mass. 501, 47 N. E. 406, holding it not negligence for mill-owners to use, after proper inspection, machinery purchased from reputable maker; *Louisville & N. R. Co. v. Allen*, 78 Ala. 494; *Jones v. Malvern Lumber Co.* 58 Ark. 125, 23 S. W. 679,—holding that person need not resort to unusual or impractical tests; *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108, holding railroad only required to exercise ordinary care in inspecting foreign cars received in regular course of business for transportation.

Cited in note in 41 L.R.A. 73, on master's duty to actively inspect instrumentalities purchased by him for the use of servant.

Presumption of negligence.

Cited in *Barnowsky v. Helson*, 89 Mich. 523, 15 L.R.A. 33, 50 N. W. 989 (dissenting opinion), on presumption of negligence from falling of roof; *Guilloz v. Ft. Wayne & B. I. R. Co.* 108 Mich. 41, 65 N. W. 666, holding mere occurrence of collision between car and wagon, insufficient to show improper speed.

Admissibility of evidence of similar defects and accidents.

Cited in *Gaar, S. & Co. v. Wilson*, 21 Ind. App. 91, 51 N. E. 502, holding evidence of falling of other similar arbors in same room prior to accident in suit, improper; *Dundas v. Lansing*, 75 Mich. 49, 13 A. S. R. 457, 5 L.R.A. 143, 42 N. W. 1011, holding evidence that sidewalks in vicinity of defective crosswalk in question were out of repair, inadmissible; *Kraatz v. Brush Electric Light Co.* 82 Mich. 457, 46 N. W. 787, holding evidence of like condition of wires some months after accident, inadmissible; *People v. Thompson*, 122 Mich. 411, 81 N. W. 344, holding that negligence cannot be proven by previous acts of negligence; *Gregory v. Detroit United R. Co.* 138 Mich. 368, 101 N. W. 546, holding similar accidents at same place, inadmissible, in action for overturning of cutter by rail above surface; *Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465, 16 N. W. 358, holding evidence of other defects in track elsewhere inadmissible; *Stoher v. St. Louis, I. M. & S. R. Co.* 91 Mo. 509, 4 S. W. 389, holding that evidence as to condition of roadbed, one, two, and three years after accident, is too remote; *Briggs v. East Broad Top R. & Coal Co.* 206 Pa. 564, 56 Atl. 36, holding evidence of defects in roadbed in other places, inadmissible, in action for injury from broken rail.

Distinguished in *Leonard v. Southern P. Co.* 21 Or. 555, 15 L.R.A. 221, 28 Pac. 887 holding evidence of condition of portions of bridge left standing, admissible, in action for injury from fall of bridge.

Admissibility of evidence of exclamations of pain.

Cited in *Atchison, T. & S. F. R. Co. v. Johns*, 36 Kan. 769, 59 A. R. 609, 14 Pac. 237; *Mayo v. Wright*, 63 Mich. 32, 29 N. W. 832, holding exclamations accompanying pain and descriptive of present suffering, admissible; *Kelley v.*

Detroit, L. & N. R. Co. 80 Mich. 237, 20 A. S. R. 514, 45 N. W. 90, holding answer of plaintiff to inquiry next morning as to sleeplessness, inadmissible; Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616, holding exclamations of present pain during pendency of action, admissible; Will v. Mendon, 108 Mich. 251, 66 N. W. 58, holding exclamations of present pain and statements as to location, admissible; McCormick v. Detroit, G. H. & M. R. Co. 141 Mich. 17, 104 N. W. 390, holding evidence of expressions of present pain admissible, though uttered by plaintiff long after injury.

Cited in notes in 95 A. D. 67, on admissibility of exclamations of pain and declarations respecting injuries; 24 L.R.A.(N.S.) 259, on admissibility of expressions or statements, subsequent to injury, of present pain; 93 A. D. 280, on when declarations of party are admissible in his own favor.

Admissibility of plaintiff's statements to physician.

Cited in Delaware, L. & W. R. Co. v. Roalefs, 16 C. C. A. 601, 28 U. S. App. 569, 70 Fed. 21; Darrigan v. New York & N. E. R. Co. 52 Conn. 285, 52 A. R. 590; Greinke v. Chicago City R. Co. 234 Ill. 564, 85 N. E. 327; Jones v. Portland, 88 Mich. 598, 16 L.R.A. 437, 50 N. W. 731; McKormick v. West Bay City, 110 Mich. 265, 68 N. W. 148; Comstock v. Georgetown, 137 Mich. 541, 100 N. W. 788; Consolidated Traction Co. v. Lamberton, 60 N. J. L. 452, 38 Atl. 683; Pennsylvania Co. v. Files, 65 Ohio St. 403, 62 N. E. 1047; Missouri, K. & T. R. Co. v. Johnson, 95 Tex. 409, 67 S. W. 768; Stewart v. Everts, 76 Wis. 35, 20 A. S. R. 17, 44 N. W. 1092,—holding that medical expert, consulted to be made witness, cannot testify to statements by plaintiff as to pain, etc.; Cleveland, C. C. & I. R. Co. v. Newell, 104 Ind. 264, 54 A. R. 312, 3 N. E. 836, holding statements of present pain made after commencement of suit, to physician for purpose of treatment, admissible; Heddle v. City Electric R. Co. 112 Mich. 547, 70 N. W. 1096, holding that physician may testify to plaintiff's exclamations of pain on examination with view to treatment; Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573, holding that statements of plaintiff to physician, as to pains suffered, are incompetent.

Cited in note in 21 L.R.A.(N.S.) 827, on admissibility as *res gestæ* of statements or declarations by injured person to physician examining him in order to qualify as witness.

Admissibility of expert evidence.

Cited in St. Louis & S. F. R. Co. Farr, 6 C. C. A. 211, 12 U. S. App. 520, 56 Fed. 994, holding opinion of expert machinist as to possibility of discovering defect by inspection before fracture of brake staff, admissible; Kelley v. Richardson, 69 Mich. 430, 37 N. W. 514 (dissenting opinion), on expert evidence as to matter not scientific question; Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499 (dissenting opinion), on necessity of proof of facts made basis of hypothetical question.

Admissibility of nonexpert evidence.

Cited in Ackerman v. Cincinnati, S. & M. R. Co. 143 Mich. 58, 114 A. S. R. 640, 106 N. W. 558, 8 A. & E. Ann. Cas. 118; Stotler v. Chicago & A. R. Co. 200 Mo. 107, 98 S. W. 509,—holding that non-expert witness may be qualified to testify to speed of train; Cronk v. Wabash R. Co. 123 Iowa, 349, 98 N. W. 884, holding evidence that witness had timed train between stations with watch and was acquainted with speed of trains shows sufficient qualification; Guggenheim v. Lake Shore & M. S. R. Co. 66 Mich. 150, 33 N. W. 161, holding that opinions of relative speed, without some standard of rapidity, are of no value

by themselves; *Mott v. Detroit*, G. H. & M. R. Co. 120 Mich. 127, 79 N. W. 3, holding evidence that witness has often observed bodies in motion and seen horses trot and run shows insufficient qualification.

Disapproved in *Bosqui v. Sutro R. Co.* 131 Cal. 390, 63 Pac. 682, holding that evidence of passengers as to speed may be considered by jury.

31 AM. REP. 326, AGRICULTURAL INS. CO. v. MONTAGUE, 38 MICH. 548.

Insurable interest in property.

Cited in *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416, 66 Pac. 249, holding that person, taking possession of premises under quitclaim deed, knowing that title was in another, has insurable interest.

— Of husband.

Cited in *Planters' Mut. Ins. Co. v. Loyd*, 71 Ark. 292, 75 S. W. 725; *Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. 428; *German American Ins. Co. v. Paul*, 2 Ind. Terr. 625, 53 S. W. 442,—holding that husband has no insurable interest in wife's separate property; *Doyle v. American F. Ins. Co.* 181 Mass. 139, 63 N. E. 394, holding that tenant by curtesy initiate has insurable interest in ordinary buildings on wife's land; *Trade Ins. Co. v. Barracliff*, 45 N. J. L. 543, 46 A. R. 792, holding that husband, in possession, with wife, of her personalty and realty, has insurable interest therein; *Tyree v. Virginia Ins. Co.* 55 W. Va. 63, 104 A. S. R. 983, 66 L.R.A. 657, 46 S. E. 706, 2 A. & E. Ann. Cas. 30, holding that husband, living with wife in house on her separate estate land, has no insurable interest therein.

Cited in reference note in 30 A. S. R. 806, on husband's insurable interest in wife's property.

Cited in notes in 104 A. S. R. 991, on husband's insurable interest in wife's personalty; 66 L.R.A. 658, on noninsurable interest of husband in wife's property unless he has beneficial interest.

Avoidance of policy for misstatement of interest.

Cited in *Mt. Leonard Mill. Co. v. Liverpool & L. G. Ins. Co.* 25 Mo. App. 259, holding that misstatement by insurer that he was owner of goods avoids policy.

Cited in note in 16 L.R.A.(N.S.) 1220, on waiver by knowledge of facts avoiding policy at time of inception.

— As to ownership.

Cited in *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571, 1 So. 202, holding that erection of party wall by agreement between insured and adjoining owner does not show that insured's interest is not sole; *Lowenthal v. Home Ins. Co.* 112 Ala. 108, 57 A. S. R. 17, 33 L.R.A. 258, 20 So. 419, holding that vendee in possession under valid executory contract of purchase is owner within meaning of policy.

Distinguished in *Travis v. Continental Ins. Co.* 47 Mo. App. 482, holding that husband, insuring in good faith wife's goods, transferred to him by void parol agreement, is absolute owner within meaning of policy.

31 AM. REP. 328, VANDERHORST v. BACON, 38 MICH. 669.

Who may claim exemption from levy.

Cited in *Skinner v. Shannon*, 44 Mich. 86, 38 A. R. 232, 6 N. W. 108, holding that each member of firm may claim amount of goods exempt from execu-

tion; *Ferguson v. Speith*, 13 Mont. 487, 40 A. S. R. 459, 34 Pac. 1020, holding that partner is entitled as against firm creditors to claim homestead in partnership estate.

Cited in reference note in 32 A. R. 30, on widow keeping boarding house as head of family within exemption statute.

Waiver of exemption.

Cited in reference notes in 87 A. S. R. 897; 33 A. R. 152,—on waiver of exemption by permitting seizure of exempt property; 62 A. S. R. 116, on necessity of claiming exemption of property from execution.

Right of officer to possession of exempt property.

Cited in *Stern v. Riches*, 111 Wis. 591, 87 A. S. R. 892, 87 N. W. 555, holding that officer levying execution may take possession of exempt property to make appraisal.

31 AM. REP. 331, PEOPLE v. WRIGHT, 38 MICH. 744.

Presumption of coercion of wife in commission of crime.

Cited in note in 33 A. S. R. 94, on conviction of married woman acting independently in commission of crime.

Duress as excuse for crime.

Cited in note in 19 L.R.A. 359, on duress of wife by husband as an excuse for crime.

What constitutes robbery.

Cited in note in 70 A. D. 189, on necessity of animus furandi in robbery.

Competency of testimony of accomplice.

Cited in *People v. McCullough*, 81 Mich. 25, 45 N. W. 515, holding that accomplice, though joined in information with prisoner, is competent witness for people, if not tried at same time.

31 AM. REP. 332, McEWAN v. ZIMMER, 38 MICH. 765.

Validity of judgment without jurisdiction.

Cited in *Bunnell v. Bunnell*, 25 Fed. 214, holding decree for alimony against defendant not personally served, void for want of jurisdiction; *Booth v. Connecticut Mut. L. Ins. Co.* 43 Mich. 299, holding that no personal decree can be made in one jurisdiction against parties living in another; *Cafrode v. Gartner*, 79 Mich. 332, 7 L.R.A. 511, 44 N. W. 623 (dissenting opinion), on validity of judgment of state court upon service of process in another state; *Howard v. Coon*, 93 Mich. 442, 53 N. E. 513, holding judgment of justice's court upon service of summons in another state, void; *Bear v. Heasley*, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 270, holding judgment of church court void for want of jurisdiction; *Monger v. New Era Asso.* 145 Mich. 683, 108 N. W. 1111, holding judgment void for want of jurisdiction; *Smith v. Grady*, 68 Wis. 215, 31 N. W. 477, holding judgment of Canadian court upon service of process here, void; *Boyles v. Roberts*, 222 Mo. 613, 121 S. W. 805, holding that foreign judgments have no binding force unless foreign court had jurisdiction over subject matter.

Cited in notes in 11 A. S. R. 821, on validity of judgments rendered without jurisdiction; 1 L.R.A. 312, as to judgment on joint liability against two, service being only on one; 16 L.R.A. 232, on validity of personal judgments rendered upon constructive service of process against nonresidents in other states than those wherein rendered; 27 L.R.A. 102, 105, on judgments of another state

. Am. Rep. Vol. XVII.—23.

or country rendered against executor or administrator; 5 E. R. C. 745, 746, on validity of foreign judgment.

Distinguished in *Ferguson v. Oliver*, 99 Mich. 161, 41 A. S. R. 593, 58 N. W. 43, holding Canadian judgment valid, where defendant, resident here, appears.

Conclusiveness of foreign judgments.

Cited in *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, holding French judgment not conclusive here as France does not so recognize our judgments.

Cited in notes in 94 A. S. R. 541, on conclusiveness of foreign judgments; 94 A. S. R. 534, on disproving jurisdiction to render foreign judgment; 20 L.R.A. 678, on necessity that foreign court have jurisdiction, to make decision conclusive.

Jurisdiction over persons voluntarily within foreign country.

Cited in note in 94 A. S. R. 537, on jurisdiction over persons voluntarily within foreign country.

31 AM. REP. 341, FIRST NAT. BANK v. PIERSON, 24 MINN. 140.

Power of bank to purchase negotiable instruments.

Cited in *Newport Nat. Bank v. Board of Education*, 114 Ky. 87, 70 S. W. 186, holding that national bank has power to purchase bonds issued by city board of education; *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909, holding that national bank has no power to purchase notes; *Salmon Falls Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504, holding that bank, engaged in general banking business, has, in absence of restriction in charter, power to purchase notes; dissenting opinions in *People ex rel. Jay v. Bennett*, 15 Hun, 58; *Ehrman v. Union Cent. L. Ins. Co.* 35 Ohio St. 324,—on right of national bank to acquire title to notes otherwise than by discount.

Cited in note in 16 L.R.A. 224, on discount of bill or note as including buying and selling.

Availability of ultra vires as defense.

Cited in *Oregonian R. Co. v. Oregon R. & Nav. Co.* 10 Sawy. 472, 23 Fed. 232, holding ultra vires not available to defendant in action by corporation; *Baltimore United German Bank v. Katz*, 57 Md. 128 (dissenting opinion), on availability of ultra vires to defeat recovery by bank upon note.

Overruled in *First Nat. Bank v. Smith*, 8 S. D. 7. 65 N. W. 437; *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 A. R. 235; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 53 A. R. 5, 21 N. W. 849,—holding plea of ultra vires not available to defeat recovery by national bank upon purchased note.

When transaction is loan.

Cited in *First Nat. Bank v. Sherburne*, 14 Ill. App. 566, holding that indorsement in blank by payee and delivery, before maturity for value, to bank is loan; *Becker's Invest. Agency v. Rea*, 63 Minn. 459, 65 N. W. 928, holding that transaction was not loan, where creditor discounted debtor's note.

31 AM. REP. 344, STATE v. COOKE, 24 MINN. 247.

Constitutionality of local option law.

Cited in *Fouts v. Hood River*, 46 Or. 492, 1 L.R.A.(N.S.) 483, 81 Pac. 370, 7 A. & E. Ann. Cas. 1160, holding local option law providing that prohibition shall take effect on July first after election, valid; *State v. Armeno*, 29 R. I.

431, 72 Atl. 216, holding that statute regulating profession of barber in cities and empowering town council to adopt its provision, is constitutional.

Cited in reference notes in 37 A. R. 6, on validity of police law to take effect upon local adoption; 109 A. S. R. 22, on validity of local-option statutes.

Cited in notes in 35 A. D. 337, on constitutionality of local-option laws; 28 L. ed. U. S. 696; 114 A. S. R. 324,—on constitutionality of local-option liquor laws; 1 L.R.A. 87, on local-option laws; 15 L.R.A.(N.S.) 944, on validity of local-option laws and submissions to popular vote.

Validity of delegation of legislative power.

Cited in *State ex rel. Wear v. Francis*, 95 Mo. 44, 8 S. W. 1, holding act, authorizing vote in cities of county on selling of refreshments, not unconstitutional as delegation of legislative power; *Owen v. Baer*, 154 Mo. 434, 55 S. W. 644 (dissenting opinion), on constitutionality of delegation of legislative power; *State ex rel. Maggard v. Pont*, 93 Mo. 606, 6 S. W. 469; *Re O'Brien*, 29 Mont. 530, 75 Pac. 196, 1 A. & E. Ann. Cas. 373,—holding local-option law not unconstitutional as delegation of legislative power to people; *Wallace v. Reno*, 27 Nev. 71, 103 A. S. R. 747, 63 L.R.A. 337, 73 Pac. 528, holding act, authorizing city to revoke business licenses, constitutional; *State, Paul, Prosecutor, v. Circuit Judge*, 50 N. J. L. 585, 1 L.R.A. 86, 15 Atl. 272, holding act, authorizing voters of county to determine granting of liquor licenses, valid delegation of power by legislature; *Portland v. Cook*, 48 Or. 550, 9 L.R.A.(N.S.) 735, 87 Pac. 772, holding that legislature may delegate police power to municipality.

Cited in note in 35 A. D. 336, on power of legislature to confer on inferior board or municipality power to regulate or prohibit sale of liquors.

Authority to revoke liquor license.

Cited in *Hevren v. Reed*, 126 Cal. 219, 58 Pac. 536, holding that municipality, having authority to grant license, may revoke same; *Carbondale v. Wade*, 106 Ill. App. 654, holding that city may revoke, under police power, license before expiration of term; *State v. Harris*, 50 Minn. 128, 52 N. W. 387; *Claussen v. Luverne*, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 A. & E. Ann. Cas. 673,—holding that liquor license may be revoked without judicial proceedings, in exercise of police power; *Arie v. State*, 1 Okla. Crim. Rep. 666, 100 Pac. 33; *Arie v. State*, 23 Okla. 166, 100 Pac. 23, 1 Okla. Crim. Rep. 260,—holding that license to carry on liquor traffic is revoked by repeal of law authorizing granting of such license; *Gillesby v. Canyon County*, 17 Idaho, 586, 107 Pac. 71, holding that no person has vested right to engage in sale of intoxicating liquors.

31 AM. REP. 346, *LEY v. HOME INS. CO.* 24 MINN. 315.

Avoidance of policy by change of title.

Cited in *Friezen v. Allemania F. Ins. Co.* 30 Fed. 352, holding that execution of mortgage is not change of title avoiding policy; *Commercial Union Assur. Co. v. Scammon*, 126 Ill. 355, 9 A. S. R. 607, 18 N. E. 562 (affirming 20 Ill. App. 500); *German Ins. Co. v. Gibe*, 59 Ill. App. 614,—holding policy not violated by change in evidence of title, if real ownership remains same; *Ethington v. Dwelling House Ins. Co.* 55 Mo. App. 129, holding that default in payment of mortgage does not avoid policy; *Hammel v. Queen's Ins. Co.* 54 Wis. 72, 41 A. R. 1, 11 N. W. 349, holding execution sale of itself no ground of forfeiture.

Cited in notes in 59 A. D. 309, on effect of clause restricting any sale, transfer,

change of title, or possession of insured property; 4 L.R.A. 538, 540, as to what constitutes a sale or transfer within meaning of clause avoiding insurance policy in case of sale or transfer; 38 L.R.A. 563, on mortgage as affecting title or ownership of insured property; 24 L.R.A.(N.S.) 808, on judicial sale of insured property as change in title, etc.

Construction in favor of insured.

Cited in *Cargill v. Millers' & Mfrs. Mut. Ins. Co.* 33 Minn. 90, 22 N. W. 6; *Olson v. St. Paul, F. & M. Ins. Co.* 35 Minn. 432, 59 A. R. 333, 29 N. W. 125; *De Graff v. Queen Ins. Co.* 38 Minn. 501, 8 A. S. R. 685, 38 N. W. 696; *Reilly v. Chicago Guaranty Fund L. Soc.* 75 Minn. 377, 77 N. W. 982,—holding that ambiguities must be resolved in favor of insured; *Central Montana Mines Co. v. Fireman's Fund Ins. Co.* 92 Minn. 223, 99 N. W. 1120, holding that policy must be construed strictly against insurer.

Nature of mortgage.

Cited in *Rogers v. Benton*, 39 Minn. 39, 12 A. S. R. 613, 38 N. W. 765, holding that mortgage is not conveyance of title, but only lien.

Retention of title until redemption.

Cited in *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32; *Lindley v. Crombie*, 31 Minn. 232, 17 N. W. 372,—holding that title does not pass to purchaser until time to redeem expires.

31 AM. REP. 349, NASH v. MINNEAPOLIS MILL CO. 24 MINN. 501.

Duty of owner as to safe condition of premises.

Cited in *Steele v. Grahl-Peterson Co.* 135 Iowa, 418, 109 N. W. 882; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N. W. 698; *Trask v. Shotwell*, 41 Minn. 66, 42 N. W. 699,—holding owner bound to use ordinary care to keep premises in safe condition for access of invited persons; *Ryder v. Kinsey*, 62 Minn. 85, 54 A. S. R. 623, 34 L.R.A. 557, 64 N. W. 94, holding that owner is bound to keep building in such condition that it will not injure person rightfully therein; *Marsh v. Minneapolis Brewing Co.* 92 Minn. 182, 99 N. W. 630, holding that owner is bound to keep inside sidewalk in safe condition for persons using it by invitation; *Perrine v. Union Stock Yards Co.* 81 Neb. 790, 116 N. W. 776; *Herd v. Koenig*, 137 Mo. App. 589, 119 S. W. 56,—holding that it is duty of landlord to keep portion of premises used in common by tenants in reasonably safe condition.

Liability of landlord for safe condition of premises.

Cited in reference notes in 31 A. R. 262, on liability of owner of dangerous premises to one lawfully thereon; 1 A. S. R. 432, on landlord's liability to third person for defective condition or construction of premises; 1 A. S. R. 490, on landlord's liability to third persons for injuries caused by defective condition of premises; 39 A. R. 503, on liability of tenant for injury to third party from defect in premises existing at time of lease.

Cited in notes in 59 A. D. 735, on liability of owner to third persons for injuries from defective premises; 50 A. D. 779, on liability of lessor to tenant for nuisances or injuries from failure to repair; 12 L.R.A. 843, on landlord's liability for dangerous premises.

Distinguished in *Harpel v. Fall*, 63 Minn. 520, 65 N. W. 913, holding landlord not liable to tenant or person entering upon premises by his invitation for their unsafe condition.

31 AM. REP. 353, SHRIVER v. SIOUX CITY & ST. P. R. CO. 24 MINN. 506.**Liability of carrier.**

Cited in note in 29 L.R.A.(N.S.) 1215, on liability of carrier accepting property improperly packed or crated.

— Of connecting carriers.

Cited in reference note in 2 A. S. R. 325, on liability of connecting carriers.

Cited in notes in 31 L.R.A.(N.S.) 103, on liability of connecting carrier for loss beyond own line; 72 A. D. 246, on remedy of shipper when he cannot locate place of loss by connecting carriers.

Right of carrier to limit liability.

Cited in reference notes in 48 A. R. 742, on limitation of carrier's liability; 13 A. S. R. 783, on validity of contract with shipper limiting carrier's liability.

Cited in notes in 32 A. D. 497, on power of common carrier to limit his liability; 32 A. D. 580, on restriction of power of common carrier to limit his liability; 5 E. R. C. 348, on right of carrier to limit his liability by contract.

— For negligence.

Cited in *Summerlin v. Seaboard Air Line R. Co.* 56 Fla. 687, 131 A. S. R. 164, 19 L.R.A.(N.S.) 191, 47 So. 557, holding that carrier cannot stipulate for exemption for his own negligence or that of servants or agents; *Nelson v. Great Northern R. Co.* 28 Mont. 297, 72 Pac. 642, holding that carrier cannot by contract confine his liability to gross or wilful negligence; *Hudson v. Northern P. R. Co.* 92 Iowa, 231, 54 A. S. R. 550, 60 N. W. 608; *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 A. R. 781, 16 N. W. 497; *Ortt v. Minneapolis & St. L. R. Co.* 36 Minn. 396, 31 N. W. 519; *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 191, 46 N. W. 333; *Alair v. Northern P. R. Co.* 53 Minn. 160, 39 A. S. R. 588, 19 L.R.A. 764, 54 N. W. 1072; *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb. 275, 29 A. S. R. 436, 49 N. W. 183; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356, 58 N. W. 968,—holding that carrier cannot by contract, exonerate himself from liability for loss or injury from his negligence.

Cited in reference note in 60 A. R. 380, on limitation by carrier against negligence.

Cited in note in 4 E. R. C. 695, on right of carrier to exempt himself by contract from liability for negligence.

— Burden to show damages within exemption.

Cited in *Lindsley v. Chicago, M. & St. P. R. Co.* 36 Minn. 539, 1 A. S. R. 692, 33 N. W. 7; *Hull v. Chicago, St. P. M. & O. R. Co.* 41 Minn. 510, 16 A. S. R. 722, 5 L.R.A. 587, 43 N. W. 391; *Shea v. Minneapolis, St. P. & S. Ste. M. R. Co.* 63 Minn. 228, 65 N. W. 458; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Home Ins. Co.* 64 Minn. 61, 66 N. W. 132,—holding that burden is upon carrier to show that cause of loss was within exemption and not due to its negligence.

Cited in notes in 88 A. S. R. 123, on burden of proof as to negligence of carrier where liability has been limited; 88 A. S. R. 121, on necessity of carrier's proving that loss comes within exemptions of bill of lading.

Burden of proof in action against carrier generally.

Cited in reference notes in 1 A. S. R. 696, on burden on carrier proving

absence of negligence; 19 A. S. R. 263, on burden of proof as to injury to freight.

Cited in notes in 97 A. D. 411, on burden of proof where loss of goods intrusted to common carrier is shown; 101 A. S. R. 394, on burden of proof in case of damage to goods to show which connecting carrier was at fault.

Presumption of continuance of same condition.

Cited in *Fockens v. United States Exp. Co.* 99 Minn. 404, 109 N. W. 834, holding presumption that damages were caused by negligence of carrier, when goods were delivered in sound condition; *Hudson River Lighterage Co. v. Wheeler Condenser & Engineering Co.* 93 Fed. 374; *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148, 23 A. S. R. 551, 7 So. 544; *Louisville, N. A. & C. R. Co. v. Nicholai*, 4 Ind. App. 119, 51 A. S. R. 206, 30 N. E. 424; *Gulf, C. & S. F. R. Co. v. Jones*, 1 Ind. Terr. 354, 37 S. W. 208; *Beard v. Illinois C. R. Co.* 79 Iowa, 518, 18 A. S. R. 381, 7 L.R.A. 280, 44 N. W. 800; *Philadelphia, B. & W. R. Co. v. Diffendal*, 109 Md. 494, 72 Atl. 193; *Leo v. St. Paul, M. & M. R. Co.* 30 Minn. 438, 15 N. W. 872; *Beede v. Wisconsin C. R. Co.* 90 Minn. 36, 101 A. S. R. 390, 95 N. W. 454; *Paterson v. Chicago, M. & St. P. R. Co.* 95 Minn. 57, 103 N. W. 621; *Calender-Vanderhoof Co. v. Chicago B. & Q. R. Co.* 99 Minn. 295, 109 N. W. 402; *Crouch v. Louisville & N. R. Co.* 42 Mo. App. 248; *Flynn v. St. Louis & S. F. R. Co.* 43 Mo. App. 424; *Myerson v. Woolverton*, 9 Misc. 186, 29 N. Y. Supp. 737; *Texas & P. R. Co. v. Capper*, 38 Tex. Civ. App. 61, 84 S. W. 694,—holding that law presumes that goods reached hands of last connecting carrier in same condition as delivered to first.

Cited in reference notes in 40 A. R. 457, on presumption that one of several successive carriers received goods in good order; 51 A. R. 483, on presumption of good order of baggage delivered to connecting carrier.

Subject of expert testimony.

Cited in *Armstrong v. Chicago, M. & St. P. R. Co.* 45 Minn. 85, 47 N. W. 459, holding that expert may give his opinion whether particular stable was proper and suitable for horses; *Fruit Dispatch Co. v. Murphy*, 90 Minn. 286, 96 N. W. 83, holding that whether bananas would decay during journey is proper subject for expert evidence.

31 AM. REP. 357, BLOCK v. McMURRY, 56 MISS. 217.

Validity of contract.

Cited in *Shaw v. Postal Telegr. & Cable Co.* 79 Miss. 670, 89 A. S. R. 666, 56 L.R.A. 486, 31 So. 222, holding contract requiring payment of additional sum to insure accuracy in telegram, valid.

—Contracts made on Sunday.

Cited in *Calhoun v. Phillips*, 87 Ga. 482, 13 S. E. 593, holding contract of sale made on Sunday, void; *Foster v. Wooten*, 67 Miss. 540, 7 So. 501, holding bill of sale executed on Sunday, in pursuance of sale made on Friday, valid; *Rosenbaum v. Hayes*, 10 N. D. 311, 86 N. W. 973, holding that Sunday transfer of property, though void, effective so far as executed; *Kelley v. Cosgrove*, 83 Iowa, 229, 17 L.R.A. 779, 48 N. W. 979, holding that bona fide contract of exchange of personality, made on Sunday, cannot be rescinded.

Cited in notes in 17 L.R.A. 779, on remedy of party as to rescission of Sunday contract; 5 L.R.A.(N.S.) 297, on return of consideration as condition of defending against contract because made on Sunday.

31 AM. REP. 360, CUNNINGHAM v. STATE, 56 MISS. 269.**Insanity as defense to crime.**

Cited in reference note in 59 A. S. R. 624, on insanity as defense in prosecution for homicide.

Cited in notes in 63 A. S. R. 100, on criminal responsibility of persons subject to insane delusions; 18 L.R.A. 225, on irresistible impulse as an excuse for crime; 10 L.R.A.(N.S.) 1033, on responsibility for crime committed in fit of anger.

Burden of proof of sanity.

Cited in *Ford v. State*, 73 Miss. 734, 35 L.R.A. 117, 19 So. 665, holding burden upon state to prove sanity of accused beyond reasonable doubt; *Ford v. State*, 71 Ala. 385; *Hodge v. State*, 26 Fla. 11, 7 So. 593; *Kelch v. State*, 55 Ohio St. 146, 60 A. S. R. 680, 39 L.R.A. 737, 45 N. E. 6,—holding that burden rests upon accused to establish insanity only by preponderance of evidence.

Cited in reference notes in 83 A. D. 239, on burden of proof of sanity when insanity is pleaded as defense to crime; 32 A. R. 99, on burden of proof as to insanity, on trial for murder; 36 A. R. 468, on burden of proof to show sanity in criminal case.

Cited in notes in 97 A. D.178, on burden of proof when insanity set up as defense to crime; 60 A. R. 213, 217, on proof of insanity as defense to crime; 76 A. S. R. 95, on burden of proof as to insanity set up as an excuse for crime; 36 L.R.A. 730, on burden of proving insanity in criminal prosecution; 39 L.R.A. 744, on reasonable doubt of insanity in criminal cases.

Test of sanity.

Cited in *Parsons v. State*, 81 Ala. 577, 60 A. R. 193, 2 So. 854; *Davis v. State*, 44 Fla. 32, 32 So. 822; *Kearney v. State*, 68 Miss. 233, 8 So. 292; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241,—holding that person capable of distinguishing right from wrong is sane; *Smith v. State*, 95 Miss. 786, 27 L.R.A.(N.S.) 461, 49 So. 945, holding that test of insanity in murder case in defendant's ability at time of act to recognize quality of act and to distinguish right from wrong.

Cited in reference note in 70 A. S. R. 637, on test of insanity which will constitute a defense to crime.

Cited in notes in 76 A. S. R. 88, on power to distinguish between right and wrong as test of criminal liability; 37 L.R.A. 266, on necessity that insane delusions be sufficient to excuse if true.

Necessity of proof of criminal charge beyond reasonable doubt.

Cited in *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *Glover v. United States*, 77 C. C. A. 450, 8 A. & E. Ann. Cas. 118, 147 Fed. 426; *State v. Scott*, 49 La. Ann. 253, 36 L.R.A. 721, 21 So. 271; *Lamar v. State*, 63 Miss. 265,—holding that jury cannot convict, if they have any reasonable doubt as to accused's guilt; *Dawson v. State*, 62 Miss. 241; *Bishop v. State*, 62 Miss. 289,—holding error to charge that accused must overcome presumption or establish defense to satisfaction of jury.

Conflicting instructions as error.

Cited in *State v. Thornton*, 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196 (dissenting opinion), on error in giving of conflicting instructions.

31 AM. REP. 369, HARKREADER v. CLAYTON, 56 MISS. 383.**Title of grantee wrongfully obtaining possession.**

Cited in *Garrett v. Goff*, 61 W. Va. 221, 56 S. E. 351, holding that no title vests in grantee who steals deed.

— Of escrow without performance of condition.

Cited in *Tarwater v. Going*, 140 Ala. 273, 37 So. 330; *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576; *Quick v. Milligan*, 108 Ind. 419, 58 A. R. 49, 9 N. E. 392—holding that no title vests in grantee who obtains possession of escrow without performance of condition.

Cited in note in 17 L.R.A. 511, on effect of delivery in escrow as to bona fide purchaser from grantee who has wrongfully obtained and recorded the deed.

— Title of purchaser from grantee.

Cited in *Stone v. French*, 37 Kan. 145, 1 A. S. R. 237, 14 Pac. 530; *Allen v. Ayer*, 26 Or. 589, 39 Pac. 1; *Steffian v. Milmo Nat. Bank*, 69 Tex. 513, 6 S. W. 823,—holding that bona fide purchaser from grantee, who obtains possession of deed without intent of grantor to deliver, acquires no title.

Test of delivery.

Cited in *Hall v. Waddill*, 78 Miss. 16, 27 So. 936, holding that test as to whether deed has been delivered is right of grantee to its possession.

Delivery in escrow.

Cited in reference notes in 32 A. R. 225, on what constitutes delivery in escrow; 48 A. S. R. 45, on when deeds delivered in escrow become operative.

Cited in note in 130 Am. St. Rep. 945, 971, on escrow.

Relation back of title.

Cited in *Lykins v. McGrath*, 184 U. S. 169, 46 L. ed. 485, 22 Sup. Ct. Rep. 450, holding that consent of secretary of interior to deed of public land may be retroactive and relate back to date of deed.

Validity of tax sale.

Cited in *Griffin v. Ellis*, 63 Miss. 348, holding tax sale of whole without offering in subdivisions required by statute, void; *Kennedy v. Sanders*, 90 Miss. 524, 43 So. 913, holding tax sale on wrong day, void; *McLemore v. Anderson*, 92 Miss. 42, 43 So. 878, to point that tax sale made on wrong day is void.

Purchase of adverse tax title.

Cited in *Hall v. Wescott*, 15 R. I. 373, 5 Atl. 629, holding that mortgagee, in or out of possession, cannot purchase and hold tax title as against mortgagor or other mortgagees.

31 AM. REP. 375, MOORE v. CHRISTIAN, 56 MISS. 408.**Right of parent to custody of child.**

Cited in *Beall v. Bibb*, 19 App. D. C. 313, holding mother, though remarried, entitled to custody of child after father's death; *Gilmore v. Kitson*, 165 Ind. 402, 74 N. E. 1083, holding that mother cannot bequeath custody of child so as to deprive father of his right to such custody; *Hibbette v. Baines*, 78 Miss. 695, 51 L.R.A. 839, 29 So. 80, holding father of good moral character and good financial condition entitled to recover custody of minor children from aunts; *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281, holding that parent may be refused right to retake control of minor child, when adopted home will best promote its welfare; *State ex rel. Wood v. Deaton*, 93 Tex. 243, 54 S. W. 901, holding mother entitled to custody of minor child, though child's interest best subserved by remaining with adoptive parent; *State ex rel. Neider v. Reuff*, 29 W. Va. 751, 6 A. S. R. 676, 2 S. E. 801, holding mother entitled to custody of minor son after father's death.

Cited in reference notes in 2 A. S. R. 57, on right to custody of children

as between parents; 2 A. S. R. 183, on award of custody of child to mother on habeas corpus; 6 A. S. R. 688, on parent's right to custody of child.

Cited in notes in 40 A. R. 330, on right to custody of child as between parents; 2 A. S. R. 184, on right of mother to custody of child; 2 A. S. R. 186, on proper methods for enforcement of parent's right to custody of child; 89 A. S. R. 269, on assignability of guardianship; 13 L.R.A.(N.S.) 291, on effect of attempt by father to appoint guardian for his child against surviving mother; 13 E. R. C. 54, on right to custody of child.

What constitutes withholding of custody of child.

Cited in *Prieto v. St. Alphonsus Convent of Mercy*, 52 La. Ann. 631, 47 L.R.A. 656, 27 So. 153, holding that influencing girl to stay in convent, though she is free to go, is withholding custody of her from her mother.

31 AM. REP. 379, LOWENBURG v. JONES, 56 MISS. 688.

Liability of connecting carriers.

Cited in reference notes in 2 A. S. R. 325, on liability of connecting carriers; 2 A. S. R. 263, on liability of connecting carrier for loss of goods; 35 A. S. R. 828, on attaching of connecting carrier's liability; 57 A. R. 199, on liability of last connecting carrier for loss of baggage.

Cited in notes in 31 L.R.A.(N.S.) 7, 42, 97, on liability of connecting carrier for loss beyond own line.

Suit in name of legal owner.

Cited in *Pollard v. Thomas*, 61 Miss. 150, holding that beneficiary in chattel trust deed must sue in name of trustee for proceeds of chattel.

31 AM. REP. 382, HENDRICKS v. ROBINSON, 56 MISS. 694.

Promise to pay debt of another within statute of frauds.

Cited in *Williams v. Auten*, 62 Neb. 832, 87 N. W. 1061, holding that person, at whose request goods are delivered to another who is liable therefor, is not liable, unless promise is in writing.

Liability of third person charged for goods.

Distinguished in *Simmons Hardware Co. v. Todd*, 79 Miss. 163, 29 So. 851, holding that unauthorized act of agent in directing goods, purchased for undisclosed principal, to be charged to third person imposes no liability on latter.

Moral obligation as consideration.

Cited in *Morris v. Norton*, 21 C. C. A. 553, 43 U. S. App. 739, 75 Fed. 912, holding that note, given because maker feels in honor bound to reimburse payee, trusting in recommended broker, is without consideration.

Cited in notes in 53 L.R.A. 354, 360, on moral obligation as a consideration for promise; 53 L.R.A. 367, on moral obligation as consideration for new promise after discovery; 7 L.R.A.(N.S.) 1054, on validity of new promise by woman after discovery to pay debt incurred in coverture.

31 AM. REP. 385, JONES v. BOARD OF REGISTRARS, 56 MISS. 766.

Restoration of suffrage by pardon.

Cited in *Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407, holding that pardon by president restores suffrage to person convicted of crime in Federal court.

Cited in reference note in 47 A. S. R. 915, on effect of pardon

Cited in note in 59 A. D. 580, on effect of pardon on disabilities arising from crime.

Parole as pardon.

Cited in *State v. Page*, 60 Kan. 664, 57 Pac. 514, holding that power to grant paroles is not power to pardon.

31 AM. REP. 389, RODGERS v. KLINE, 56 MISS. 808.

What constitutes libel.

Cited in notes in 116 A. S. R. 808, on rule for construing language used to determining whether it is libelous per se; 26 L.R.A. 326, on libel or slander in imputing general incompetency to physicians; 26 L.R.A. 327, on libel or slander in charging fault to physician in particular case.

— As question for jury.

Cited in reference note in 14 A. S. R. 878, on libel as a question for the jury.

Cited in note in 9 E. R. C. 128, on province of court and jury in determining whether publication capable of meaning ascribed to it by innuendo.

Instruction as to meaning of words.

Cited in *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318, holding that court may instruct jury as to ordinary meaning of anaesthetic, chloroform and poison, as given by dictionary.

Judicial notice.

Cited in note in 124 A. S. R. 46, on judicial notice of language, words and phrases, and abbreviations.

31 AM. REP. 394, STATE SAV. BANK v. SHAFFER, 9 NEB. 1, 1 N. W. 980.

Recovery on altered instrument.

Cited in *Taylor v. Acom*, 1 Ind. Terr. 436, 45 S. W. 130, holding that recovery may be had on note, although additional maker is procured without maker's knowledge; *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538, holding that insertion of rate of interest, where none was originally specified, prevents recovery on note; *Fisherdict v. Hutton*, 44 Neb. 122, 62 N. W. 488, holding that alteration of instrument, which neither varies meaning nor changes legal effect, will not prevent recovery thereon; *Erickson v. First Nat. Bank*, 44 Neb. 622, 48 A. S. R. 753, 28 L.R.A. 577, 62 N. W. 1078, holding that fraudulent erasure of name of payee invalidates note, even in hands of bona fide holder; *Foxworthy v. Colby*, 64 Neb. 216, 62 L.R.A. 393, 89 N. W. 800, holding that unauthorized insertion of "gold" before "dollars" destroys right to recover on instrument; *Wallace v. Tice*, 32 Or. 283, 51 Pac. 733, holding that honest alteration to correct note does not destroy right to recover on it when restored.

Cited in notes in 86 A. S. R. 114, on intent with which alteration of instrument is made; 4 L.R.A. 198, on effect of alteration of negotiable instrument as discharge; 35 L.R.A. 467, on removal of condition of note as change affecting bona fide holder.

Recovery on original consideration.

Cited in *Walton Plow Co. v. Campbell*, 35 Neb. 173, 16 L.R.A. 468, 52 N. W. 883, holding that fraudulent alteration of note secured by mortgage cancels debt and discharges mortgage; *Courcamp v. Weber*, 39 Neb. 533, 58 N. W. 187, holding that recovery may be had on original debt, when rate of interest was

innocently changed; *Savage v. Savage*, 36 Or. 268, 59 Pac. 461, holding that material alteration of note without fraudulent intent will not affect right of action on debt; *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 878, holding that holder can recover on original debt, where note is innocently altered by reducing rate of interest.

Cited in notes in 86 A. S. R. 123, on effect of alteration of instrument upon right of action on original consideration; 6 E. R. C. 617, on alteration of written instrument as discharge from liability under the contract.

31 AM. REP. 396, BRAHMSTADT v. McWHIRTER, 9 NEB. 6, 2 N. W. 232.

Validity of assignment for creditors.

Cited in reference notes in 36 A. R. 366; 75 A. S. R. 810,—on validity of assignment for benefit of creditors; 41 A. R. 58, on validity of powers of sale granted in assignments for benefit of creditors; 42 A. R. 354, on validity of assignment for benefit of creditors empowering assignee in his discretion to sell for cash or credit.

Cited in note in 58 A. S. R. 77, 78, as to invalidity, on their face, of assignments for creditors.

31 AM. REP. 399, MAY v. MAY, 9 NEB. 16, 2 N. W. 221.

Right of wife to contract with husband.

Cited in *Greene v. Greene*, 42 Neb. 634, 47 A. S. R. 724, 60 N. W. 937, holding that wife may make valid contracts with husband; *Dayton Spice-Mills Co. v. Sloan*, 49 Neb. 622, 68 N. W. 1040, holding that husband may give wife mortgage to secure pre-existing bona fide debt.

Cited in note in 69 L.R.A. 364, on effect of statutes on conveyance by husband to wife.

Distinguished in *Board of Trade v. Hayden*, 4 Wash. 263, 31 A. S. R. 919, 16 L.R.A. 530, 30 Pac. 87, holding that wife cannot make contract of partnership with husband.

Right of wife to sue husband.

Cited in *Bronson v. Brady*, 28 App. D. C. 250; *Mathewson v. Mathewson*, 79 Conn. 23, 5 L.R.A.(N.S.) 611, 63 Atl. 285, 6 A. & E. Ann. Cas. 1027,—holding that wife may maintain action against husband on note; *Heacock v. Heacock*, 108 Iowa, 540, 75 A. S. R. 273, 79 N. W. 353, holding that wife cannot sue husband on note made by him to her during coverture; *Trayer v. Setzer*, 72 Neb. 845, 101 N. W. 989, holding that disability of husband and wife to sue each other at law upon contracts has been removed by statute; *Grubbe v. Grubbe*, 26 Or. 363, 38 Pac. 182, holding that wife may maintain action against husband to recover not only money voluntarily loaned, but interest thereon; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898, holding that wife may enforce in equity husband's note payable to her; *Alexander v. Alexander*, 85 Va. 353, 1 L.R.A. 125, 7 S. E. 335, holding that wife can take confession of judgment from husband; *Bennett v. Bennett*, 37 W. Va. 396, 38 A. S. R. 47, 16 S. E. 638, holding that judgment confessed by husband in favor of wife, free from fraud, is not void as to his creditors.

Cited in reference note in 31 A. R. 623, on right of married woman to sue on note executed by husband to her during coverture.

Cited in notes in 73 A. S. R. 279, on actions maintainable at law between

husband and wife; 75 A. S. R. 282, on wife's right to sue husband; 6 L.R.A. 507; 5 L.R.A.(N.S.) 612,—on right of wife to sue husband on contract.

31 AM. REP. 406, MARSH v. STEELE, 9 NEB. 96, 1 N. W. 369.
Constitutionality of attachment statute.

Cited in *Olmstead v. Rivers*, 9 Neb. 234, 2 N. W. 366, holding statute, authorizing attachment of property of nonresident without undertaking, constitutional.

31 AM. REP. 409, ROOSE v. PERKINS, 9 NEB. 304, 2 N. W. 715.

Action for death under civil damage act.

Cited in *Stafford v. Levinger*, 16 S. D. 118, 102 A. S. R. 686, 91 N. W. 462. 1 A. & E. Ann. Cas. 132; *Gardner v. Day*, 95 Me. 558, 50 Atl. 892; *Mead v. Stratton*, 87 N. Y. 493, 41 A. R. 386; *Brockway v. Patterson*, 72 Mich. 122, 1 L.R.A. 708, 40 N. W. 192,—holding that widow may recover for injury to means of support from death of husband from intoxication; *Pegram v. Stortz*, 31 W. Va. 230, 6 S. E. 485, holding that widow cannot recover damages for injury to means of support from death of husband from intoxication; *Murphy v. Willow Springs Brewing Co.* 81 Neb. 223, 115 N. W. 761, holding that action under civil damage act is not maintainable by personal representatives; *Pennington v. Gillespie*, 63 W. 541, 61 S. E. 416; *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245,—holding that action accorded by civil damage act for death by intoxication is action for loss of means of support resulting from death.

Cited in reference notes in 35 A. R. 601, on recovery for death of another under civil damage act; 102 A. S. R. 692, on liability under civil damage acts for death of intoxicated person.

Cited in notes in 35 A. D. 338, on constitutionality of civil damage laws; 48 A. D. 626, on who may sue under civil damage liquor laws; 48 A. D. 627, on who may be sued under civil damage liquor laws; 48 A. D. 629, on action by relative for injury to means of support; 52 A. R. 160, on application of proximate and remote cause to cases arising under civil-damage act.

—**Joinder of wife and children as plaintiffs.**

Cited in *Jones v. Bates*, 26 Neb. 693, 4 L.R.A. 495, 42 N. W. 751, holding that married woman and minor children may join in action for loss of support caused by intoxication of husband; *Durein v. Pontious*, 34 Kan. 353, 8 Pac. 428, to point that minor children may join as plaintiffs in cause of action under civil damage act.

Cited in note in 48 A. D. 631, on pleading, practice, and evidence in action for injury to relative.

—**Liability of contributing liquor dealers.**

Cited in *Elshire v. Schuyler*, 15 Neb. 561, 20 N. W. 29; *Wardell v. McConnell*, 23 Neb. 152, 36 N. W. 278; *Murphy v. Gould*, 40 Neb. 728, 59 N. W. 383; *Chmelir v. Sawyer*, 42 Neb. 362, 60 N. W. 547,—holding that all liquor dealers furnishing liquor to intoxicated person are liable; *Schiek v. Sanders*, 53 Neb. 664, 74 N. W. 39, holding liquor dealer liable if death is contributed to by liquors furnished by him.

—**Determination of damages.**

Cited in *Warrick v. Rounds*, 17 Neb. 411, 22 N. W. 785, holding testimony of wife as to amount necessary to support family in ordinary comfortable circumstances, admissible; *Uldrich v. Gilmore*, 35 Neb. 288, 53 N. W. 135, holding that

habits prior to acts complained of may be considered by jury in determining damages.

Cited in note in 48 A. D. 639, on damages for death of relative.

Recovery of exemplary damages.

Cited in *Riewe v. McCormick*, 11 Neb. 261, 9 N. W. 88; *Winkler v. Roeder*, 23 Neb. 706, 8 A. S. R. 155, 37 N. W. 607; *Rosewater v. Hoffman*, 24 Neb. 222, 38 N. W. 857; *Atkins v. Gladwish*, 25 Neb. 390, 41 N. W. 347; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L.R.A. 190, 58 N. W. 84; *Bee Pub. Co. v. World Pub. Co.* 59 Neb. 713, 82 N. W. 28,—holding that exemplary damages are never allowed in civil actions; *Rawlins v. Vidvard*, 34 Hun, 205, holding that exemplary damages cannot be awarded without proof of aggravating circumstances.

Admissibility of mortality tables.

Cited in *Joliet v. Blower*, 155 Ill. 414, 40 N. E. 619; *Knott v. Peterson*, 125 Iowa, 404, 101 N. W. 173,—holding mortality tables admissible; *Vicksburg R. Power & Mfg. Co. v. White*, 82 Miss. 468, 34 So. 331, holding mortality tables not admissible, when person is not shown to belong to class from which tables were made; *King v. Bell*, 13 Neb. 409, 14 N. W. 141; *Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41; *Friend v. Ingersoll*, 39 Neb. 717, 58 N. W. 281,—holding Carlisle tables admissible; *Robinson v. Helena Light & R. Co.* 38 Mont. 222, 99 Pac. 837, to point that in personal injury action mortuary tables are admissible to aid in estimating damages.

Cited in note in 40 L.R.A. 559, on tables of expectancies of life as evidence.

Waiver of objection to misconduct of counsel.

Cited in *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 127, 74 N. W. 454, holding that objection to misconduct of counsel cannot be raised for first time on appeal.

31 AM. REP. 412, SCOFIELD v. STATE NAT. BANK, 9 NEB. 316, 2 N. W. 888.

Action against national bank as successor.

Cited in *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412, 59 A. S. R. 543, 35 L.R.A. 444, 68 N. W. 628, holding that depositor in failed bank cannot recover from national bank organized as its successor.

Cited in note in 59 A. S. R. 554, on liability of bank for debts of preceding corporation or partnership.

Power of national bank to take mortgage security.

Cited in note in 26 L. ed. U. S. 443, on power of national banks to take mortgage security.

Relief against sham pleading.

Cited in *Upton v. Kennedy*, 36 Neb. 66, 53 N. W. 1043, holding that court will strike out general denial appearing from pleadings to be false.

Cited in note in 113 A. S. R. 645, on relief obtainable as against sham pleading.

Injunction against judgment.

Cited in *Hess v. Lell*, 4 Neb. (Unof.) 476, 94 N. W. 975; *Petalka v. Fitle*, 33 Neb. 756, 51 N. W. 131; *Langley v. Ashe*, 38 Neb. 53, 56 N. W. 720; *Norwegian Plow Co. v. Rollman*, 47 Neb. 185, 31 L.R.A. 74, 66 N. W. 208; *Losey v. Neidig*, 52 Neb. 167, 71 N. W. 1067; *Bankers' L. Ins. Co. v. Robbins*,

53 Neb. 44, 73 N. W. 269,—holding that injunction against judgment will not be granted unless defendant has defense and no remedy at law and was not negligent.

Cited in notes in 30 L.R.A. 787, on injunctions against judgments obtained by fraud, accident, mistake, surprise, and duress; 31 L.R.A. 758, on injunctions against judgments on contracts contrary to public policy; 31 L.R.A. 765, on injunction against judgments on account of setoff where there has been a trial at law; 32 L.R.A. 324, on general equitable jurisdiction as to injunction against judgment where a legal defense was asserted at law.

31 AM. REP. 415, MAPSTRICK v. RAMGE, 9 NEB. 390, 2 N. W. 739.
Actionable conspiracy.

Cited in *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969, 43 So. 590, holding that to constitute conspiracy either act conspired or manner of its doing must be unlawful; *McCartney v. Berlin*, 31 Neb. 411, 47 N. W. 1111; *Farley v. Peebles*, 50 Neb. 723, 70 N. W. 231,—holding that petition alleging conspiracy to destroy plaintiff's business, acts done to accomplish such purpose and resulting damages, states cause of action; *Commercial Union Assur. Co. v. Shoemaker*, 63 Neb. 173, 88 N. W. 156, holding that conspiracy is not actionable, unless something in pursuance of common plan is done, resulting in damage; *Brace Bros. v. Evans*, 5 Pa. Co. Ct. 163, 18 Pittsb. L. J. N. S. 399; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881,—holding that boycott is actionable wrong; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995, to the point that means which would be lawful if used by individual are conspiracy when used as combination; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 128 A. S. R. 492, 22 L.R.A.(N.S.) 607, 114 S. W. 997, holding that malicious injury to business of another gives right of action to injured.

Cited in reference notes in 3 A. S. R. 39, on action for damages for conspiracy; 26 A. S. R. 759, on conspiracy to injure business; 40 A. S. R. 325, on validity of combinations; 108 A. S. R. 509, on liability of members of labor union for interfering with employment or causing discharge of employee.

Cited in notes in 61 A. S. R. 711, on what is unlawful interference or intimidation by strikers; 62 L.R.A. 699, on effect of bad motive to make actionable an injury to trade which otherwise would not be actionable.

31 AM. REP. 418, SEWALL v. COHOES, 75 N. Y. 45.

Liability of municipality for defective highways.

Cited in *Hubbell v. Yonkers*, 35 Hun, 349, holding city liable to one injured because of dangerous plan of construction of street.

Cited in notes in 20 L.R.A.(N.S.) 544, 555, 560, on liability of municipality for defects or obstructions in streets; 21 L.R.A.(N.S.) 630, 650, on contributory negligence as affecting municipal liability for defects and obstructions in streets.

—Negligence of city officers.

Cited in *Groves v. Rochester*, 39 Hun, 5, holding city liable for negligence of executive board charged with care of streets.

—Adopted highway.

Cited in *Faust v. Cleveland*, 58 C. C. A. 194, 121 Fed. 810, holding city not liable for obstruction in stream unless duty of keeping stream free therefrom is imposed by statute; *Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246, holding village liable for defect in sidewalk constructed by it on private property; *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 A. R. 82, 7 N. E. 743, holding city liable

for its negligence in construction of sewer on private property; *Huntington v. McClurg*, 22 Ind. App. 261, 53 N. E. 658, holding city liable for defective sidewalk, constructed by county, but recognized by city; *Jewhurst v. Syracuse*, 108 N. Y. 303, 15 N. E. 409, holding city liable for injury from defective condition of land just outside street, where there is no visible boundary to line of street; *Haynes v. Brooks*, 116 N. Y. 476, 22 N. E. 1083, holding town liable for condition of road recognized and treated by town officers as highway; *Seymour v. Salamanca*, 137 N. Y. 364, 33 N. E. 304, holding village liable for injury from defective sidewalk, though statute was not followed in laying out street; *Porter v. Attica*, 33 Hun, 605, holding village liable for defective condition of private way which has become highway by user; *Cohoes v. Morrison*, 42 Hun, 216, holding city liable for obstruction on land appropriated as street, though it is state land; *McVee v. Watertown*, 92 Hun, 306, 36 N. Y. Supp. 870, holding city liable for defect in land which it assumes authority to control as street; *Schafer v. New York*, 12 App. Div. 384, 42 N. Y. Supp. 744 (dissenting opinion), on liability of city for injury from obstruction on land used as street.

Distinguished in *Hoyt v. New York L. E. W. R. Co.* 6 N. Y. S. R. 7, holding village not liable for defect in railroad crossing, though village officials assumed to keep it in repair; *Veeder v. Little Falls*, 100 N. Y. 343, 3 N. E. 306, holding village not liable for failure to place railing along street along canal on state land.

—Bridges.

Cited in *Greenwood v. Westport*, 63 Conn. 587, 60 Fed. 560, holding town liable for negligence in operation of drawbridge, voluntarily assumed by it; *Spencer v. Hudson County*, 66 N. J. L. 301, 49 Atl. 483, holding county not liable for defect in bridge connecting private lands, built by county without authority; *Schomer v. Rochester*, 15 Abb. N. C. 57, holding city, treating bridge over state canal as public street, liable for neglect to repair bridge; *Langlois v. Cohoes*, 58 Hun, 226, 11 N. Y. Supp. 908, holding city liable for injury from defective bridge, originally private property, after acceptance thereof; *Ehle v. Minden*, 70 App. Div. 275, 74 N. Y. Supp. 903, holding town not liable for injury from negligence in construction of temporary bridge on private property; *Anderson v. St. Cloud*, 79 Minn. 88, 81 N. W. 746, holding that whether city maintained bridge in safe condition is question for jury.

Distinguished in *Carpenter v. Cohoes*, 81 N. Y. 21, 37 A. R. 468, holding city not liable for failure to guard approaches to bridge over canal on state land.

—Negligence of third party.

Cited in *Lane v. Syracuse*, 12 App. Div. 118, 42 N. Y. Supp. 219, holding city liable for injury from negligent construction by street railroad of barrier in street.

Admissibility of subsequent precautions after accident.

Cited in *Skinner v. Locks & Canals*, 154 Mass. 168, 26 A. S. R. 226, 12 L.R.A. 554, 28 N. E. 10, holding subsequent acts in taking additional precautions to prevent other accidents, inadmissible; *Sprague v. Rochester*, 52 App. Div. 53, 64 N. Y. Supp. 846, holding evidence that foreman of sidewalks repaired walk after accident admissible when limited to question of his authority; *Markowitz v. Dry Dock, E. B. & B. R. Co.* 12 Misc. 412, 33 N. Y. Supp. 702, holding evidence that railroad removed snowbank on day following accident inadmissible.

Cited in notes in 50 A. R. 54, on evidence of precautions subsequent to accident as proof of negligence; 57 A. R. 184, on construction or alteration after railroad accident as evidence that conditions were previously dangerous.

Distinguished in *Kennedy v. Cumberland*, 65 Md. 514, 57 A. R. 352, 5 Atl. 234, holding subsequent repairs admissible to show previous adoption of street by city.

31 AM. REP. 424, NEWALL v. NICHOLS, 75 N. Y. 78.

Burden of proof of survivorship.

Cited in *Cowman v. Rogers*, 73 Md. 403, 10 L.R.A. 550, 21 Atl. 64; *United States Casualty Co. v. Kacer*, 169 Mo. 301, 92 A. S. R. 641, 58 L.R.A. 436, 69 S. W. 370; *Supreme Council, R. A. v. Kacer*, 96 Mo. App. 93, 69 S. W. 671,—holding that one claiming through survivorship must prove survivorship; *Ehle's Will*, 73 Wis. 445, 41 N. W. 627, holding that claimants of realty by descent from life tenant have burden of showing that he survived remaindermen.

Presumption of survivorship.

Cited in *Faul v. Hulick*, 18 App. D. C. 9; *Middeke v. Blader*, 198 Ill. 590, 92 A. S. R. 284, 59 L.R.A. 653, 64 N. E. 1002 (former appeal in 92 Ill. App. 227); *Russell v. Hallett*, 23 Kan. 276; *Johnson v. Merithew*, 80 Me. 111, 6 A. S. R. 162, 13 Atl. 132; *St. John v. Andrews' Institute*, 191 N. Y. 254, 83 N. E. 981, 14 A. & E. Ann. Cas. 708 (modifying 117 App. Div. 698, 102 N. Y. Supp. 808); *Re McInnes*, 119 App. Div. 440, 104 N. Y. Supp. 147; *Walton & Co. v. Burchel*, 121 Tenn. 715, 130 A. S. R. 788, 121 S. W. 391; *Re Gerdes*, 50 Misc. 88, 100 N. Y. Supp. 440,—holding that there is no presumption in law of survivorship in case of persons perishing by common disaster; *Re Lott*, 65 Misc. 422, 121 N. Y. Supp. 1102; *Dunn v. Amsterdam Casualty Co.* 67 Misc. 109, 121 N. Y. Supp. 686; *Dunn v. New Amsterdam Casualty Co.* 63 Misc. 225, 118 N. Y. Supp. 491,—holding that where beneficiary and insured perish in same catastrophe, no presumption arises as to survival of either.

Cited in notes in 92 A. D. 708; 104 A. S. R. 210; 10 L.R.A. 550,—on presumption of survivorship; 41 A. D. 524, on presumption of survivorship when death results from same catastrophe; 104 A. S. R. 212, on presumption of survivorship as between parent and child or other relatives; 51 L.R.A. 870; 8 E. R. C. 552,—on presumption of survivorship as between those perishing in same calamity.

When survivorship assumed to be unascertainable.

Cited in *Young Women's Christian Home v. French*, 187 U. S. 401, 47 L. ed. 233, 23 Sup. Ct. Rep. 184; *Southwell v. Gray*, 35 Misc. 740, 72 N. Y. Supp. 342; *Re Willvor*, 20 R. I. 126, 78 A. S. R. 842, 51 L.R.A. 862, 37 Atl. 634,—holding that in absence of evidence, question of survivorship of persons perishing in same calamity must be regarded as unascertainable.

Vesting of remainder.

Cited in *Re Ridgeway*, 4 Redf. 226, holding that upon death of grandchildren without issue before time limited for distribution of principal gifts vested in those to whom they were upon such contingency limited.

Equitable conversion.

Cited in *Lee v. Tower*, 34 N. Y. S. R. 829, 12 N. Y. Supp. 240, holding that there is no equitable conversion, where power to sell is discretionary.

Creation of conditional limitation.

Cited in *Magee v. O'Neill*, 19 S. C. 170, 45 A. R. 765, holding that bequest to

granddaughter, provided she is raised as Catholic, otherwise to testator's daughters, creates conditional limitation.

31 AM. REP. 428, COWEE v. CORNELL, 75 N. Y. 91.

Followed without discussion in *Mitchell v. Mitchell*, 75 N. Y. 589.

Presumption of delivery of note.

Cited in *Moak v. Stevens*, 45 Misc. 147, 91 N. Y. Supp. 903, holding that ordinarily possession and production of note will raise presumption of delivery.

Sufficiency of consideration.

Cited in *Clark's Appeal*, 57 Conn. 565, 19 Atl. 332; *Wolford v. Powers*, 85 Ind. 294, 44 A. R. 16; *Price v. Jones*, 105 Ind. 543, 55 A. R. 230, 5 N. E. 683; *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106,—holding that judgment of parties as to sufficiency of consideration, consisting of services, will not be disturbed by court; *Root v. Strang*, 77 Hun, 14, 28 N. Y. Supp. 273; *Re Bradbury*, 105 App. Div. 250, 93 N.Y. Supp. 418,—holding performance of services sufficient to sustain note for amount for in excess of value of services; *Re Flagg*, 27 Misc. 401, 59 N. Y. Supp. 167, holding that valuable consideration, though wholly inadequate, is sufficient to support note; *Hagan v. Ward*, 38 Misc. 367, 77 N. Y. Supp. 893, holding that sale by extravagant, dissipated woman of her interest in estate for half its value will not be set aside for inadequacy of consideration; *Sherman v. Matthieu*, 106 App. Div. 368, 94 N. Y. Supp. 565; *Re Simmons*, 48 Misc. 484, 96 N. Y. Supp. 1103,—holding that mere inadequacy in value does not constitute failure of consideration.

Cited in notes in 56 A. R. 335, on promise of extra compensation for services as consideration for duebill; 39 A. S. R. 744, on sufficiency of moral obligation as consideration for express promise; 5 L.R.A. 857, on sufficiency of consideration for contract.

Investigation of consideration by original parties to note.

Cited in *Batterman v. Butcher*, 95 App. Div. 213, 88 N. Y. Supp. 685, holding that consideration for note is open to investigation in action between original parties.

Personal dealing of trustee with trust estate.

Cited in *Golson v. Dunlap*, 73 Cal. 157, 14 Pac. 576, holding that trustee cannot purchase from himself, either directly or indirectly; *Whitney v. Martine*, 88 N. Y. 535, holding that attorney cannot avail himself of his superior knowledge of matter derived from fiduciary relation to take unfair advantage; *Post v. Benchley*, 48 Hun, 83; *Elias v. Schweyer*, 17 Misc. 707, 40 N. Y. Supp. 910,—holding that trustee cannot deal with trust estate for his own benefit.

Cited in note in 11 L.R.A. 65, on equitable relief from violation of confidential relation.

Presumption of fraud or undue influence.

Cited in *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584, holding that intimate friendship does not raise presumption of fraud.

Cited in notes in 4 L.R.A. 637, on presumption against validity of transaction in case of mental weakness; 8 L.R.A. 261, on undue influence; 10 L.R.A. 680, on effect of holder's knowledge of facts and circumstances attending execution of note; 13 L.R.A. 758, on presumption of undue influence.

—Of blood relation.

Cited in *Toms v. Greenwood*, 30 N. Y. S. R. 478, 9 N. Y. Supp. 606; *Carpenter* Am. Rep. Vol. XVII.—24.

v. Soule, 88 N. Y. 251, holding that mere relation of father and son or daughter does not per se create presumption of fraud; Green v. Roworth, 113 N. Y. 462, 21 N. E. 165, holding that deed by aged, enfeebled father to sons, leaving him destitute, raises presumption of fraud; La Fourette v. La Fourette, 54 App. Div. 137, 66 N. Y. Supp. 430, holding no presumption that husband was dominated by wife; Green v. Benham, 57 App. Div. 9, 68 N. Y. Supp. 248, holding no presumption of undue influence in antenuptial agreement by widow, accustomed to business transactions; Williams v. Whittell, 69 App. Div. 340, 74 N. Y. Supp. 820, holding no presumption of fraud in agreement between educated husband and children of deceased wife to treat her letter as will; Ferris v. Ferris, 22 Misc. 577, 49 N. Y. Supp. 593, holding that mere proof of relation of parent and child is insufficient to make out prima facie case of undue influence; Yeakel v. McAtee, 156 Pa. 600, 27 Atl. 277, 33 W. N. C. 144, on presumption of fraud and undue influence on gift from parent to child; Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75, holding presumption of undue influence conclusive, where aged grantor gave proceeds of sale, negotiated by daughter, to her; Gick v. Stumpf, 126 App. Div. 548, 110 N. Y. Supp. 712, holding that burden of showing that gift was voluntary act is on son who receives money from mother and deposits it in bank to credit of himself in trust for mother.

Cited in reference note in 45 A. R. 696, as to whether gift or deed from grandparent to grandson is presumptively fraudulent.

Cited in notes in 25 A. R. 728, on note from grandfather to grandson as presumptively fraudulent; 36 L.R.A. 724, on presumption of sanity with relation to contracts and conveyances; 36 L.R.A. 733, on burden of proof as to sanity with relation to contracts and conveyances.

—Business relation.

Cited in Brown v. Mercantile Trust & D. Co. 87 Md. 377, 40 Atl. 256, holding that whether relation between principal and agent for special purpose is so confidential as to raise presumption of undue influence is question of fact; Smith v. Ogilvie, 5 N. Y. Supp. 382, holding that fact that person, dying prior to transaction, was partner both in plaintiff and defendant firms does not show fiduciary relation, raising presumption of fraud; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513, holding presumption against fairness of transaction of directors, in position of conflict between self-interest and integrity; Doheny v. Lacy, 168 N. Y. 213, 61 N. E. 255 (affirming 42 App. Div. 218, 59 N. Y. Supp. 724), holding relation of president and cashier of bank does not create presumption of undue influence; Spier v. Hyde, 92 App. Div. 467, 87 N. Y. Supp. 285, holding relation between members of stock pool, fiduciary, raising presumption of fraud; Kelly v. Aahforth, 47 Misc. 498, 95 N. Y. Supp. 1004, holding that presumption of fraud does not necessarily arise from confidential business relations between real estate owner and agent.

Cited in note in 6 E. R. C. 877, on degree of proof necessary on part of one who occupies position of trust or sustains position of legal or natural authority over another, to establish validity of gift or benefit from latter to former or any financial settlement between them.

—Professional relation.

Cited in Valentine v. Richardt, 39 N. Y. S. R. 38, 14 N. Y. Supp. 483, holding dealings of physicians with patient, with whom he lived in illicit relations, presumed fraudulent; Tragman v. Littlefield, 45 N. Y. S. R. 673, 18 N. Y. Supp. 583, holding dealing between attorney and client, in which interest of client may

have been betrayed, *prima facie* fraudulent; *McClellan v. Grant*, 83 App. Div. 599, 82 N.Y. Supp. 208, holding that conveyance by aged, illiterate woman to her pastor will be presumed fraudulent; *Re Murphy*, 28 Misc. 650, 59 N. Y. Supp. 1078, holding that fact that one of principal legatees drew will creates no presumption of undue influence; *Barnes v. Waterman*, 54 Misc. 392, 104 N. Y. Supp. 685, holding undue influence presumed from unfair contracts for annuity by decrepit old man with confidential adviser; *Re Wilcox*, 55 Misc. 170, 106 N.Y. Supp. 468, holding that no presumption of undue influence necessarily arises from fact that principal beneficiary, nearest relative, drew will.

Cited in note in 33 A. R. 739, on burden of proof as to undue influence in gift from patient to physician.

Burden of proof of fairness.

Cited in *Kyle v. Perdue*, 95 Ala. 579, 10 So. 103, holding that burden as to fiduciary transaction applies to relation between feeble woman and intimate business friends; *Nichols v. McCarthy*, 53 Conn. 299, 55 A. R. 105, 23 Atl. 93, holding that person, receiving benefit of confidential transaction, has burden of proving its fairness; *Jones v. Jones*, 137 N. Y. 610, 33 N. E. 479, holding that burden is not upon party receiving benefit, when confidential relation, raising presumption of fraud, is not proved; *People's Trust Co. v. Harman*, 43 App. Div. 348, 60 N. Y. Supp. 178, holding burden upon trustee of showing fairness of assignment to him of interest of beneficiary; *Rcsevear v. Sullivan*, 47 App. Div. 421, 62 N. Y. Supp. 447, holding burden upon grantee of premises of aged, weak woman to show fairness of deed for her support; *Sloan v. McCartney*, 58 Misc. 75, 108 N. Y. Supp. 840, holding burden of showing fairness and capacity upon person receiving benefit of conveyance by person, mentally impaired.

— Blood relation.

Cited in *Duncombe v. Richards*, 46 Mich. 166, 9 N.W. 149, holding burden upon nephew of showing fairness of assignments of mortgages by uncle on death-bed; *Yount v. Yount*, 144 Ind. 133, 43 N. E. 136; *Crawford v. Hoeft*, 58 Mich. 1, 24 N. W. 645,—holding burden upon son of showing fairness of transaction with aged mother; *Farmer v. Farmer*, 39 N. J. Eq. 211, holding burden of showing fairness of transaction upon husband, acting as wife's agent; *Ireland v. Ireland*, 43 N. J. Eq. 311, 12 Atl. 184, holding burden upon husband to show fairness of agreement with wife; *LeGendre v. Byrnes*, 44 N. J. Eq. 372, 14 Atl. 621, holding burden upon daughter who is agent of mother, to show fairness of conveyance from mother; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997, holding burden upon son to show fairness of conveyance by aged mother in consideration of support; *Barnard v. Gantz*, 140 N. Y. 249, 35 N. E. 430, holding burden upon son-in-law, also trusted adviser and agent, of showing fairness of transfer of bonds; *Tallinger v. Mandeville*, 48 Hun, 152 (dissenting opinion), on burden of proof as to undue influence in antenuptial contract; *Nutting v. Pell*, 11 App. Div. 55, 42 N. Y. Supp. 987, on whether burden upon grandmother of showing fairness of deed by epileptic; *Ferris v. Ferris*, 34 App. Div. 144, 54 N. Y. Supp. 523, holding burden upon son of showing fairness of release by mother of his liability as her agent; *Dolan v. Cummings*, 116 App. Div. 787, 102 N. Y. Supp. 91, holding burden upon cotenant, purchasing from brother and sister cotenants, to show that no deception was practised.

— Business relation.

Cited in *Ferguson v. Bateman*, 1 App. D. C. 279, holding burden upon manager

of syndicate to show that no deception was practised upon other members: *New York & B. Ferry Co. v. Moore*, 18 Abb. N. C. 106 (reversing 32 Hun, 29), on whether acquisition of riches during employment imposes upon toll-gatherer burden of showing innocence of embezzlement; *Re Moon*, 5 Silv. Sup. Ct. 65. 8 N. Y. Supp. 86, 28 N. Y. S. R. 205, holding burden upon employer, of old unmarried woman, who was sole beneficiary under her will, of showing fairness; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 50 N. E. 963, holding burden of fairness upon plaintiff in ejectment, who is shown to have held confidential relation to parties to successive deeds under which he claims; *Butler v. Prentiss*, 158 N. Y. 49, 52 N. E. 652, holding burden upon partner, of superior business ability and therefore trusted by other partner, of showing fairness of transaction.

— Professional relation.

Cited in *Yerkes v. Crum*, 2 N. D. 72, 49 N. W. 422, holding burden upon attorney of showing fairness of purchase of client's interest in subject-matter of litigation; *Whipple v. Barton*, 63 N. H. 613, 3 Atl. 922, holding burden upon attorney of showing fairness of gift from client; *Re Smith*, 95 N. Y. 516, holding burden upon attorney, principal beneficiary of infirm client, showing lack of undue influence; *Sheehan v. Erbe*, 77 App. Div. 176, 79 N. Y. Supp. 43, holding burden upon attorney to show fairness of assignment to him of lease by client.

31 AM. REP. 437, CASHMAN v. HENRY, 75 N. Y. 103.

Power of married woman to contract.

Cited in *Leach v. Leach*, 21 Hun, 381, holding that married woman may convey or devise her realty, as though she was feme sole; *Hendricks v. Isaacs*, 117 N. Y. 411, 15 A. S. R. 524, 6 L.R.A. 559, 22 N. E. 1029, holding contracts between husband and wife invalid; *Jones v. Fleming*, 104 N. Y. 418, 10 N. E. 693, holding that wife may agree to execute release of dower after husband's death; *Meeker v. Wright*, 76 N. Y. 262, 7 Abb. N. C. 299, holding that mortgage by wife on conveyance to her by husband of his interest in land owned by them, is valid; *Zimmerman v. Erhard*, 8 Daly, 311, holding that wife may form valid contract of partnership in trade with husband.

Cited in reference note in 78 A. D. 227, on power of married woman to bind her separate property by contract.

Cited in note in 4 L.R.A.(N.S.) 549, on ownership of separate estate, trade, or business as condition of married woman's right to contract.

Liability of married woman on contract.

Cited in *Krouskop v. Shontz*, 51 Wis. 204, 37 A. R. 817, 8 N. W. 241, holding wife liable for goods purchased on credit of farm as her separate estate; *Fairlie v. Bloomingdale*, 38 Hun, 220, holding wife liable on joint and several note by her and her husband for money borrowed by her on her own account; *Martin v. Roberts*, 30 Hun, 255, holding wife liable upon several notes by herself and husband for money loaned to her, independent of purpose for which it was borrowed; *Bush v. Babbitt*, 25 Hun, 213, holding married woman liable for rent of premises leased to her; *Scott v. Otis*, 25 Hun, 33, holding married woman liable to accommodation indorser of her note; *Tremeyer v. Turnquist*, 85 N. Y. 516, 39 A. R. 674; *Crisfield v. Banks*, 24 Hun, 159, holding married woman liable for provisions purchased by her upon her own credit; *Brand v. Hammond*, 65 How. Pr. 264, holding that coverture is only defense, where joint note was given outside her separate business or not for benefit of her separate

estate; *Wilson Sewing Mach. Co. v. Fuller*, 60 How. Pr. 480, holding married woman not liable or bound, charging her separate estate, when she has none; *Third Nat. Bank v. Guenther*, 17 N. Y. S. R. 403, 1 N. Y. Supp. 753, holding wife, carrying on separate business, subject to all liabilities attached thereto; *New York L. Ins. Co. v. Aitkin*, 125 N. Y. 660, 20 N. E. 732, holding married woman liable on her assumption of mortgage.

Cited in reference notes in 31 A. R. 655, on personal liability of married woman to pay mortgage debt which she had assumed on conveyance of land to her; 28 A. S. R. 838, on liability of married woman on contracts concerning her separate estate.

Cited in note in 78 A. D. 90, on assumption of mortgage by married woman.

Liability of one assuming mortgage or other debt.

Cited in *Carrier v. United Paper Co.* 73 Hun, 287, 26 N. Y. Supp. 414; *Bonhoff v. Wiehorst*, 57 Misc. 456, 108 N. Y. Supp. 437,—holding grantee, assuming mortgage, not liable for debt, if grantor was not personally liable therefor; *Howard v. Robbins*, 67 App. Div. 245, 73 N. Y. Supp. 172 (dissenting opinion), to point that liability of grantee, assuming mortgage, depends on, and is coextensive with, personal liability of grantor.

Cited in reference note in 62 A. S. R. 763, on effect of purchaser's assumption of mortgage.

Cited in notes in 78 A. D. 77, on enforcement by mortgagees of grantee's obligation; 8 L.R.A. 315, on necessity of grantor's being personally liable where premises convey subject to mortgage debt; 25 L.R.A. 276, on right of mortgagee, creditor, or lienor to sue one purchasing subject to mortgage, debt, or lien; 71 A. S. R. 200, on right to enforce contract to pay another person's debt.

31 AM. REP. 446, MARTIN v. FUNK, 75 N. Y. 134.

What constitutes a valid gift.

Cited in *Miller v. Clark*, 40 Fed. 15, holding that direction to teller to transfer sum to niece, who signed pass-book but could not draw during life of depositor, constitutes valid gift; *Fowler v. Fowler*, 135 Fed. 405, holding that execution of conveyance of interest in brother's estate constitutes gift; *Barnum v. Reed*, 136 Ill. 388, 26 N. E. 572, holding that gift must be consummated whether it is by delivery only or by creation of trust; *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, 67 N. E. 232, holding that deposit in name of son and mailing to him of written order, authorizing either to draw, which he did not sign, constitutes gift; *Schollmier v. Schoendelen*, 78 Iowa, 426, 16 A. S. R. 455, 43 N. E. 282, holding that "Pay to S. & H. within deposit after my death," written in bank book requires additional evidence to show completed gift; *Marcy v. Amazeen*, 61 N. H. 131, 60 A. R. 320, holding deposit in another's name subject to depositor's order, without notice to other party retaining control of fund, no gift; *Orr v. McGregor*, 43 Hun, 528, holding that deposit to credit of another is not gift, when there is contrary intent; *Re Small*, 27 App. Div. 438, 50 N. Y. Supp. 341, holding that advising executory to give beneficiary certain sum, if the thought best, which he promised to do, does not constitute gift; *Devlin v. Hinman*, 34 App. Div. 107, 54 N. Y. Supp. 496, holding no gift, upon deposit in trust for daughter who gave father power of attorney to control account; *Re Rose*, 35 Misc. 21, 71 N. Y. Supp. 172, holding that deposit, in event of death, payable to brother, and delivery of bank book to him, does not constitute valid gift; *Crouse v. Judson*, 41 Misc. 338, 84 N. Y. Supp. 755,

holding finding of stock certificates in daughter's name in his safe deposit box and proof of his declarations, sufficient evidence of gift; *Providence Inst. for Sav. v. Carpenter*, 18 R. I. 287, 27 Atl. 337, holding deposit in names of depositor or another, with understanding that latter was to have it after depositor's death, neither gift nor trust; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 A. R. 781, holding that deposit in name of another, but payable to depositor, does not constitute gift.

Cited in reference notes in 4 A. S. R. 334, on deposit of money in bank in another's name as gift; 49 A. S. R. 646, on effect of deposit in savings bank in name of another.

Cited in notes in 48 A. R. 788, on gift of savings bank deposit; 34 A. S. R. 199, 222, on circumstances under which gift is regarded as complete; 5 L.R.A. 73, on enforcement by equity of gift not enforceable at law; 11 L.R.A. 685, on insufficiency of mere intention to give as a gift; 1 L.R.A.(N.S.) 790, on deposit in bank for other person as gift or transfer of title; 12 E. R. C. 440, on sufficiency of gift *inter vivos*.

Distinguished in *Re Crawford*, 113 N. Y. 560, 5 L.R.A. 71, 21 N. E. 692 (modifying 14 N. Y. S. R. 587), holding that registry of bonds in name of another does not constitute gift.

—Necessity of delivery.

Cited in *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119, holding no gift by deposit in another's name without delivery to such person or to anyone for her; *Casteel v. Flint*, 112 Iowa, 92, 83 N. W. 796, holding no gift, by issuance of stock to owner as trustee of another, without delivery to latter; *Smith v. Ossipee Valley Ten Cents Sav. Bank*, 64 N. H. 228, 10 A. S. R. 400, 9 Atl. 792, holding that deposit in name of daughter, retaining income during life, with daughter's assent, without delivery of bank book, constitutes gift; *McElroy v. Albany Sav. Bank*, 8 App. Div. 46, 40 N. Y. Supp. 422, holding delivery of pass book unnecessary to validity of gift by deposit in name of wife, or husband, or survivor; *Flanders v. Blandy*, 45 Ohio St. 108, 12 N. E. 321, holding that setting apart by father of certain U. S. bonds as gift to daughter, without delivery, except of interest, does not constitute valid gift; *Candee v. Connecticut Sav. Bank*, 81 Conn. 372, 22 L.R.A. (N.S.) 568, 71 Atl. 551, holding that valid gift of money on deposit in savings bank in donor's name may be made without delivery of book.

Cited in reference note in 49 A. S. R. 485, on effect of deposit of money in bank by donor retaining pass book.

Cited in note in 21 L. R. A. 695, on undelivered written transfer of property as a gift by sealed instrument.

—Sufficiency of delivery.

Cited in *Devol v. Dye*, 123 Ind. 321, 7 L.R.A. 439, 24 N. E. 246, holding direction to cashier to place money in sack and mark thereon person's name, sufficient delivery to constitute gift; *Stokes v. Sprague*, 110 Iowa, 89, 81 N. W. 195, holding endorsement of notes "In case of my death pay to," with promise of friend to deliver them to payee, insufficient delivery to constitute gift; *Eastman v. Woronoco Sav. Bank*, 136 Mass. 208, holding that deposit in another's name, subject to depositor's order, delivery of bank book to donee and redelivery to depositor for safe keeping, constitutes gift; *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458, holding execution of deeds, which maker retains, with instructions indorsed thereon that they be delivered after his death, no

gift; *Hurlbut v. Hurlbut*, 49 Hun, 189, 1 N. Y. Supp. 854, holding delivery to company of assignment to daughter of policy payable to insured, sufficient to create gift; *Bettinger v. Van Alstine*, 79 Hun, 517, 29 N. Y. Supp. 904, holding retention of deeds subject to change by draftsman, to be kept until grantor's death, not irrevocable delivery; *Gannon v. McGuire*, 22 App. Div. 43, 47 N. Y. Supp. 870, holding no gift of mortgage, where grantor took back mortgage, redelivered it to grantee, and again took it back and retained it; *Re King*, 115 App. Div. 751, 100 N. Y. Supp. 1089, holding that delivery of stock certificates with assignment in blank is unqualified delivery, though donor reserves right to dividends; *Langworthy v. Crissey*, 10 Misc. 450, 31 N. Y. Supp. 85, holding that valid gift may be made by delivery of note, unindorsed, to third person, with direction to deliver to donee on donor's death; *Re Wachter*, 16 Misc. 137, 38 N. Y. Supp. 941, 1 Gibbons, Sur. Rep. 552, holding valid gift of horse and buggy by father to minor daughter, though remaining on farm, where she had entire charge thereof; *Gano v. Fink*, 43 Ohio St. 462, 54 A. R. 819, 3 N. E. 532, holding giving of key with statement that donor wanted donee to take notes in box, insufficient delivery; *Royston v. McCulley*, (Tenn. Ch. App.) 52 L.R.A. 399, 59 S. W. 725, holding telling father of donee to unlock trunk and get pocketbook, containing certificates, indorsed to donee, sufficient delivery.

Power to make one's self trustee of his own property.

Cited in *Locke v. Farmers' Loan & T. Co.* 140 N. Y. 135, 35 N. E. 578 (reversing 66 Hun, 428, 50 N. Y. S. R. 287, 21 N. Y. Supp. 524); *De Camp v. Wallace*, 45 Misc. 436, 92 N. Y. Supp. 746,—holding that person by valid declaration of trust may constitute himself trustee for another of property already owned by him.

Creation of trust.

Cited in *Lucas v. Coe*, 86 Fed. 972, holding that stock, purchased at request of father with funds held in trust for son, is held in trust; *Fowler v. Gowing*, 152 Fed. 801, holding that issuance of stock to owner as trustee for another creates trust; *Fellows v. Fellows*, 69 N. H. 339, 46 Atl. 474, holding that conveyance, in consideration of support during life and payment of money to another after death, does not create irrevocable trust; *Hurlbut v. Durant*, 88 N. Y. 121, 2 N. Y. Civ. Proc. Rep. (Browne) 115, holding that direction of testator to executors to pay interest of specified amount to certain beneficiaries creates trust; *McPherson v. Rollins*, 107 N. Y. 316, 1 A. S. R. 826, 14 N. E. 411, holding that conveyance to daughter and taking back of mortgage, conditioned for certain payments, creates trust; *Kelsey v. Cooley*, 33 N. Y. S. R. 775, 11 N. Y. Supp. 745; *Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731,—holding that conveyance and return of mortgage for support of grantor and payment of sum to third party does not create trust in favor of latter; *Brown v. Spohr*, 180 N. Y. 201, 73 N. E. 14 (affirming 87 App. Div. 522, 84 N. Y. Supp. 995), holding that four essentials of trust are designated beneficiary, trustee, and property, and delivery or assignment to trustee; *Robb v. Washington & J. College*, 185 N. Y. 485, 78 N. E. 359 (modifying 103 App. Div. 327, 93 N. Y. Supp. 92), holding that declaration of trust to college of securities for maintaining professional chair transfers title thereto to college; *Westlake v. Wheat*, 43 Hun, 77, holding that instrument reciting that half of bequest was for benefit of another's children and that legatee accepted trust, establishes trust; *Phipard v. Phipard*, 55 Hun, 433, 8 N. Y. Supp. 728, holding that statement, attached to tontine policy, that it was for benefit of insured's children creates

trust; *Wadd v. Hazelton*, 62 Hun, 602, 17 N. Y. Supp. 410, holding that delivery of assignment of mortgage, executed but not acknowledged, to executor and statement of intention to give it to assignee, establishes trust; *Locke v. Rings*, 66 Hun, 428, 21 N. Y. Supp. 524 (dissenting opinion), on sufficiency of declaration of trust setting apart stock certificates for apportionment of dividends; *Beeman v. Beeman*, 88 Hun, 14, 34 N. Y. Supp. 484, holding, to constitute trust, either explicit declaration of trust or circumstances showing intention to create trust, necessary; *Todd v. Vaughan*, 90 Hun, 70, 35 N. Y. Supp. 457, holding that valid trust is created where testator in lifetime delivers money to third party with direction to expend it in specified manner; *Williams v. Charlier*, 15 App. Div. 128, 44 N. Y. Supp. 225, holding that mailing of list of securities, in which money entrusted to writer is invested, constitutes declaration of trust; *Sears v. Palmer*, 109 App. Div. 126, 95 N. Y. Supp. 1023, holding that deed made by direction of grantee, to him for life, with remainder in fee to children, creates trust in their favor; *Re Cooper*, 6 Misc. 501, 27 N. Y. Supp. 425, holding that gift with direction to pay certain sums and hold balance for use of named person, without specifying time or manner of such use, creates valid trust; *Johnson v. Williams*, 63 How. Pr. 233, holding written statement of gift of stock and request to another to see that it is paid to donee after donor's death, no declaration of trust; *Re Cooper*, 1 Power, 563, holding that delivery of money to person, to be applied to specific purposes, to which he assents, creates trust; *Sargent v. Baldwin*, 60 Vt. 17, 13 Atl. 854, holding that conveyance to person who executes mortgage back, conditional for maintenance of mortgagee, creates trust; *Pennsylvania Co.'s Appeal*, 48 Phila. Leg. Int. 463; *Noble v. Learned*, 153 Cal. 245, 94 Pac. 1047, holding that ineffectual attempt to make gift does not create trust; *Millholland v. Whalen*, 89 Md. 212, 44 L.R.A. 205, 43 Atl. 43, holding that deposit "in trust for herself (depositor) and M, joint owners, subject to order of either; balance to belong to survivor" belonged to M on death of depositor.

Cited in reference note in 33 A. S. R. 712, on imperfect gifts not being effective as trusts.

Cited in notes in 34 A. S. R. 223, on possession of pass book as creating trust; 24 L.R.A. 380, on effect of assignment for creditors.

Distinguished in *Hamer v. Sidway*, 57 Hun, 229, 11 N. Y. Supp. 182, holding that letter that writer had in bank for nephew money promised upon latter's refraining from certain acts until majority does not establish trust; *Govin v. De Miranda*, 76 Hun, 414, 27 N. Y. Supp. 1049, holding mere execution of declaration of trust, without placing evidence thereof in custody of another, insufficient to create trust.

—Form of declaration.

Cited in *Norway Sav. Bank v. Merriam*, 88 Me. 146, 33 Atl. 840; *Warner v. Greenwood*, 106 Mich. 572; *Young v. Young*, 80 N. Y. 422, 36 A. R. 634; *Wadd v. Hazelton*, 137 N. Y. 215, 33 A. S. R. 707, 21 L.R.A. 693, 33 N. E. 143; *Watts v. Shipman*, 21 Hun, 598; *Re Crise*, 2 Connoly, 59, 7 N. Y. Supp. 202; *Smith's Estate*, 144 Pa. 428, 27 A. S. R. 641, 22 Atl. 916, 28 W. N. C. 565,—holding no certain form of declaration necessary to create trust, but intention must be plainly manifest and not derived from equivocal expressions; *Ashman's Estate*, 223 Pa. 543, 72 Atl. 899, holding that declaration in writing by father that he gives certain bonds to son, but providing they were not to be used

until father's death, followed by no delivery, and where no declaration is made that father holds them in trust, does not pass title.

Cited in reference note in 60 A. S. R. 284, on form of words required to create a trust.

Cited in note in 12 L.R.A.(N.S.) 551, on sufficiency of declarations to establish voluntary trust where legal title is retained by settler.

—Necessity of writing.

Cited in *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273; *Booth v. Oakland Bank for Sav.* 122 Cal. 19, 54 Pac. 370; *Seavey v. Seavey*, 30 Ill. App. 625; *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 A. S. R. 380, 32 L.R.A. 377, 33 Atl. 836; *Milholland v. Whalen*, 89 Md. 212, 44 L.R.A. 205, 43 Atl. 43; *Barry v. Lambert*, 98 N. Y. 300, 50 A. R. 677; *Gilman v. McArdle*, 65 How. Pr. 330, 17 Jones & S. 463, 12 Abb. N. C. 414,—holding that trust is not invalid because it is not declared in writing.

—By deposit in trust for another.

Cited in *Gerrish v. New Bedford Inst. for Sav.* 128 Mass. 159, 35 A. R. 365, holding that deposit in trust for son, with statement that son was to have money after depositor's death, creates trust; *Cleveland v. Hampden Sav. Bank*, 182 Mass. 110, 65 N. E. 27, holding that deposit in trust for another does not create trust, if depositor did not have such intent; *Anderson v. Thomson*, 38 Hun, 394; *Re Walker*, 45 N. Y. S. R. 21, 17 N. Y. Supp. 636; *Boone v. Citizens' Sav. Bank*, 9 Abb. N. C. 146 (reversing 21 Hun, 235); *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 A. S. R. 479, 4 L.R.A. 145, 21 N. E. 172, 2 Silv. Ct. App. 280, 23 Abb. N. C. 133 (reversing 47 Hun, 399),—holding that deposit in trust for another entitles latter to money on death of depositor; *Farleigh v. Cadman*, 159 N. Y. 169, 53 N. E. 808, holding that deposit in trust for person, to her knowledge and in her presence, constitutes trust; *Lee v. Kennedy*, 25 Misc. 140, 54 N. Y. Supp. 155; *Harrison v. Totten*, 29 Misc. 700, 62 N. Y. Supp. 754; *Re Totten*, 179 N. Y. 112, 70 L.R.A. 711, 71 N. E. 748, 1 A. & E. Ann. Cas. 900 (reversing 89 App. Div. 368, 85 N. Y. Supp. 928, which reversed 38 Misc. 349, 77 N. Y. Supp. 928), holding that deposit in one's name as trustee for another, standing alone, does not establish irrevocable trust during lifetime of depositor; *Hyde v. Kitchen*, 69 Hun, 280, 23 N. Y. Supp. 573, holding that deposit in trust for another, in absence of evidence of contrary intent, creates trust; *Ackerman v. Herrick*, 71 Hun, 190, 24 N. Y. Supp. 606, holding that deposit in trust for another raises inference of attempt to give money; *Sayre v. Weil*, 94 Ala. 466, 15 L.R.A. 544, 10 So. 546; *Boone v. Citizens' Sav. Bank*, 84 N. Y. 83, 38 A. R. 498; *Willis v. Smyth*, 91 N. Y. 297; *Mabie v. Bailey*, 95 N. Y. 206; *Re Mueller*, 15 App. Div. 67, 44 N. Y. Supp. 280; *Decker v. Union Dime Sav. Inst.* 15 App. Div. 553, 44 N. Y. Supp. 521; *Williams v. Brooklyn Sav. Bank*, 51 App. Div. 332, 64 N. Y. Supp. 1021; *Miller v. Seaman's Bank for Sav.* 33 Misc. 708, 68 N. Y. Supp. 983; *Barker v. Harbeck*, 17 N. Y. S. R. 678, 2 N. Y. Supp. 425; *Terry v. Bale*, 1 Dem. 452; *Re Collyer*, 4 Dem. 24; *Macy v. Williams*, 83 Hun, 243, 31 N. Y. Supp. 620,—holding that deposit by one person in trust for another, unexplained, constitutes trust; *Domestic Missions v. Mechanics' Sav. Bank*, 40 App. Div. 120, 54 N. Y. Supp. 28 (affirming 24 Misc. 595, 54 N. Y. Supp. 28), on point that direction by depositor to make her pass book payable in trust for named eleemosynary society creates valid trust; *Re Smith*, 40 Misc. 331, 81 N. Y. Supp. 1035, holding no trust created by depositor in trust for husband by

wife who survives him and denies trust; *Weber v. Weber*, 9 Daly, 211; *Weber v. Weber*, 58 How. Pr. 255,—holding no trust created by deposit in trust for another under circumstances clearly showing intention not to part with ownership; *Atkinson's Petition*, 16 R. I. 413, 27 A. S. R. 745, 3 L.R.A. 392, 16 Atl. 712, holding that deposit by father in name of children, himself as trustee, telling them that it would be theirs at his death, constitutes trust; *Re Podhajshy*, 137 Iowa, 742, 115 N. W. 590; *Keyl v. Waterhaus*, 42 Mo. App. 49; *Trubey v. Pease*, 240 Ill. 513, 88 N. E. 1005, 16 A. & E. Ann. Cas. 370,—holding that trust must be established by clear proof, where delivery to trustee.

Cited in notes in 105 A. S. R. 741, on duty of savings bank in case of deposits in trust for another; 32 L.R.A. 374, on what is sufficiency to show trust in favor of third person in deposit in bank.

Distinguished in *Cunningham v. Davenport*, 147 N. Y. 43, 49 A. S. R. 641, 32 L.R.A. 373, 41 N. E. 412 (reversing 74 Hun, 53, 26 N. Y. Supp. 322), holding that deposit in trust for brother does not create trust, when depositor survives brother and denies trust.

—By deposit in another's name.

Cited in *Hoboken Bank v. Schwoon*, 62 N. J. Eq. 503, 50 Atl. 490, holding joint account, payable to either or survivor, and delivery of pass book to another, with direction to deliver on death, complete declaration of trust; *Beaver v. Beaver*, 137 N. Y. 59, 32 N. E. 1102 (reversing 62 Hun, 104, 16 N. Y. Supp. 746; former appeal in 117 N. Y. 421, 15 A. S. R. 531, 6 L.R.A. 403, 22 N. E. 940; reversing 53 Hun, 258, 6 N. Y. Supp. 586), holding that deposit in name of minor son, who died before depositor without knowledge of deposit, did not create trust; *Sullivan v. Sullivan*, 161 N. Y. 554, 56 N. E. 116 (affirming 39 App. Div. 99, 56 N. Y. Supp. 693), holding that deposit, payable to depositor, or in case of his death to another, does not create trust; *Jagger v. Bird*, 42 Hun, 423, holding that father has no interest in money after indorsement of check to son and deposit thereof, with father's assent, in son's name; *Rode v. De Young*, 2 N. Y. City Ct. Rep. 101, holding that direction by mother to another to deposit money to children's credit creates trust.

—Necessity of knowledge by beneficiary.

Cited in *Rogers Locomotive & Mach. Works v. Kelley*, 88 N. Y. 234, holding notice to or assent of creditors to be benefited not essential to completeness of trust; *Scott v. Harbeck*, 49 Hun, 292, 1 N. Y. Supp. 788, holding that fact that beneficiary is ignorant of deposit in trust for her until after depositor's death does not invalidate trust; *Houghton v. Davenport*, 74 Me. 590; *Marquette v. Wilkinson*, 119 Mich. 413, 43 L.R.A. 840, 78 N. W. 474; *Mize v. Bates County Nat. Bank*, 60 Mo. App. 358; *Re George*, 1 Connoly, 241, 3 N. Y. Supp. 426, 23 Abb. N. C. 43; *Fullerton v. National Burglar & Theft Ins. Co.* 63 How. Pr. 5, 10 Abb. N. C. 364; *Hurd v. Farmers' Loan & T. Co.* 63 How. Pr. 314; *Moloney v. Tilton*, 22 Misc. 682, 51 N. Y. Supp. 19,—holding that actual possession or knowledge by beneficiary is not essential to creat valid trust; *Alliance Mill. Co. v. Eaton*, 86 Tex. 401, 24 L.R.A. 369, 25 S. W. 614, holding knowledge and assent of creditors essential to deed of trust to secure creditors; *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571, 33 A. S. R. 944, 25 Atl. 487, holding that deposit to credit of son, unknown to him, and retention of deposit book, naming son as depositor and father as trustee, creates voluntary trust.

Cited in notes in 34 A. S. R. 224, on notice of trust to donee; 24 L.R.A.

370, on presumption of assent to assignment or deed of trust for creditors; 10 L.R.A.(N.S.) 616, on necessity of beneficiary's knowledge of trust.

Distinguished in *People's Sav. Bank v. Webb*, 21 R. I. 218, 42 Atl. 874, holding notice to beneficiary necessary to establish trust.

—Effect of retention of control over property.

Cited in *Manhattan Co. v. Blake*, 148 U. S. 412, 37 L. ed. 504, 13 Sup. Ct. Rep. 640, holding that deposit by state treasurer for payment of state debts does not create trust in favor of creditors, deposit being subject to withdrawal; *Bartlett v. Remington*, 59 N. H. 364, holding that deposit in trust for another, without his knowledge, depositor retaining control of fund, is executory trust; *Robertson v. McCarty*, 54 App. Div. 103, 66 N. Y. Supp. 327; *Jenkins v. Baker*, 77 App. Div. 509, 78 N. Y. Supp. 1074; *Mabie v. Bailey*, 12 Daly, 60; *Macy v. Williams*, 55 Hun, 489, 8 N. Y. Supp. 658,—holding that deposit in trust for another creates trust, though depositor draws all money from bank; *Von Hesse v. Mackaye*, 62 Hun, 458, 17 N. Y. Supp. 55, holding that retention of control of bonds during life and borrowing of money thereon does not invalidate trust; *Turnbull v. Turnbull*, 118 App. Div. 449, 103 N. Y. Supp. 499, holding no gift or trust where certificate of deposit, payable to depositor or brother, accepted with intention that money shall be used by depositor during life, balance to go to brother, are retained by depositor until death; *Re King*, 51 Misc. 375, 101 N. Y. Supp. 279, holding that trust is established by deposit in person's name with addition "subject also to control of" depositor; *Markey v. Markey*, 38 N. Y. S. R. 173, 13 N. Y. Supp. 925, holding that deposit in trust for another, with intent to control it during life and leave it to other after death, does not create trust; *Bishop v. Senman's Bank for Sav.* 33 App. Div. 181, 53 N. Y. Supp. 488; *Graffing v. Heilman*, 1 App. Div. 260, 37 N. Y. Supp. 253,—holding that retention by depositor of bank book and drawing of interest during life is not inconsistent with intention to create trust; *Re Biggars*, 39 Misc. 426, 80 N. Y. Supp. 214, holding retention of bank book and large withdrawals from deposit insufficient to invalidate trust; *Tygard v. McComb*, 54 Mo. App. 85; *Millard v. Clark*, 80 Hun, 141, 29 N. Y. Supp. 1012, 61 N. Y. S. R. 633 (reversing 7 Misc. 366, 27 N. Y. Supp. 631); *Martin v. Martin*, 46 App. Div. 445, 61 N. Y. Supp. 813; *Marsh v. Keogh*, 82 App. Div. 503, 81 N. Y. Supp. 825; *Haynes v. McKee*, 18 Misc. 361, 41 N. Y. Supp. 553; *Merigan v. McGonigle*, 205 Pa. 321, 54 Atl. 994,—holding that retention of pass book of deposit in name of depositor in trust for another is not decisive against validity of trust; *Re Richardson*, 138 Iowa, 668, 100 N. W. 797, holding that in case of voluntary trust, beneficial title passes to cestui que trust while legal title may be retained by trustor or transferred to third person.

Cited in reference note in 34 A. S. R. 189, on assignment without delivery.

Distinguished in *Pierson v. Drexel*, 11 Abb. N. C. 150, holding that deposit by insurance company for protection of policy holders did not create trust, dominion over money being reserved to depositor.

31 AM. REP. 455, BLAIR v. BARTLETT, 75 N. Y. 150.

Conclusiveness of judgment.

Cited in *Crandall v. Grow*, 41 N. J. Eq. 482, 5 Atl. 136, holding that recovery for defective performance of contract does not excuse payment of balance due on contract; *Murran v. Plymouth Coal Co.* 13 Luzerne Leg. Reg. 217,

holding that damages from malperformance of services may be set up as defense to action for services.

Cited in reference note in 71 A. S. R. 474, on conclusiveness of judgment.

Cited in notes in 96 A. D. 781, as to what facts judgment is not *res judicata*; 112 A. S. R. 35, on judgment of eviction against tenant for nonpayment of rent as *res judicata*.

— Judgment by default.

Cited in *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733, holding default judgment as conclusive as to essentials to support judgment as one rendered after answer and contest.

Cited in reference note in 38 A. S. R. 655, on conclusiveness of judgments by default.

— Matters concluded.

Cited in *Schwinger v. Raymond*, 83 N. Y. 192, 38 A. R. 415; *Pray v. Hege-man*, 98 N. Y. 351; *Lee v. Jefferson County*, 62 How. Pr. 201; *Wandering v. Straw*, 25 W. Va. 692,—holding judgment *res adjudicata* as to every ground of recovery or defence which might have been presented; *Smith v. Ontario*, 18 Blachf. 454, 4 Fed. 386, holding that adjudication that bonds were issued by agents without authority precludes proof in another action of ratification; *McNicholas v. Lake*, 13 Colo. App. 164, 56 Pac. 987, holding judgment in action on building contract *res adjudicata* as to performance, in subsequent action upon separate items in contract; *McRoberts v. Pooley*, 12 N. Y. Civ. Proc. Rep. 139, holding determination in surplus money proceedings *res adjudicata* as to amount to be credited upon mortgage; *Re Crise*, 2 Connoly, 59, 7 N. Y. Supp. 202, holding that failure of beneficiaries under will to file claim against executor in settlement estops them from afterwards claiming money; *Bulmer v. Young*, 47 App. Div. 464, 62 N. Y. Supp. 406, holding judgment in action by plaintiff's assignor for price of engine, *res adjudicata* in action by plaintiff for price; *John V. Farwell Co. v. Lykins*, 59 Kan. 96, 52 Pac. 99, holding that though special findings against notes are silent as to account constituting consideration, judgment for defendant for costs bars subsequent action on account; *Bollong v. Schuyler Nat. Bank*, 26 Neb. 281, 18 A. S. R. 781, 3 L.R.A. 142, 41 N. W. 990, holding judgment only for amount of note less usurious interest bar to action to recover back twice amount of illegal interest paid; *Levin v. Standard Fashion Co.* 16 Daly, 404, 11 N. Y. Supp. 706, holding judgment for wages no bar to action for breach of contract in discharging plaintiff; *Dunham v. Bower*, 77 N. Y. 76, 33 A. R. 570, holding judgment for freight, bar to action by shipper for destruction of goods; *Masten v. Olcott*, 24 Hun, 587, holding judgment for trespass, in which defense of title was withdrawn, no bar to action to recover land; *Vigeant v. Scully*, 35 Ill. App. 44, holding judgment for contractor for work bar to action for damages for negligence of architect in supervision; *Everett v. New York Engraving & Printing Co.* 19 Misc. 360, 43 N. Y. Supp. 502, holding judgment for installments of commissions due, *res adjudicata* as to right to recover installments afterwards due; *Campbell v. Thompson*, 27 Hun, 541, holding payment to settle action for commissions no bar to recovery by consignor of damages for sale in violation of his instructions; *Dowd v. Smith*, 8 Misc. 619, 29 N. Y. Supp. 821, holding judgment upon contract of sale and partial delivery bar to action for breach of contract in refusing to make full delivery; *Kirven v. Virginia-Carolina Chemical Co.* 77 S. C. 493, 58 S. E. 424, holding

judgment on note for fertilizer no bar to action for damages to crops from its use; *Bliss v. Locke*, 9 Daly, 526, holding recovery for purchase price of machines bar to action for breach of warranty; *Honsinger v. Union Carriage & Gear Co.* 175 N. Y. 229, 67 N. E. 436 (dissenting opinion), holding judgment for price upon default as bar to action for breach of warranty; *Tysen v. Tompkins*, 10 Daly, 244, holding judgment for rent, where breach of agreement to repair is set up as defense, conclusive, in another action for rent under same lease; *Grafton v. Brigham*, 70 Hun, 131, 24 N. Y. Supp. 54, holding judgment in summary proceedings conclusive, in subsequent action for rent, upon tenant's liability as assignee of lease; *Reich v. Cochran*, 151 N. Y. 122, 56 A. S. R. 607, 37 L.R.A. 805, 45 N. E. 367, holding judgment in summary proceedings, bar to action by tenant to cancel lease.

Distinguished in *Meyerhoffer v. Baker*, 121 App. Div. 797, 106 N. Y. Supp. 718, holding default order in summary proceedings no bar to action by tenant for fraudulent inducement to make lease.

— Judgment for services as bar to malpractice.

Cited in *Jordahl v. Berry*, 72 Minn. 119, 71 A. S. R. 469, 45 L.R.A. 541, 75 N. W. 10, holding default judgment for physician's services no bar to action for malpractice; *Goble v. Dillon*, 86 Ind. 327, 44 A. R. 308; *Elebach v. Weed*, 29 Misc. 754, 60 N. Y. Supp. 1136; *Schopen v. Baldwin*, 83 Hun, 234, 31 N. Y. Supp. 581,—holding that judgment for physician's services bars action for malpractice; *Sale v. Eichberg*, 105 Tenn. 333, 52 L.R.A. 894, 59 S. W. 1020, holding judgment no bar, where rendered upon enforced confession as condition to issuance of injunction to prevent its use as defense in malpractice action; *Lawson v. Conaway*, 37 W. Va. 159, 38 A. S. R. 17, 18 L.R.A. 627, 16 S. E. 564 (dissenting opinion), judgment for physician's services as bar to action for malpractice; *Resseguie v. Byers*, 52 Wis. 650, 38 A. R. 775, 9 N. W. 779, holding judgment for physician's services no bar to action for malpractice, when that question was not litigated; *Clement v. Moore*, 135 App. Div. 723, 119 N. Y. Supp. 883; *Martin v. Prentice*, 133 App. Div. 741, 118 N. Y. Supp. 215, to point that recovery by physician for services in justice's court bars action for malpractice.

Cited in notes in 38 A. R. 780, on former action for value of services as bar to subsequent action for nonperformance; 45 L.R.A. 542, 543, on recovery by physician as bar to action for malpractice.

Distinguished in *Deeves v. Lockhart*, 19 Jones & S. 302, holding payment for surgeon's services prior to return day of summons no bar to action for malpractice.

Disapproved in *Lawson v. Conaway*, 37 W. Va. 159, 38 A. S. R. 17, 18 L.R.A. 627, 16 S. E. 564, holding that if physician procures judgment by default, for services, patient is not estopped from bringing action for malpractice.

Necessary proof of cause of action.

Cited in *McDonald v. Nuse*, 12 Misc. 507, 33 N. Y. Supp. 661, holding that plaintiff, on defendant's default, must establish his cause of action by legal proof; *Toohey v. Patterson*, 52 Misc. 285, 102 N. Y. Supp. 1122, holding proof of damages necessary as material element of case.

When estoppel arises.

Cited in *Campbell v. Thompson*, 27 Hun, 541, holding payment of amount of commissions due commission merchant does not estop consignor from recovering damages if the sale was wrongfully made in violation of his instructions.

31 AM. REP. 459, CREGIN v. BROOKLYN CROSSTOWN R. CO. 75 N. Y. 192, Later appeal in 83 N. Y. 595, 38 Am. Rep. 474, reversing 19 Hun, 341.

Abatement of action by death.

Cited in *Burke v. Holtzmann*, 117 App. Div. 292, 102 N. Y. Supp. 162, holding that action for damages for refusal to allow preference of veteran survives death of plaintiff; *Price v. Price*, 75 N. Y. 244, 31 A. R. 463, holding cause of action for fraudulently inducing marriage, by representing that first wife was dead, does not survive; *Seventeenth Ward Bank v. Webster*, 67 App. Div. 228, 73 N. Y. Supp. 648, holding action by bank against president loaning money without authority on worthless securities survives; *Gorden v. Strong*, 158 N. Y. 407, 53 N. E. 33, holding taxpayer's action survives plaintiff; *Miller v. Young*, 90 Hun, 132, 35 N. Y. Supp. 643, holding action to restrain diversion of water with damages therefor, not abated by plaintiff's death; *United States v. De Goer*, 38 Fed. 80, holding action for forfeiture of goods, under revenue laws, for fraudulent under valuation, abates upon defendant's death.

Cited in reference note in 24 A. S. R. 672, on survival of actions founded on contract.

Cited in notes in 53 A. R. 531, 532, on survival of actions *ex delicto*: 53 A. R. 537, on abatement of action of divorce by death; 2 E. R. C. 18, on survival of actions of tort and contract.

— Civil damage action.

Cited in *Morenus v. Crawford*, 51 Hun, 89, 94, 5 N. Y. Supp. 453, holding action against liquor seller under civil damage act for horse killed by intoxicated person not abated by plaintiff's death; *Moriarty v. Bartlett*, 34 Hun, 272, holding wife's action for damages from death of husband while intoxicated not abated by liquor seller's death.

— Action for libel.

Cited in *Wellman v. Sun Printing & Pub. Co.* 66 Hun, 331, 21 N. Y. Supp. 577, holding cause of action for libel does not survive; *Johnson v. Bradstreet Co.* 87 Ga. 79, 13 S. E. 250, holding action for libel does not abate upon plaintiff's death, under statute preserving actions for "injury to person."

— Action for personal injuries.

Cited in *Scott v. Brown*, 24 Hun, 620, holding action for damages and expense of illness of plaintiff's children occasioned by plumber's negligence survives defendant; *Stephen v. Woodruff*, 79 N. Y. S. R. 712, 45 N. Y. Supp. 712, holding cause of action for loss of child's services through illness occasioned by failure to repair leaky roof survives defendant; *Kelsey v. Jewett*, 34 Hun, 11, holding action for personal injuries abates upon plaintiff's death, after reversal of judgment in his favor; *Forbes v. Omaha*, 79 Neb. 6, 112 N. W. 326, holding that cause of action for loss of services occasioned by negligent injury to wife survives.

Cited in reference note in 31 A. R. 463, on survivability of action by husband against carrier for negligence causing loss of wife's services owing to her injury.

Cited in notes in 53 A. R. 529, on survival of actions *ex contractu* involving personal and property interests; 17 L.R.A.(N.S.) 571, as to whether husband's action for damages sustained by him on account of personal injury to wife abates by his own death or that of the wrongdoer.

— **Action for death.**

Cited in *Bates v. Sylvester*, 205 Mo. 493, 120 A. S. R. 761, 11 L.R.A. (N.S.) 1157, 104 S. W. 73, 12 A. & E. Ann. Cas. 457, holding that action for killing of husband does not survive to widow against administrator of defendant; *Mundt v. Glokner*, 27 N. Y. Civ. Proc. Rep. 126, 48 N. Y. Supp. 940 (dissenting opinion), on abatement of action for intestate's death by death of sole next of kin; *Re Meekin*, 31 N. Y. Civ. Proc. Rep. 230, 58 N. E. 50, holding that action for intestate's death survives death of plaintiff, administrator and sole beneficiary; *Hamilton v. Jones*, 125 Ind. 176, 25 N. E. 192; *Ilegerich v. Keddie*, 99 N. Y. 258, 52 A. R. 25, 1 N. E. 787,—holding statutory cause of action for negligently causing death does not survive wrongdoer; *Pennsylvania Co. v. Davis*, 4 Ind. App. 51, 29 N. E. 425, holding father's action for negligent killing of infant child does not abate with his death; *Re Meekin*, 164 N. Y. 145, 79 A. S. R. 635, 51 L.R.A. 235, 58 N. E. 50, holding action for negligently causing death survives death of sole next of kin; *Mundt v. Glokner*, 24 App. Div. 110, 48 N. Y. Supp. 940 (dissenting opinion), majority holding action for negligently causing death does not abate upon death of only person beneficially interested.

— **Action for seduction.**

Distinguished in *Holliday v. Parker*, 23 Hun, 71, holding action for seduction of daughter does not survive defendant.

Abatement of action by termination of corporate existence.

Cited in *Shayne v. Evening Post Pub. Co.* 56 App. Div. 426, 67 N. Y. Supp. 937, holding action for libel abates upon termination of defendant's corporate existence.

— **Action for personal injuries.**

Cited in *Re Yuengling Brewing Co.* 24 App. Div. 223, 49 N. Y. Supp. 12, holding cause of action against corporation for negligently causing personal injuries does not survive voluntary dissolution; *Grafton v. Union Ferry Co.* 22 N. Y. Civ. Proc. Rep. 402, 19 N. Y. Supp. 966, holding that action for personal injuries abates on dissolution, pendente lite, of defendant corporation by lapse of term of existence; *Marstaller v. Mills*, 143 N. Y. 398, 38 N. E. 370, holding cause of action for loss of son's services through corporation's negligence survives its dissolution.

Right of action.

Cited in note in 11 L.R.A. 222, on actions by husband and wife for damages.

— **For injuries to wife.**

Cited in *Jones v. Utica & B. River R. Co.* 40 Hun, 349, holding husband may recover damages for loss of wife's society by reason of negligent injury; *Citizens' Street R. Co. v. Twiname*, 121 Ind. 375, 7 L.R.A. 352, 23 N. E. 150; *Blair v. Chicago & A. R. Co.* 89 Mo. 334, 1 S. W. 367, holding husband may maintain separate action for loss of wife's services and expense occasioned by injury in railroad accident.

— **For alienating husband's affections.**

Cited in *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17, sustaining wife's right to maintain action in her own name for alienation of husband's affections.

Nature or kind of action.

Cited in *Catlin v. Adirondack Co.* 20 Hun, 19, holding action against common

carrier for loss of baggage grounded in tort, permitting issuance of body execution for costs against plaintiff.

Distinguished in *Tinker v. Colwell*, 193 U. S. 473, 48 L. ed. 754, 24 Sup. Ct. Rep. 505 (affirming 169 N. Y. 531, 98 A. S. R. 587, 58 L.R.A. 765, 62 N. E. 668), holding that criminal conversation with wife constitutes wilful injury to property rights of husband so as to be unaffected by discharge in bankruptcy; *Galveston, H. & S. A. R. Co. v. Roemer*, 1 Tex. Civ. App. 191, 20 S. W. 843, holding suit for damages in carrying passenger beyond destination barred by statute of limitations applicable to actions for tort.

— Action for personal injuries or death.

Cited in *Crapo v. Syracuse*, 183 N. Y. 395, 35 N. Y. Civ. Proc. Rep. 195, 76 N. E. 465, holding that action by administrator for decedent's death an action for personal injuries within statute requiring notice of accident; *Groth v. Washburn*, 34 Hun, 509, holding husband's action for loss of services and expenses occasioned by wife's injuries is governed by statute of limitations applicable to suits for injury to property; *Frazier v. Georgia R. & Bkg. Co.* 101 Ga. 70, 28 S. E. 684, holding action for loss of services of son killed by defendant's negligence is governed by statute of limitations applicable to actions for injuries to personalty; *Boroswitz v. Union Traction Co.* 23 Pa. Co. Ct. 243, 8 Pa. Dist. R. 676, holding passenger's action for medical expenses and loss of business occasioned by injury is barred by statute applicable to personal injury.

— Action for seduction.

Cited in *Hutcherson v. Durden*, 113 Ga. 987, 54 L.R.A. 811, 39 S. E. 495, holding father's action for daughter's seduction barred by statute of limitations governing injuries to person.

Assignability of cause of action.

Cited in *Moore v. Kinstry*, 37 Hun, 194, holding cause of action for fraud and deceit passes to assignee for creditors.

Measure of damages for personal injuries.

Cited in *Ohio & M. R. Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373, holding damages for loss of time and medical expenses not recoverable in wife's action for personal injuries, in which husband joined.

Cited in note in 10 L.R.A. 794, on expenses for medical attendance as element of damages for personal injury.

Use of deposition in other action.

Cited in *Murphy v. New York C. & H. R. R. Co.* 31 Hun, 358, holding deposition of deceased taken in negligence action brought by himself, inadmissible on trial of executor's action for death negligently caused.

31 AM. REP. 463, PRICE v. PRICE, 75 N. Y. 244.

Abatement of action by death.

Cited in *Payne's Appeal*, 65 Conn. 397, 48 A. S. R. 215, 33 L.R.A. 418, 32 Atl. 948, holding that action for fraud in inducing plaintiff to marry her does not survive her death; *Hegerich v. Keddle*, 99 N. Y. 258, 52 A. R. 25, 1 N. E. 787, holding that action for death abates on death of wrong-doer; *Holliday v. Parker*, 23 Hun, 71, holding that action for seduction abates on death of defendant; *Larocque v. Conheim*, 42 Misc. 613, 87 N. Y. Supp. 625, holding that action for breach of promise of marriage, accompanied by seduction does not survive death

of plaintiff; *Sperry v. Cook*, 138 Mo. App. 296, 120 S. W. 654 (dissenting opinion), on nonsurvival of action for breach of promise of marriage.

Cited in reference notes in 31 A. R. 459, on survivability of action for fraud of defendant in inducing marriage by false pretense that his first wife was dead; 34 A. R. 765, on action for breach of promise against representative of promisor; 48 A. S. R. 226, on survivability of actions for tort.

Cited in notes in 53 A. R. 531, on survival of actions *ex delicto*; 33 L.R.A. 411, on abatement of action by woman for fraudulently inducing her to marry; 2 E. R. C. 17, on survival of actions of tort and contract.

31 AM. REP. 467, *CLAFLIN v. MEYER*, 75 N. Y. 260.

Upon whom burden of proof rests.

Cited in *Western Assur. Co. v. J. H. Mohlman*, 40 L.R.A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811; *N. & M. Friedman Co. v. Atlas Assur. Co.* 133 Mich. 212, 94 N. W. 757,—holding burden on insurer to prove, as defense, that building fell from other cause than fire; *Jones v. Prospect Mountain Tunnel Co.* 21 Nev. 339, 31 Pac. 642, holding that burden of proof is not shifted to defendant by making out *prima facie* case; *Stokes v. Stokes*, 155 N. Y. 581, 50 N. E. 342, holding that defendant, demanding affirmative, has burden of proving defense; *Whisten v. Brengal*, 16 Misc. 37, 37 N. Y. Supp. 813, holding burden upon plaintiff of proving negligence of employee, temporarily left in charge of business; *Cassidy v. Cady*, 49 Misc. 478, 97 N. Y. Supp. 1046, holding defendant not bound to prove justification, until plaintiff proves facts from which it is to be presumed that assault was without just cause.

Distinguished in *Rapid Safety Fire Extinguisher Co. v. Hay Budden Mfg. Co.* 37 Misc. 556, 75 N. Y. Supp. 1008, holding that burden is not upon lessor to show negligence of lessee of personality, when latter is liable, independent of negligence.

—As to negligence of bailee.

Cited in *Cussen v. Southern California Sav. Bank*, 133 Cal. 534, 85 A. S. R. 221, 65 Pac. 1099, holding burden upon defendant to show proper care in safe-keeping, where loss of plaintiff's money is established; *Waterman v. American Pin Co.* 19 Misc. 638, 44 N. Y. Supp. 410, holding that presumption of negligence of bailee is not rebutted by evidence of employee that he mailed goods to bailor; *Hoffmann v. Coughlin*, 26 Misc. 24, 55 N. Y. Supp. 600; *Rothoser v. Cosel*, 39 Misc. 337, 79 N. Y. Supp. 855,—holding that bailee must prove with reasonable certainty that goods were stolen; *Patriska v. Kronk*, 57 Misc. 552, 109 N. Y. Supp. 1092, holding burden upon gratuitous bailee of showing circumstances of loss, not sustained by proof that boarder disappeared at same time as money; *The Strathdon*, 89 Fed. 374, holding burden on plaintiff of showing negligence of ship owners, in case of injury to cargo by fire; *Hunter v. Ricke Bros.* 127 Iowa, 108, 102 N. W. 826; *Stewart v. Stone*, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595 (affirming 16 N. Y. S. R. 52); *Polack v. O'Brien*, 114 App. Div. 366, 100 N. Y. Supp. 385,—holding that burden continues on bailor of proving negligence for loss occasioned by accident not within control of bailee; *Siegman v. Keeler*, 4 Misc. 528, 24 N. Y. Supp. 821, holding burden upon plaintiff of showing negligence of boarding house keeper for loss from theft; *Bissell v. Harris*, 1 Neb. (Unof.) 535, 95 N. W. 779; *Kafka v. Levensohn*, 18 Misc. 202, 41 N. Y. Supp. 368,—holding that burden continues on bailor to show negligence, when it appears that goods were stolen; *Wilson v. Wyckoff, Church & Partridge*, Am. Rep. Vol. XVII.—25.

133 App. Div. 92, 117 N. Y. Supp. 783 (dissenting opinion), on burden of proof of negligence as upon bailor in case of loss of goods.

— **As to negligence of warehouseman.**

Cited in *Davis v. Hurt*, 114 Ala. 146, 21 So. 468, holding burden on warehouseman, failing to deliver or account for failure, of proving loss without want of ordinary care; *Marshall v. Andrews*, 8 N. D. 364, 79 N. W. 851, holding burden on defendants of establishing destruction by fire, where reply denies that plaintiff's grain was in warehouse burned; *Lockwood v. Manhattan Storage & Warehouse Co.* 28 App. Div. 68, 50 N. Y. Supp. 974, holding burden upon storage company of explaining and excusing nonproduction of money placed in safe deposit box in warehouse; *Lichtenstein v. Jarvis*, 31 App. Div. 33, 52 N. Y. Supp. 605, holding that warehouseman cannot rebut presumption of negligence by mere evidence that property has disappeared; *Aaronson v. Pennsylvania R. Co.* 23 Misc. 666, 52 N. Y. Supp. 95, holding that warehouseman cannot rebut presumption of negligence by mere proof that goods cannot be found; *Liberty Ins. Co. v. Central Vermont R. Co.* 19 App. Div. 509, 46 N. Y. Supp. 576; *Seals v. Edmondson*, 71 Ala. 509,—holding burden on bailor of showing negligence of warehouseman in case of loss by fire; *Holt Ice & Cold Storage Co. v. Arthur Jordan Co.* 25 Ind. App. 314, 57 N. E. 575, holding burden on plaintiff of proving negligence of warehouseman, who shows that damage to butter stored was without his fault; *Kaiser v. Latimer*, 9 App. Div. 36, 41 N. Y. Supp. 94 (later appeal in 40 App. Div. 149, 57 N. Y. Supp. 833), holding burden upon bailor to show that collapse of warehouse was caused by negligence of warehouseman; *Mautner v. Terminal Warehouse Co.* 25 Misc. 729, 55 N. Y. Supp. 603, holding that bailor must reassume burden of establishing negligence, when warehouseman accounts for damage without lack of care; *Madan v. Covert*, 13 Jones & S. 245; *Adler v. Weir*, 49 Misc. 134, 96 N. Y. Supp. 736,—holding burden upon plaintiff to show negligence of warehouseman for loss by theft; *Yazoo & M. V. R. Co. v. Hughes*, 94 Miss. 242, 22 L.R.A.(N.S.) 975, 47 So. 662, holding that in action against warehouseman by bailor of goods burned with warehouse burden is on plaintiff of showing negligence.

Cited in reference notes in 24 A. S. R. 614, on burden of proof in action against warehouseman; 35 A. R. 263, on burden of proof in action against warehouseman for loss by fire; 56 A. R. 684, on burden of proof of negligence of warehouseman for injury to goods caused by fall of warehouse; 64 A. S. R. 546, on burden of proof as to negligence of warehousemen; 24 A. D. 151, on burden of proof as to negligence of warehouseman.

Distinguished in *Williamson v. New York, N. H. & H. R. Co.* 24 Jones & S. 508, 4 N. Y. Supp. 834, holding existence of some, but not conclusive, evidence that property was stolen from warehouse, insufficient to cast burden on plaintiff.

Presumption of negligence of bailee.

Cited in reference note in 6 A. S. R. 138, on presumption that bailee has been negligent.

— **From failure to deliver goods.**

Cited in *Levy v. Appleby*, 1 N. Y. City Ct. Rep. 252, holding failure of bathing-house manager to redeliver valuables of bather, prima facie evidence of negligence; *Canfield v. Baltimore & O. R. Co.* 93 N. Y. 532, 45 A. R. 268; *Trimble v. New York C. & H. R. R. Co.* 39 App. Div. 403, 57 N. Y. Supp. 437,—holding that failure of carrier to deliver goods upon demand establishes prima

facie liability; *Pattison v. Hammerstein*, 17 Misc. 375, 39 N. Y. Supp. 1039, holding rule that unexplained failure to deliver goods is prima facie evidence of negligence, inapplicable to loss in theatre; *Bean v. Ford*, 65 Misc. 481, 119 N. Supp. 1074; *Porter v. Duval Co.* 60 Misc. 122, 111 N. Y. Supp. 825,—holding that total default of carrier in delivering or accounting for goods is prima facie evidence of negligence.

—From delivery in damaged condition.

Cited in *Reed v. Crowe*, 13 Daly, 164, holding that return by warehouseman of trunk with contents saturated with water warrants presumption of negligence; *Jamiet v. American Storage & Moving Co.* 109 Mo. App. 257, 84 S. W. 128; *McLoughlin v. New York Lighterage & Transp. Co.* 7 Misc. 119, 27 N. Y. Supp. 248,—holding that return of chattel in damaged condition is prima facie evidence of negligence.

Care required of bailee.

Cited in *American Preservers Co. v. Drescher*, 4 Misc. 482, 24 N. Y. Supp. 361, holding that bailee is required to exercise ordinary care in protecting property.

Cited in note in 136 Am. St. R. 225, 226, 229, on duty of warehousemen in care of property.

Liability of bailee.

Cited in *Smith v. Dinmore*, 9 Daly, 188, holding that conversion lies, where warehouseman, upon demand, neither delivers goods, nor accounts for failure to do so; *Gibbs v. Coykendall*, 39 Hun, 140, holding agister not liable for death of cattle from disease contracted by being ignorantly pastured upon fields previously occupied by Texan cattle; *Campbell v. Klein*, 52 Misc. 123, 101 N. Y. Supp. 577, holding retention of key by defendant's predecessor, without evidence connecting key with loss, insufficient to show negligence.

Cited in notes in 24 A. D. 154, on liability of warehouseman where goods are stolen; 7 L.R.A. 532, on warehouseman's liability for negligence; 20 L. ed. U. S. 528, on liability of bailee for loss by theft or robbery; 26 L. ed. U. S. 433, on liability of warehousemen for goods delivered to them.

Consideration by referee of inspection of premises.

Cited in *Hentz v. Mt. Vernon*, 78 App. Div. 515, 79 N. Y. Supp. 774, holding that damages assessed by referee under stipulation that view might be considered by him are not reviewable; *Radway v. Duffy*, 79 App. Div. 116, 80 N. Y. Supp. 334, holding basing of findings by referee partly on his knowledge and experience and partly on record, erroneous; *Lewis v. Yagel*, 77 Hun, 337, 28 N. Y. Supp. 833; *Cooper v. New York, L. & W. R. Co.* 122 App. Div. 128, 106 N. Y. Supp. 611,—holding inspection of premises by referee only for purpose that he might better understand and apply evidence; *Crouch v. Gutmann*, 32 N. Y. S. R. 254, 10 N. Y. Supp. 275, holding that referee allowed to inspect premises, can construe testimony in light of information thus obtained.

Recovery when facts are consistent with due care.

Cited in *McCaffrey v. Twenty-third Street R. Co.* 47 Hun, 404; *McKelvey v. Twenty-third Street R. Co.* 5 Misc. 424, 26 N. Y. Supp. 711,—holding that no recovery can be had, where facts are as consistent with due care as with want of it.

Delivery by carrier.

Cited in note in 9 A. S. R. 511, on carrier's right to deliver property to real consignee or his agent.

Who are warehousemen.

Cited in note in 24 A. D. 149, on keepers of bonded warehouses as warehousemen.

31 AM. REP. 470, MILES v. LOOMIS, 75 N. Y. 288.**Competency of experts as to handwriting.**

Cited in *International Cotton Seed Oil Co. v. Wheelock*, 124 Ala. 567, 27 So. 517, holding that expert may state that, in his opinion, two papers were written at same time; *State v. Farrington*, 90 Iowa, 673, 57 N. W. 606, holding that person, who has known another for twenty years, is acquainted with his handwriting and has seen him write, can give opinion as to handwriting; *Springer v. Hall*, 83 Mo. 693, 53 A. R. 598, holding that expert, who never saw defendant write, cannot give opinion of genuineness of note sued on by comparison with signature of defendant to plea; *Haddock v. O'Rourke*, 25 N. Y. S. R. 55, 66 N. Y. Supp. 549; *Sudlow v. Warshing*, 108 N. Y. 520, 15 N. E. 532,—holding that expert may testify from comparison of signatures that he found no evidence in signature that it was simulated imitation; *Re Burbank*, 104 App. Div. 312, 34 N. Y. Civ. Proc. Rep. 247, 93 N. Y. Supp. 866, holding testimony of non-expert as to genuineness of lost signature by comparison of recollection thereof with proved signature, incompetent

Cited in notes in 66 A. D. 240, on points respecting which handwriting experts may testify; 12 L.R.A. 457, on expert and opinion testimony as to handwriting.

What writings may be compared.

Cited in *Shorb v. Kinzie*, 100 Ind. 429, holding that affidavit, not in evidence, nor admitted to be genuine, cannot be compared by jury with handwriting in dispute; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336, holding that papers not in evidence nor admitted to be genuine cannot be shown to witness and used upon examination; *People v. Parker*, 67 Mich. 222, 11 A. S. R. 578, 34 N. W. 720, holding that witness cannot compare signature with genuine one in paper not legally in evidence for some other purpose; *Hynes v. McDermott*, 82 N. Y. 41, 37 A. R. 538, holding that comparison cannot be made with photographic copies of writings, at least without proof of exactness of photographic method used; *People v. Dorothy*, 50 App. Div. 44, 14 N. Y. Crim. Rep. 545, 63 N. Y. Supp. 592, holding that witness cannot compare memorandum, not in evidence with writings, not shown to be genuine; *Pontius v. People*, 21 Hun, 328, permitting comparison of note, bearing genuine indorsement, with account book, in which alleged forger had written forged name; *McKay v. Lasher*, 50 Hun, 383, 3 N. Y. Supp. 352, holding that disputed writing may be compared with other writings, given in evidence for other purposes than comparison; *Shaw v. Bryant*, 90 Hun, 374, 35 N. Y. Supp. 909, holding that comparison of handwriting may be made with genuine handwriting of alleged forger, received in evidence, without objection, not solely for comparison.

Admissibility of writings for purpose of comparison.

Cited in *Williams v. Conger*, 125 U. S. 397, 31 L. ed. 778, 8 Sup. Ct. Rep. 933, holding that papers, not otherwise competent, cannot be introduced in evidence for mere purpose of enabling jury to compare handwriting; *Peck v. Callaghan*, 95 N. Y. 73, holding competent to give in evidence writings proved to be genuine for purpose of enabling experts to make comparisons; *Merritt*

v. Campbell, 79 N. Y. 625; People v. Molineux, 168 N. Y. 264, 62 L.R.A. 193, 16 N. Y. Crim. Rep. 120, 61 N. E. 286, holding that writings cannot be introduced in evidence merely as standard of comparison with disputed writing.

Cited in notes in 62 L.R.A. 850, on comparison of handwriting; 62 L.R.A. 863, on comparison of handwriting with writings already in evidence; 62 L.R.A. 869, on comparison of handwriting by witnesses; 20 L. ed. U. S. 418, on evidence of handwriting or signature.

Basis of opinion as to handwriting.

Cited in Re Gould, 15 N. Y. S. R. 784; Green v. Benham, 57 App. Div. 9, 68 N. Y. Supp. 248; Re Albinger, 30 Misc. 187, 63 N. Y. Supp. 744,—holding that opinion as to handwriting should depend not so much upon mathematical measurements and minute criticisms as upon general character and features.

Availability on appeal of objection to genuineness of signature.

Cited in State v. David, 131 Mo. 380, 33 S. W. 28, holding that objection cannot be raised for first time on appeal, to genuineness of defendant's signature to inquest, read in evidence without objection.

Offer of proof.

Cited in note in 12 L.R.A. 558, on right to make offer of proof in presence of jury.

31 AM. REP. 476, BELKNAP v. BENDER, 75 N. Y. 446.

Validity under statute of frauds of promise to pay another's debt.

Cited in Walsh v. McCloskey, 12 N. Y. S. R. 173, holding that oral promise to pay debt of another, even for good consideration, is void under statute of frauds; Berry v. Brown, 1 Silv. Ct. App. 542, holding promise by husband to pay firm debts, upon wife's purchasing her partner's interest therein, void under statute of frauds; Storrs v. Flint, 14 Jones & S. 498, holding promise, without consideration, to pay debt of another void under statute of frauds; Ackley v. Parmenter, 98 N. Y. 425, 50 A. R. 693 (affirming 31 Hun, 476), holding promise by third person to pay amount due, if foreclosure sale was adjourned, void under statute of frauds; Berry v. Brown, 107 N. Y. 659, 14 N. E. 289, holding that oral agreement to indemnify out-going partner against firm debts is void under statute of frauds; Strough v. Brown, 38 Hun, 307, holding promise to pay amount due from his father, if workman would continue to work for son, void under statute of frauds; Lachman v. Irish, 72 Hun, 491, 25 N. Y. Supp. 193, holding oral promise by person, procuring building loans, to pay workmen, void under statute of frauds.

Cited in reference note in 41 A. R. 148, on effect of statute of frauds upon promise to pay debt of another.

Cited in note in 95 A. D. 251, as to what promises to answer for third person's debt are within statute of frauds and what are not.

Distinguished in Barry v. Coville, 36 N. Y. S. R. 598, 13 N. Y. Supp. 4, holding statute of frauds inapplicable to agreement for services; First Nat. Bank v. Chalmers, 144 N. Y. 432, 39 N. E. 331, holding that promise by creditor, receiving transfer of firm property upon condition that he pay its debts, is not within statute of frauds; Metzger v. Edson, 25 Misc. 236, 55 N. Y. Supp. 61, holding that verbal promise by assignee of firm assets to assume firm debts as part of consideration is not within statute of frauds.

Liability of person receiving debtor's property to pay debt.'

Cited in Bennett v. Merchantville Bldg. & L. Assn. 44 N. J. Eq. 116, 13 Atl.

852, holding that person, furnishing lumber for house, can recover price thereof from person, to whom money is given by debtor for payment thereof; *Brumme v. Herod*, 38 App. Div. 558, 56 N. Y. Supp. 670, holding that creditor, agreeing to complete debtor's building and pay claims from proceeds of sale thereof, is not personally liable to material man until sale.

Sufficiency of consideration.

Cited in *Winne v. Mehrbach*, 130 App. Div. 329, 114 N. Y. Supp. 618, holding that agreement by officer of corporation to pay for ice to be furnished corporation is no consideration for agreement to pay debt already due.

Distinguished in *Hamer v. Sidway*, 124 N. Y. 538, 21 A. S. R. 693, 12 L.R.A. 463, 27 N. E. 256, holding that refraining from drinking, smoking and gambling is good consideration.

Application of doctrine of waiver.

Cited in *Roblee v. Masonic Life Asso.* 38 Misc. 481, 77 N. Y. Supp. 1098, holding doctrine of waiver inapplicable, where, because of death of applicant before reception of certificate, he never became member of benefit society.

31 AM. REP. 482, PEOPLE v. MANN, 75 N. Y. 484.

What constitutes forgery.

Cited in *Re Benson*, 34 Fed. 649, holding printed theater ticket, subject of forgery at common law; *State v. Corfield*, 46 Kan. 207, 26 Pac. 498, holding person, making out claim to county commissioners, when county owed him nothing, not guilty of forgery; *People v. Filkin*, 83 App. Div. 589, 17 N. Y. Crim. Rep. 348, 82 N. Y. Supp. 15, holding that issuance of fish net destruction bounty certificate by ex-town clerk constitutes forgery.

Cited in reference note in 30 A. R. 782, on ultra vires certificate as forgery.

Cited in notes in 24 L.R.A. 37, on necessity that instrument purport to be act of another to be subject of forgery; 31 L.R.A. 832, on forgery by false assumption of authority in signing another's name as agent for him.

31 AM. REP. 484, NATIONAL BANK v. LEWIS, 75 N. Y. 516, Modified on rehearing in 81 N. Y. 15.

Sufficiency of plea of usury.

Cited in *Lewis v. Barton*, 106 N. Y. 70, 12 N. E. 437; *Laux v. Gildersleeve*, 23 App. Div. 352, 48 N. Y. Supp. 301; *Myers v. Wheeler*, 24 App. Div. 327, 48 N. Y. Supp. 611,—holding that usury must be set out with such certainty and precision that it appears on face of defence that contract is usurious; *Leubusher v. Ruffhead*, 7 Misc. 429, 27 N. Y. Supp. 943, holding allegation that note had no legal inception prior to transfer to plaintiff and that such transfer was made in pursuance of usurious agreement sufficient.

Availability of usury as defense.

Cited in *First Nat. Bank v. Childs*, 133 Mass. 248, 43 A. R. 509; *Central Nat. Bank v. Haseltine*, 155 Mo. 58, 85 A. S. R. 531, 55 S. W. 1015,—holding that usurious interest cannot be set-off or credited on principal in suit by bank; *Caponigri v. Altieri*, 165 N. Y. 255, 59 N. E. 87 (affirming 29 App. Div. 304, 51 N. Y. Supp. 418, which reverses 22 Misc. 101, 48 N. Y. Supp. 808), holding that in action by individual banker on note, penalty for usury cannot be enforced by way of counterclaim; *Union Bank v. Gilbert*, 83 Hun. 417, 31 N. Y. Supp. 945, holding that individual liable to pay note as indorser, is entitled to interpose defense of usury; *Simpson v. Hefter*, 42 Misc. 482, 87

N. Y. Supp. 243, holding that accommodation indorser of note usuriously discounted may set up usury as defense, though no rate of interest is fixed in note.

Cited in notes in 39 A. R. 477, on right of defendant to set off penalty for usury against a national bank in state where note was not discounted; 56 L.R.A. 695, on who may set up defense of illegal interest paid to national bank; 56 L.R.A. 698, on set-off or counterclaim of illegal interest paid to national bank; 23 L. ed. U. S. 197, on usury by national banks.

When usurious transaction occurs.

Distinguished in *Smith v. First Nat. Bank*, 70 App. Div. 376, 75 N. Y. Supp. 131, holding that usurious transaction does not occur until discounted note is paid.

Recovery of penalty for usury.

Cited in *Hill v. National Bank*, 56 Vt. 582, holding action in state court to recover excess above legal interest not maintainable, after recovery of statutory penalty in U. S. Court.

Cited in note in 56 L.R.A. 674, on strict or liberal construction of statute for forfeiture or other penalty for taking or reserving illegal interest by national bank.

Taint of usury through series of renewed notes.

Cited in *Re Hoole*, 3 Fed. 496; *Loveridge v. Larned*, 7 Fed. 294; *Froese v. Prosnitz*, 34 N. Y. S. R. 9; *First Nat. Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14,—holding that usury affects whole series of renewal notes; *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925, holding that usury affects whole series of renewal notes and works forfeiture of entire interest; *Brown v. James*, 2 App. Div. 105, 37 N. Y. Supp. 529, holding that if original note was illegal renewal is open to same defense.

Nonallowance of interest paid on series of notes.

Distinguished in *Spaulding v. Kelly*, 43 Hun, 301, holding that objection to non-allowance of interest paid upon whole series of notes, unless presented upon record, cannot be raised.

31 AM. REP. 488, BERKSHIRE WOOLEN CO. v. JUILLARD, 75 N. Y. 535.

Obligation by partners as firm obligation.

Cited in *Re Kitzinger*, 19 Nat. Bankr. Reg. 152, Fed. Cas. No. 7,861, holding debt provable in bankruptcy against principal debtors composing a firm though joint judgment has been recovered against debtors and surety; *Ex parte Nason*, 70 Me. 363, holding that joint and several note or partners, having no firm name, for loan for firm purposes, is firm obligation; *Re Davis*, 1 How. Pr. N. S. 79, holding that assignment, "We, D., J., B. & E., comprising firm of D., J., B. & Co., assign our property for creditors," does not cover individual debts; *New York Institution v. Crockett*, 117 App. Div. 269, 102 N. Y. Supp. 412, holding that fact that obligation is joint obligation of partners does not alone make it firm debt; *Rouse v. Wallace*, 10 Colo. App. 93, 50 Pac. 366; *Meier v. First Nat. Bank*, 55 Ohio St. 446, 45 N. E. 907,—holding that note, signed by partners, for consideration received by firm is firm obligation; *Colwell v. Weybosset Nat. Bank*, 16 R. I. 288, 15 Atl. 80, holding that notes by partner to order of other partner, discounted to raise firm funds, are firm obligations; *Blish v. McCormick*, 15 Utah, 188, 49 Pac.

529, holding that note by individual partners for loan to purchase cattle for firm is firm obligation; *McCoy v. Jack*, 47 W. Va. 201, 34 S. E. 991, holding that bond by individual partners for firm debt will be treated in equity as firm obligation.

31 AM. REP. 491, KROMER v. HEIM, 75 N. Y. 574.

What constitutes an accord and satisfaction.

Cited in *Whitsett v. Clayton*, 5 Colo. 476, holding agreement to make and accept new note, accord and satisfaction; *O'Connor v. Philipsen*, 74 Hun. 68, 20 N. Y. Supp. 359, holding settlement of disputed claim binding; *Bicknell v. Speir*, 7 Misc. 1087, 27 N. Y. Supp. 386, holding acceptance of notes in payment of loan good accord and satisfaction of agreement to make loan; *Mautner v. Pike*, 32 Misc. 500, 66 N. Y. Supp. 387, holding that offer of goods, which other party took and gave receipt, "on storage only," wishing to inspect them after journey, constitutes an accord and satisfaction; *Goffe v. Jones*, 132 App. Div. 864, 117 N. Y. Supp. 407, holding that agreement to pay money in future in settlement of claim is not accord and satisfaction.

Cited in reference note in 16 A. S. R. 403, on plea of accord and satisfaction.

Cited in notes in 11 L.R.A. 712, on what is an accord and satisfaction; 23 L.R.A. 121, on extinguishment of debt by payment by volunteer or stranger to original undertaking.

Distinguished in *Gray v. Herman*, 75 Wis. 453, 6 L.R.A. 691, 44 N. W. 248, holding payment by third person, for whom goods were purchased, available as defense, if accepted by plaintiff in satisfaction of debt.

— By part payment.

Cited in *Re Freeman*, 117 Fed. 680, holding settlement of judgment against bankrupt in consideration of trustee's promise not to appeal valid accord and satisfaction, after expiration of time to appeal; *Fuller v. Kemp*, 40 N. Y. S. R. 672, 16 N. Y. Supp. 158, holding that mailing of check in full satisfaction and cashing thereof does not constitute accord and satisfaction; *Babcock v. Bonnell*, 80 N. Y. 244, holding promise to accept less than amount of debt, when paid and security surrendered, binding; *Nassoiy v. Tomlinson*, 148 N. Y. 326, 51 A. S. R. 695, 42 N. E. 715, holding that sending of check as in full and its collection by creditor constitutes accord and satisfaction; *Bandman v. Finn*, 185 N. Y. 508, 12 L.R.A.(N.S.) 1134, 78 N. E. 175, holding accord and satisfaction inapplicable to promise of agreed sum by owner to real estate broker for surrender of contract for sale; *Spier v. Hyde*, 78 App. Div. 151, 79 N. Y. Supp. 699, holding that agreement to accept certain stock in full for services constitutes accord and satisfaction.

Cited in reference note in 1 A. S. R. 398, as to whether payment of less sum discharges debt.

Cited in note in 20 L.R.A. 800, on accord and satisfaction by part payment of disputed claim.

Invalidity of accord without satisfaction.

Cited in *Way v. Russell*, 33 Fed. 5, holding agreement to accept in payment of note, note held by debtor against third party, which could not be found, accord without satisfaction; *Humphreys v. Third Nat. Bank*, 21 C. C. A. 538, 43 U. S. App. 698, 75 Fed. 852, holding agreement by indorsee to receive as

cured notes for less amount, not good plea in bar, unless notes are fully paid; *Coblentz v. Wheeler & W. Mfg. Co.* 40 Ark. 180, holding that agreement, without consideration, to accept less than judgment is accord unexecuted and invalid; *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037, holding oral agreement to render satisfaction at future date insufficient accord and satisfaction of written contract; *Brennan v. Ostrander*, 18 Jones & S. 426, holding tender of performance of accord insufficient; *Morehouse v. Second Nat. Bank*, 98 N. Y. 503; *McCreiry v. Day*, 119 N. Y. 1, 16 A. S. R. 793, 6 L.R.A. 503, 23 N. E. 198; *Davis v. Willis*, 57 Hun, 200, 10 N. Y. Supp. 883,—holding new agreement, based on good consideration, though not performed, satisfaction, if accepted as such; *Hadley Falls Nat. Bank v. May*, 29 Hun, 404, holding that debtor, who has not complied with composition agreement cannot set it up as defense to original debt; *Campbell v. Hurd*, 74 Hun, 235, 26 N. Y. Supp. 458, holding order upon debtor by his agent when accepted not satisfaction unless it is paid in full; *Colt v. O'Connor*, 59 Misc. 83, 109 N. Y. Supp. 689, holding release, by wife of married man, of all claims against him in consideration of provision in will, accord without satisfaction; *Shoemaker v. Fegley*, 14 Pa. Dist. R. 850, holding accord alone without satisfaction insufficient to extinguish original demand, performance also necessary; *Rogers v. Spokane*, 9 Wash. 168, 37 Pac. 300, holding allegation of promise to pay certain sum in satisfaction of claim for damages, insufficient plea of accord and satisfaction.

Cited in note in 100 A. S. R. 451, 452, on necessity for satisfaction.

Necessity of complete execution of accord.

Cited in *Long v. Scanlan*, 105 Ga. 424, 31 S. E. 436, holding execution of part and tender of performance of residue of accord, insufficient; *Oliwill v. Verdenhalven*, 39 N. Y. S. R. 200, 15 N. Y. Supp. 94; *Smith v. Cranford*, 84 Hun, 318, 32 N. Y. Supp. 375,—holding that to sustain plea of accord and satisfaction agreement must be completely executed; *Lansing v. Thompson*, 8 App. Div. 54, 40 N. Y. Supp. 425, holding offer by tenant of payment of part of sum under new agreement with landlord, insufficient accord and satisfaction; *Jacobs v. Day*, 5 Misc. 410, 25 N. Y. Supp. 763, holding that acceptance of return of part of money paid on account by buyer of goods inferior to sample does not constitute accord and satisfaction; *Hard v. Burton*, 62 Vt. 314, 20 Atl. 269, holding payment by one debtor of part of joint debt and agreement by other debtor to pay balance, insufficient.

Cited in reference note in 51 A. S. R. 699, on necessity for complete execution to constitute accord and satisfaction.

Cited in notes in 35 A. D. 571, on bar of action by accord executory; 100 A. S. R. 438, on substitution of new executory agreement as consideration for accord and satisfaction; 100 A. S. R. 454, on effect of tendering satisfaction; 1 E. R. C. 400, on unexecuted accord as satisfaction; 12 L.R.A.(N.S.) 1134, on distinction between novation and accord executory.

Sufficiency of consideration.

Cited in *Ceballos v. Munson S. S. Line*, 93 App. Div. 593, 87 N. Y. Supp. 811, holding contract to substitute third party for one of parties to prior contract supported by sufficient consideration.

31 AM. REP. 494, DELAVALLETTE v. WENDT, 75 N. Y. 579.

Parol evidence to vary writing.

Cited in *Anderson v. Matheny*, 17 S. D. 225, 95 N. W. 911 (dissenting opin-

ion), to point that surety cannot show by parol that payee would first proceed on mortgage by maker in consideration of transfer by surety of interest in firm; *Juillaird v. Chaffee*, 92 N. Y. 529, holding oral agreement, made in connection with written contract, admissible by way of defense, when use of contract inconsistent with agreement fraudulent; *Union Trust Co. v. Whiton*, 97 N. Y. 172, holding that parol evidence is admissible to explain indorsement of loan on envelope of securities; *Ostrander v. Snyder*, 73 Hun, 378, 26 N. Y. Supp. 263, holding evidence admissible to show that due bill was memorandum of money furnished to maker to invest in realty on joint account; *Fareira v. Smith*, 3 Misc. 255, 22 N. Y. Supp. 939, holding evidence admissible to show that money receipted for was received by another.

Cited in notes in 3 A. S. R. 749, on parol evidence to explain or contradict receipt; 6 L.R.A. 34, on admissibility of parol evidence to contradict consideration of written contract; 11 E. R. C. 233, on parol evidence to explain or contradict receipt.

Damages for breach of lease.

Cited in *Slater v. Von Chorus*, 120 App. Div. 16, 104 N. Y. Supp. 996, holding that landlord's damage after regaining possession is difference between rent reserved and rent subsequently received.

Cited in reference note in 34 A. R. 544, on damages for breach of warranty of seed.

Interest as damages.

Cited in *Missouri, K. & T. Trust Co. v. Clark*, 60 Neb. 406, 83 N. W. 202, holding interest recoverable for use or destruction of property, when amount due plaintiff is ascertainable by reference to market values; *Mansfield v. New York C. & H. R. R. Co.* 114 N. Y. 331, 4 L.R.A. 566, 21 N. E. 735, holding contractors for construction of superstructure of elevator not entitled to interest on damages for inconvenience and extra work caused by unfinished condition of foundations; *Gray v. Central R. Co.* 157 N. Y. 483, 52 N. E. 555 (dissenting opinion), on allowance of interest on recovery of unliquidated damages; *General Electric Co. v. National Contracting Co.* 178 N. Y. 369, 70 N. E. 928, holding vendor entitled to interest on balance after auction sale from time of purchaser's refusal to accept goods; *Pursell v. Fry*, 19 Hun, 595, holding interest not allowable when no price was agreed upon for services to be rendered; *McAfee v. Dix*, 101 App. Div. 69, 91 N. Y. Supp. 464, holding that interest is incident to verdict for contract price; *Coughlin v. New York*, 35 Misc. 446, 71 N. Y. Supp. 91, holding municipal contractor entitled to interest on sum certified by board of estimate from time of performance of work; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327, holding claimant entitled to interest from demand, when claim is capable of ascertainment by reference to reasonably certain market values of various items.

Cited in reference notes in 1 A. S. R. 83, as to when interest is allowable; 52 A. R. 478; 53 A. S. R. 247,—on allowance of interest on unliquidated demand.

Cited in notes in 51 A. D. 277, on allowance of interest; 62 A. D. 137, on right of plaintiff to interest on damages awarded in action for breach of contract; 14 E. R. C. 562, on right to collect interest.

Availability on appeal of objection to form of judgment.

Cited in *Brigg v. Hilton*, 99 N. Y. 517, 52 A. R. 63, 3 N. E. 51, holding that objection to form of judgment cannot be taken for first time on appeal.

Proper remedy to correct judgment.

Cited in *Olcott v. Kohlsaat*, 27 N. Y. S. R. 914, 8 N. Y. Supp. 117; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 A. R. 491,—holding that remedy is by motion to correct judgment, not by appeal, where clause is inserted in judgment without authority.

When demand note is due.

Cited in *Cottle v. Marine Bank*, 166 N. Y. 53, 59 N. E. 736, holding that note payable upon demand is due forthwith; *Hyman v. Doyle*, 53 Misc. 597, 103 N. Y. Supp. 778, holding that note payable on demand after date is due forthwith.

When limitations begin to run.

Cited in *Irish v. Citizens' Trust Co.* 163 Fed. 880; *Darby v. Darby*, 120 La. 847, 14 L.R.A.(N.S.) 1208, 45 So. 747, 14 A. & E. Ann. Cas. 805,—holding that prescription on demand note runs from date and not from demand; *Moore v. Williams*, 26 N. Y. Supp. 766, holding that statute of limitations begins to run from time of demand and not from time of conversion of bailee.

Cited in reference note in 3 A. S. R. 63, on effect of statute of limitations against counterclaim or recoupment.

Cited in notes in 28 A. D. 468, on running of limitations from demand which is necessary to give right of action; 136 Am. St. R. 471, on limitations of actions on obligations payable on or after demand.

When note is barred.

Cited in *McMullen v. Rafferty*, 89 N. Y. 456 (affirming 24 Hun, 363), holding that action against indorser of non-negotiable note, payable on demand with interest, is barred six years from making and delivery; *Raegener v. Medicus*, 32 Misc. 591, 66 N. Y. Supp. 460, holding that capital stock note, providing for maintenance of suit thirty days after notice and demand of assessment, is barred six years after said thirty days.

31 AM. REP. 499, HILL v. SHIELDS, 81 N. C. 250.**Admissibility of evidence of agreement between immediate parties.**

Cited in *Iredell County v. Wasson*, 82 N. C. 308; *Hoffman v. Moore*, 82 N. C. 313; *Adrian v. McCaskill*, 103 N. C. 182, 14 A. S. R. 788, 3 L.R.A. 759, 9 S. E. 284; *First Nat. Bank v. Pegram*, 118 N. C. 671, 24 S. E. 487,—holding parol evidence admissible under blank indorsement to annex special contract as between immediate parties; *Reardon v. Cockrell*, 54 Wash. 400, — L.R.A. (N.S.) —, 103 Pac. 457, to the point that parol proof is inadmissible to show agreement between indorser in blank and immediate indorser as against remote parties.

Cited in reference note in 31 A. R. 610, on admissibility of parol evidence to vary the terms of a promissory note.

Protection of holder against equities.

Cited in *Young Men's Christian Association Gymnasium Co. v. Rockford Nat. Bank*, 179 Ill. 599, 70 A. S. R. 135, 46 L.R.A. 753, 54 N. E. 297, holding that bank advancing money to holder of overdue note indorsed in blank by payee, without notice that it was held merely as collateral, is protected against latent equities of third parties.

Endorsement "without recourse."

Cited in note in 87 A. D. 389, on effect of indorsement "without recourse."

31 AM. REP. 503, WHITAKER v. SMITH, 81 N. C. 340.**Who are laborers.**

Cited in *Buncombe County v. Tommey*, 115 U. S. 122, 29 L. ed. 305, 5 Sup. Ct. Rep. 626; *Tommey v. Spartanburg & A. R. Co.* 4 Hughes, 640, 7 Fed. 429,—holding railroad contractor not a laborer; *Little Rock, H. S. & T. R. Co. v. Spencer*, 65 Ark. 183, 42 L.R.A. 334, 47 S. W. 196 (dissenting opinion), as to whether railroad contractor is a laborer; *Meands v. Park*, 95 Me. 527, 50 Atl. 706, holding foreman of logging operation not a laborer; *Flournoy v. Shelton*, 43 Ark. 168, holding farm overseer not a laborer; *Blanchard v. Portland & R. F. R. Co.* 87 Me. 241, 32 Atl. 890, holding superintendent of building of bridges not a laborer; *Pullis Bros. Iron Co. v. Boemler*, 91 Mo. App. 85, holding superintendent of iron company not a laborer; *Cook v. Ross*, 117 N. C. 193, 23 S. E. 252, holding superintendent of erection of factory not a laborer; *Moore v. American Industrial Co.* 138 N. C. 304, 50 S. E. 687, holding that superintendent of mill not a laborer; *Nash v. Southwick*, 120 N. C. 459, 27 S. E. 127, holding bookkeeper not a laborer; *Welch v. Ellis*, 22 Ont. App. 255, holding that man who hires and discharges laborer, pays out money to them and is paid fortnightly is not laborer under “joint stock” law; *Hand v. Cole*, 88 Tenn. 400, 7 L.R.A. 96, 12 S. W. 922, holding drummer not a laborer.

Cited in notes in 58 A. S. R. 306, on overseers, foremen, and superintendents as laborers; 18 L.R.A. 306, on what laborers, employees, or servants are secured by mechanics’ liens laws.

31 AM. REP. 505, CAPEHART v. SEABOARD & R. R. CO. 81 N. C. 438.**Right of carrier to contract against negligence.**

Cited in *Thomas v. Southern R. Co.* 131 N. C. 590, 42 S. E. 964, holding that carrier cannot contract with passenger against loss of baggage by negligence; *Stringfield v. Southern R. Co.* 152 N. C. 125, 67 S. E. 333; *Jones-Lane Co. v. Atlantic Coast Line R. Co.* 14 N. C. 580, 62 S. E. 701; *Everett v. Norfolk & S. R. Co.* 138 N. C. 68, 1 L.R.A. (N.S.) 985, 50 S. E. 557,—holding that carrier can contract for relief from liability as insurer, but not for negligence.

Cited in reference note in 13 A. S. R. 783, on validity of contract with shipper limiting carrier’s liability.

Cited in notes in 32 A. D. 498, on power of common carrier to limit his liability; 32 A. D. 500, on restriction on power of common carrier to limit its liability; 32 A. D. 502, on how far liability of carrier can be restricted by notice; 88 A. S. R. 105, on limitation of amount recoverable against carrier in case of loss; 13 A. S. R. 784, 785, on necessity that contract be reasonable which exempts carrier from common-law liability.

Validity of stipulation by carrier.

Cited in *Whitehead v. Wilmington & W. R. Co.* 87 N. C. 255, holding stipulation to ship cotton at railroad’s convenience, reasonable; *Winslow Bros. & Co. v. Atlantic Coast Line R. Co.* 151 N. C. 250, 65 S. E. 965, holding stipulation limiting value of live stock to \$100 per head, is valid.

Cited in note in 38 A. D. 425, on effect of particular stipulations in bill of lading.

—As to time for giving notice of claim.

Cited in *Rhodes v. Continental Furniture Co.* 2 Ga. App. 116, 58 S. E. 293,

holding stipulation requiring claim for damage to be filed within thirty days, invalid.

Annotation cited in *The St. Hubert*, 102 Fed. 362, holding requirement that notice of claim be given before removal of goods, valid to extent of requiring notice to be given.

Cited in reference note in 26 A. S. R. 35, on validity of stipulation limiting time for claiming damages against telegraph companies.

Cited in notes in 88 A. S. R. 97, on validity of limitation of carrier's liability for losses caused by negligence of carrier or employees; 88 A. S. R. 114, on necessity that stipulation by carrier for notice of claim for loss or damages shall be reasonable; 17 L.R.A.(N.S.) 632, on validity of stipulation in carrier's contract requiring notice of loss within specified time, as applied to loss due to carrier's negligence; 5 E. R. C. 346, on right of carrier to limit time for presentation of claim for damages.

Distinguished in *Selby v. Wilmington & W. R. Co.* 113 N. C. 588, 37 A. S. R. 635, 18 S. E. 88, holding stipulation that shipper of live stock give written notice of claim before removal from place of destination, reasonable and valid; *Austin-Stephenson Co. v. Southern R. Co.* 151 N. C. 137, 65 S. E. 757, holding that stipulation requiring notice of claim for damages to live stock to be given before stock is removed from car, is valid.

31 AM. REP. 512, DOBBIN v. RICHMOND & D. R. CO. 81 N. C. 446.

Who are fellow servants.

Cited in *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502, holding that train dispatcher and fireman are not fellow-servants; *Higgins v. Missouri P. R. Co.* 104 Mo. 413, 16 S. W. 409, holding that engineer and laborer on construction train are fellow-servants; *Wallace v. Boston & M. R. Co.* 72 N. H. 504, 57 Atl. 913, holding that train dispatcher is not fellow-servant of brakeman; *Kirk v. Atlanta & C. Air-Line R. Co.* 94 N. C. 625, 55 A. R. 621, holding that yard master and car-repairer are fellow servants; *Hobbs v. Atlantic & N. C. R. Co.* 107 N. C. 1, 9 L.R.A. 838, 12 S. E. 124, holding that fireman and locomotive engineer are fellow-servants; *East Tennessee V. & G. R. Co. v. De Armond*, 86 Tenn. 73, 6 A. S. R. 816, 5 S. W. 600, holding that telegraph operator and conductor are not fellow-servants.

Cited in notes in 1 A. S. R. 33; 53 A. R. 46; 36 A. D. 289,—on who are fellow servants; 25 L. ed. U. S. 614, on who are coservants within rule that the master is not responsible for injuries to servant occasioned by negligence of co-servant.

Who is vice principal.

Cited in *Bloyd v. St. Louis & S. F. R. Co.* 58 Ark. 66, 41 A. S. R. 85, 22 S. W. 1089, holding that foreman of squad of railroad workmen, having power to employ and discharge, is vice-principal; *Ryan v. Bagaley*, 50 Mich. 179, 45 A. R. 35, 15 N. W. 72, holding that mining captain, having entire management of mine, is vice-principal; *Edge v. Southwest Missouri Electric R. Co.* 206 Mo. 471, 104 S. W. 90, holding that car dispatcher is vice-principal; *McCosker v. Long Island R. Co.* 59 How. Pr. 258, holding that yard master is vice-principal as to driller; *Patton v. Western North Carolina R. Co.* 96 N. C. 455, 1 S. E. 863, holding that section master, authorized to employ and discharge laborers, is vice-principal; *Ward v. Odell Mfg. Co.* 126 N. C. 946, 36 S. E. 194, holding that loom-fixer, who

is boss of loom room, is vice-principal; *Bryan v. Southern R. Co.* 128 N. C. 387, 38 S. E. 914, holding railroad not liable for injury to workmen from negligence of boss of gang.

Cited in notes in 75 A. S. R. 535, on who is a vice-principal; 18 A. S. R. 456, on railroad's liability for employee's death caused by despatcher's negligence; 75 A. S. R. 611, on elevator managers and instructors as vice principals; 75 A. S. R. 630, 631, on railroad employees as vice principals; 46 L.R.A. 344, on power of conductor to control subordinate who was injured, as constituting former a vice principal; 51 L.R.A. 523, on application of doctrine of vice principalship from superior rank to various grades of supervising employees; 51 L.R.A. 549, on significance of existence or absence of power to hire subordinates on question of vice principalship; 51 L.R.A. 617, 618, on vice principalship with reference to relative rank of negligent servant; 51 L.R.A. 551, on employees in control of railway trains as vice principals.

Masters liability for injury to servant.

Cited in notes in 67 A. D. 592, on liability of master for injury to servant from negligence of superior servant; 17 E. R. C. 244, on liability of master for injury of servant through negligence of another employee.

31 AM. REP. 517, STATE v. HOLDER, 81 N. C. 527.

Larceny of animals.

Cited in *Mullaly v. People*, 86 N. Y. 365, holding that stealing of dog is larceny.

Cited in notes in 88 A. S. R. 588, on larceny of animals; 40 L.R.A. 515, on larceny and obtaining dog by false pretenses; 40 A. R. 83, 84; 67 A. S. R. 297; 9 E. R. C. 687,—on whether larceny lies for taking a dog.

Dogs as property.

Cited in *Sentill v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693; *Mowery v. Salisbury*, 82 N. C. 175,—holding tax on dogs, constitutional.

Cited in note in 9 L.R.A. 352, on license on privilege to keep dogs.

Element of larceny.

Cited in note in 57 A. D. 277, on intent as element of larceny.

31 AM. REP. 518, STATE v. LYON, 81 N. C. 600.

Agreement to turn state's evidence.

Cited in reference notes in 73 A. S. R. 323, on agreement to turn state's evidence; 32 A. R. 174, on rights of accomplice testifying for state.

Cited in note in 40 A. S. R. 768, 774, on agreements concerning state's evidence.

Agreement for immunity as defense.

Cited in *Whitney v. State*, 53 Neb. 287, 73 N. W. 696, holding that agreement for immunity by prosecuting officer, without consent or advice of court, constitutes no defense; *State v. Moran*, 15 Or. 262, 14 Pac. 419, holding that accomplice, by fleeing before testifying on trial, though he testified fully before coroner and grand jury, loses immunity; *Camron v. State*, 32 Tex. Crim. Rep. 180, 40 A. S. R. 763, 22 S. W. 682, holding that agreement to turn state's evidence in consideration of immunity from prosecution constitutes defense.

Impeachment of witness.

Cited in *State v. Hooper*, 151 N. C. 646, 65 S. E. 613, to the point that parol evidence is admissible to show that witness gave contradictory testimony at preliminary hearing.

Competency of witnesses.

Cited in note in 16 A. S. R. 31, on competence of children as witnesses.

Corroboration of accomplice's testimony.

Cited in reference note in 19 A. S. R. 318, on corroboration of accomplice's testimony.

31 AM. REP. 527, HODGSON v. BARRETT, 33 OHIO ST. 63.**Rights of assignee of insolvent.**

Cited in *Lemmon v. Hutchins*, 1 Ohio C. C. 388; *Colberf v. Baetjer*, 4 App. D. C. 416,—holding that assignee takes no better title and no higher rights than assignor had at time of assignment; *Salladin v. Mitchell*, 42 Neb. 859, 61 N. W. 127, holding that assignee of insolvent corporation takes property subject to whatever equities existed against assignor.

Cited in note in 47 A. S. R. 143, on right of set-off against receiver or assignee of insolvent bank.

Distinguished in *Snyder v. Betz*, 2 Ohio C. C. 485, holding that unrecorded mortgage is of no effect as against assignee, holding title by subsequent assignment by mortgagor.

Passing of title on cash sale.

Cited in *Edwards v. Glancy*, 1 Ohio C. C. 453, holding that title will pass, before payment, on cash sale, if seller waives right to immediate payment.

Replevin on nonpayment on delivery.

Cited in *Strauss v. Hirsch*, 63 Mo. App. 95, holding that vendor, on cash sale, can replevin goods, if payment is not made on delivery.

Right to retake goods on dishonor of check.

Cited in *Chicago B. & N. R. Co. v. L. T. Sowle Elevator Co.* 44 Minn. 224, 9 L.R.A. 263, 46 N. W. 342; *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 38 A. S. R. 615, 22 S. W. 813; *Hall v. Missouri P. R. Co.* 50 Mo. App. 179,—holding that vendor can retake goods, if check, given in payment, is dishonored; *People's State Bank v. Brown*, 80 Kan. 520, 23 L.R.A. (N.S.) 824, 103 Pac. 102, holding that seller for cash may reclaim property if check given for price is dishonored upon presentation within reasonable time.

When action for conversion maintainable.

Cited in *Pike v. Equitable Nat. Bank*, 1 Ohio N. P. 205, holding that conversion will not lie against third party, who has parted with value, without notice, upon apparent title of wrong doer.

31 AM. REP. 530, ARMLEDER v. LIEBERMAN, 33 OHIO ST. 77.**New trial for misconduct of jurors.**

Cited in *Ohio Southern R. Co. v. Rawlins*, 4 Ohio S. & C. P. Div. 483, 29 Ohio L. J. 260, holding that fact that two jurymen viewed premises after regular view is not misconduct requiring new trial; *Thomas v. Clark Co.* 5 Ohio S. & C. P. Dec. 510, 5 Ohio N. P. 453, holding casual meeting of juror with one of plaintiffs during view of premises, insufficient ground for new trial.

— Separation of jury.

Cited in *State v. Church*, 7 S. D. 289, 64 N. W. 152 (dissenting opinion), on vacation of verdict for separation of jury; *Cleveland, C. C. & St. L. R. Co. v. Monaghan*, 140 Ill. 474, 30 N. E. 869, holding separation of jury after signing, but before reception of verdict, insufficient ground for new trial.

Cited in notes in 43 A. D. 77, on separation of jury in civil cases after cause submitted and before agreement; 43 A. D. 87, on what constitutes improper separation of jury; 103 A. S. R. 170, on separation of jury during trial.

Right to reversal when bill of exceptions omits evidence.

Cited in *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250, holding that judgment will not be reversed, where former judgment, so referred to as to authorize court to regard it in evidence, does not appear in bill of exceptions; *Murdock v. McNeely*, 1 Ohio C. C. 16, 1 Ohio C. D. 9, holding that court cannot reverse judgment as against evidence, when it appears that bill of exceptions does not contain all evidence; *Robertson v. Consolidated Boat Store Co.* 8 Ohio S. & C. P. Dec. 521, 5 Ohio N. P. 257, holding that exhibits, though not attached to nor made part of bill of exceptions, but referred to in testimony by their numbers, may be considered by court.

31 AM. REP. 533, SCHAEFLER v. SANDUSKY, 33 OHIO ST. 246.**Liability for injury on highway.**

Cited in *Russell v. Toledo*, 19 Ohio C. C. 418, holding negligence of city in failing to remove accumulation of ice on walk, question for jury.

Cited in note in 47 A. R. 746, on municipal liability for injuries on icy sidewalks.

— Effect of contributory negligence.

Cited in reference note in 1 A. S. R. 59, on contributory negligence in voluntarily passing over street known to be unsafe.

Cited in notes in 21 L.R.A. 276, on contributory negligence affecting liability of municipal corporation for ice on streets or sidewalks; 21 L.R.A.(N.S.) 644, on contributory negligence as affecting municipal liability for defects and obstructions in streets; 4 L.R.A. 214, on effect of voluntary assumption of known risk.

What constitutes contributory negligence.

Cited in reference note in 8 A. S. R. 851, on what constitutes contributory negligence.

Cited in notes in 55 A. D. 673, on knowledge of or reason to apprehend danger as essential to contributory negligence which will defeat recovery for injury; 12 L.R.A. 282, on voluntary assumption of peril as contributory negligence.

— On highway.

Cited in *Bohl v. Dell Rapids*, 15 S. D. 619, 91 N. W. 315, holding person negligent in going on known dangerous walk on dark night; *Salem v. Walker*, 16 Ind. App. 687, 46 N. E. 90, holding horseman, voluntarily riding his horse second time to place of obstruction in street, negligent; *Crown Point v. Thompson*, 31 Ind. App. 195, 65 N. E. 13, holding plaintiff negligent, in driving under large flag, suspended in principal street; *Corlett v. Leavenworth*, 27 Kan. 673, holding person driving wagon along familiar street with embankment on side without guard, negligent; *Covington v. Manwaring*, 113 Ky. 592, 68 S. W. 625, hold-

ing that grocery deliveryman, whose duty it was to sweep off sidewalk, cannot recover for injury from stumbling on raised bricks in walk; *Wheat v. St. Louis*, 179 Mo. 572, 64 L.R.A. 292, 78 S. W. 790, holding milk wagon driver, familiar with conditions, negligent in not avoiding manhole projecting above street level; *Madison v. Missouri P. R. Co.* 60 Mo. App. 509, holding that knowledge that farm crossing was defective will not preclude recovery, unless plaintiff knew that it was dangerous to cross with his load; *Cincinnati v. Taylor*, 19 Ohio C. C. 737; *Norwalk v. Tuttle*, 73 Ohio St. 242, 76 N. E. 617,—holding person, voluntarily going upon sidewalk, known to him to be dangerous, guilty of contributory negligence.

Cited in notes in 44 A. R. 267, on contributory negligence of one traveling in a highway he knows to be defective; 47 A. R. 744, on contributory negligence in walking over dangerous sidewalk.

—**Traveling on icy sidewalk.**

Cited in *Gosport v. Evans*, 112 Ind. 133, 2 A. S. R. 164, 13 N. E. 256; *Middleport v. Taylor*, 2 Ohio C. C. 366; *Wright v. St. Cloud*, 54 Minn. 94, 55 N. W. 319,—holding person, voluntarily traveling on known icy walk, which could be avoided without appreciable inconvenience, is negligent; *Conneaut v. Naef*, 54 Ohio St. 529, 44 N. E. 236, holding person, who voluntarily goes upon accumulation of ice on walk, guilty of contributory negligence; *Hausmann v. Madison*, 35 Wis. 187, 39 A. S. R. 834, 21 L.R.A. 263, 55 N. W. 167, holding that person, walking in daytime upon familiar icy sidewalk, is guilty of contributory negligence.

Contributory negligence as question for jury.

Cited in *Langan v. Atchison*, 35 Kan. 318, 57 A. R. 165, 11 Pac. 38, holding traveler on walk, injured by fall of bill board, not negligent as matter of law; *Harris v. Clinton Twp.* 64 Mich. 447, 8 A. S. R. 842, 31 N. W. 425, holding that negligence of person in passing over flooded highway is question for jury; *Muller v. Newburgh*, 32 Hun, 24 (dissenting opinion), to point that negligence of plaintiff, chargeable with knowledge of dangerous condition of walk, is question for jury; *Gulf, C. & S. F. R. Co. v. Gass Camp*, 69 Tex. 545, 7 S. W. 227, holding that person, crossing railway bridge, having reason to believe it unsafe, is not negligent as matter of law, when there is no other way.

—**Traveling on icy sidewalk.**

Cited in *Thomas v. New York*, 28 Hun, 110, holding negligence of person, who goes upon crowded icy walk, question for jury.

31 AM. REP. 535, GOODALL v. CROFTON, 33 OHIO ST. 271.

Injunction against nuisance.

Cited in *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839, holding that to entitle party to injunction against nuisance before resorting to court of law, his case must be clear; *Owen v. Phillips*, 73 Ind. 284, holding that to warrant interference by injunction, injury from nuisance must be material and essential; *Daniels v. Keokuk Waterworks*, 61 Iowa, 549, 16 N. W. 705, denying injunction against waterworks; *Hennessey v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374, holding that continuing injury to land appreciably affecting its value will be enjoined; *Weber v. Miller*, 9 Ohio C. C. 674, refusing to enjoin use of drain crossing property which has been subdivided, and sold to different parties; *Shaw v. Queen City Forging Co.* 7 Ohio N. P. 254, granting injunction against operation of drop-hammers;

Madison v. Ducktown Sulphur, Copper & I. Co. 113 Tenn. 331, 83 S. W. 658, denying injunction against operation of copper plant after delay of ten years; **Woodard v. West Side Mill Co.** 43 Wash. 308, 86 Pac. 579, denying injunction against operation of mill, erected and sold by plaintiff.

Cited in notes in 56 A. R. 15, on right of property owner to enjoin operations causing injury to his property; 118 A. S. R. 883, on necessity for reasonable promptness in seeking equitable relief against nuisance; 31 L.R.A.(N.S.) 897, 898, on doctrine of comparative injury in suit to enjoin nuisance.

What constitutes nuisance.

Cited in note in 42 A. R. 542, on acts constituting nuisance.

Validity of ordinance as to nuisance.

Cited in *State ex rel. Russell v. Beattie*, 16 Mo. App. 131 (dissenting opinion), on validity of ordinance, prohibiting erection of livery stable without consent of property owners.

31 AM. REP. 539, SECOND NAT. BANK v. MCGUIRE, 33 OHIO ST. 295.

Waiver of demand and notice.

Cited in note in 39 A. D. 96, 98, on waiver of demand and notice by taking security.

31 AM. REP. 543, PITTSBURGH, C. & ST. L. R. CO. v. MOORE, 33 OHIO ST. 384.

Legislative power to fix tolls, rates etc.

Cited in notes in 33 L.R.A. 187; 46 L. ed. U. S. 593,—on contract exemptions from legislative power to fix tolls, rates, or prices.

Recovery of penalty.

Cited in note in 16 E. R. C. 550, on right to recover penalty imposed upon prohibited act.

Admissions by demurrer.

Cited in *Alter v. Cincinnati*, 4 Ohio N. D. 427; *Ricketts v. Crewdson*, 13 Wyo. 284, 81 Pac. 1,—holding that demurrer does not admit statements of legal conclusions not warranted by facts on which they are predicated.

Judicial notice of statute.

Cited in *Cincinnati, W. & B. R. Co. v. Hoffhines*, 46 Ohio St. 643, 22 N. E. 871, holding that courts will not take judicial notice of special statute, unless it is pleaded.

31 AM. REP. 546, WORKMAN v. WRIGHT, 33 OHIO ST. 405.

Ratification of agent's acts.

Cited in *Britt v. Gordon*, 132 Iowa, 431, 108 N. W. 319, 11 A. & E. Ann. Cas. 407, holding that attorney in fact cannot ratify his own unauthorized acts; *Ferris v. Snow*, 130 Mich. 254, 90 N. W. 850, holding that there can be no ratification of contract by stranger to it; *Hamlin v. Sears*, 82 N. Y. 27, holding that ratification by principal must rest upon some consideration or upon estoppel.

Cited in notes in 5 A. S. R. 618, 619, on power of principal to ratify criminal act; 59 A. S. R. 638, 639, on contracts of agent which cannot be ratified; 13 L.R.A. 220, on general rules applied to ratification.

— Of forgery.

Cited in *Henry v. Hub*, 114 Ind. 275, 5 A. S. R. 613, 16 N. E. 600, holding that in absence of estoppel, or without new consideration, forged note cannot be ratified; *Howell v. McCrie*, 36 Kan. 636, 59 A. R. 584, 14 Pac. 257, holding act of husband in procuring another to sign wife's name to mortgage, incapable of ratification; *Owsley v. Phillips*, 78 Ky. 517, 39 A. R. 358, holding that promise to obligee by person whose name has been signed to note without his knowledge, is not ratification; *Wilson v. Hayes*, 40 Minn. 531, 12 A. S. R. 754, 4 L.R.A. 196, 42 N. W. 467, holding that assent by maker without new consideration, to alteration, amounting to forgery, will not create liability; *Kelchner v. Morris*, 75 Mo. App. 588, holding that there can be no ratification of forged note.

Ratification of forged contracts generally.

Cited in reference note in 57 A. S. R. 460, on what amounts to ratification of forgery.

Cited in notes in 59 A. S. R. 641, on forged contracts which cannot be ratified; 12 L.R.A. 140, on power to ratify a forged or altered instrument.

What constitutes an estoppel.

Cited in *Barry v. Kirkland*, 6 Ariz. 1, 40 L.R.A. 471, 52 Pac. 771, 2 A. & E. Ann. Cas. 295, holding sureties, whose names are forged by maker on new note, not estopped by promise, without consideration, to pay note; *Kuriger v. Joest*, 22 Ind. App. 633, 52 N. E. 764, holding surety on note, failing to claim forgery on negotiations for taking up note, estopped from setting up defense of forgery; *Farmer's Bank v. Orr*, 25 Ind. App. 71, 55 N. E. 35, holding that payment of interest on gravel-road certificates for ten years constitutes estoppel to defense of payment in labor; *First State Bank v. Williams*, 143 Iowa, 177, 136 A. S. R. 759, 23 L.R.A.(N.S.) 1234, 121 N. W. 702, to the point that defense of forgery is not precluded by promise to pay it after received by holder.

Cited in reference notes in 37 A. R. 704, on promise to pay forged instrument; 57 A. S. R. 460, on estoppel to deny genuineness of forged instrument.

Cited in notes in 38 A. R. 321, on mistake as defense to claim of estoppel in regard to boundary line; 36 L.R.A. 539, on estoppel by promise to deny liability on forged paper; 36 L.R.A. 544, on estoppel by adoption to deny liability on forged paper.

Negotiable instruments given to compound felonies.

Cited in reference note in 39 A. S. R. 343, on negotiable instruments given to compound felonies.

31 AM. REP. 555, UNION CENT. L. INS. CO. v. POTTKER, 33 OHIO ST. 459.**Forfeiture of insurance policy.**

Cited in note in 2 L.R.A. 118, on forfeitures of life insurance.

— For nonpayment of premium.

Cited in *Hartford Life & Annuity Ins. Co. v. Eastman*, 54 Neb. 90, 74 N. W. 394, holding that forfeiture cannot be declared, where insurer has invited insureds to use mail in transmitting premiums and given directions therefor; *Home Protection v. Avery*, 85 Ala. 348, 7 A. S. R. 54, 5 So. 143; *Hartford L. Ins. Co. v. Hyde*, 101 Tenn. 396, 48 S. W. 968; *Kavanaugh v. Security Trust & L. Ins. Co.* 117 Tenn. 33, 7 L.R.A.(N.S.) 253, 96 S. W. 499, 10 A. & E. Ann. Cas. 680,—holding forfeiture for nonpayment of premium will not be enforced where insurer does not give notice in accordance with custom.

Cited in notes in 35 A. R. 126, on forfeiture of policy for nonpayment of premium; 20 L.R.A.(N.S.) 1038, on effect of custom of giving insured notice of maturity of premium; 26 L. ed. U. S. 766, on forfeiture of life insurance policy for nonpayment of premium and waiver thereof.

Remedy for wrongful forfeiture of policy.

Cited in *Bradbury v. Mutual Reserve Fund Life Asso.* 53 N. J. Eq. 306, 31 Atl. 775, holding specific performance proper remedy, where insured has right and desire to be relieved from default.

Rescission and recovery of premiums.

Cited in *Supreme Council C. L. H. v. Black*, 59 C. C. A. 414, 123 Fed. 650, holding insured entitled to rescission and repayment of assessments, upon renunciation by fraternal society of its contracts by illegal by-law; *Mutual Reserve Fund Life Asso. v. Ferrenbach*, 7 L.R.A.(N.S.) 1163, 75 C. C. A. 304, 144 Fed. 342, holding that premiums paid are not proper measure of damages for wrongful cancellation of policy; *Clifford v. Protective Life Asso.* 36 Misc. 287, 73 N. Y. Supp. 467, holding that premiums cannot be recovered back upon illegal cancellation of accident policy for unsubstantial failure to pay assessment; *Suess v. Imperial L. Ins. Co.* 64 Mo. App. 1; *National L. Ins. Co. v. Tullidge*, 39 Ohio St. 240,—holding insured entitled to rescission and repayment of premiums, where insurer wrongfully refuses to receive premiums; *Connecticut Mut. L. Ins. Co. v. Pyle*, 44 Ohio St. 19, 58 A. R. 781, 4 N. E. 465, holding that insured can recover back premiums paid on policy void ab initio; *Gass v. United States L. Ins. Co.* 3 Ohio N. P. 216, holding that insured cannot maintain action to recover premiums paid for refusal of insurer to permit selection of new beneficiary on death of original beneficiary.

31 AM. REP. 561, AMERICAN EXP. CO. v. SMITH, 33 OHIO ST. 511.

Duty of carrier to protect freight.

Cited in *Regan v. Grand Trunk*, 61 N. H. 579, holding carrier bound to use all reasonable means such as prudent owner would take to protect property from damage.

Cited in reference note in 52 A. R. 460, on carrier's duty as to perishable goods.

Liability of carrier.

Cited in reference note in 7 A. S. R. 878, on carrier's liability for loss or deterioration from delay in transportation.

Cited in notes in 11 A. S. R. 360, on carrier's liability for injury to goods by delay; 5 E. R. C. 349, on liability of carrier for deterioration of perishable property.

— For inevitable accident.

Cited in *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 A. R. 790, 19 N. W. 744, holding carrier not liable for injury, whose proximate cause is inevitable accident.

Cited in reference note in 41 A. R. 696, on liability of carrier for delay caused by an act of God.

Cited in notes in 11 A. S. R. 362, on carrier's liability for injury to goods by delay caused by act of God; 11 L.R.A. 615, on what constitutes an act of God exempting a carrier from liability; 1 E. R. C. 215, on what constitutes inevitable accident.

Liability for lack of foresight.

Cited in *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 1 C. C. A. 231, 4 U. S. App. 109, 49 Fed. 409, holding refusal to charge that carrier is not liable, though it could have in light of subsequent events, prevented collision, not error, when it is mere abstract proposition; *New York, C. & St. L. R. Co. v. Kestler*, 66 Ohio St. 326, 64 N. E. 130, holding that engineer, suddenly confronted with danger, cannot be held to strict account as to course of conduct in good faith.

Measure of damages for delay in delivery by carrier.

Cited in reference note in 26 A. S. R. 19, on measure of damages against carrier for delay in delivery.

Express companies as corporations.

Cited in *State v. United States Exp. Co.* 1 Ohio N. P. 259, holding that express companies may be regarded by court as corporation.

31 AM. REP. 571, EDGAR v. RICHARDSON, 33 OHIO ST. 581.**Admissibility of admissions.**

Cited in *Cleveland v. Cleveland*, C. C. & St. L. R. Co. 93 Fed. 113, holding that allegation that defendants unlawfully keep plaintiff out of possession is not admission that defendants' possession is adverse; *Morey v. Hoyt*, 62 Conn. 542, 19 L.R.A. 611, 26 Atl. 127, holding oral admissions of party against himself admissible, though relating to contents of writing; *Combs v. Union Trust Co.* 146 Ind. 688, 46 N. E. 16, holding that answers to interrogatories are admissions; *Purinton v. Purinton*, 101 Me. 250, 115 A. S. R. 309, 63 Atl. 925, 8 A. & E. Ann. Cas. 205, holding statements of addressee, reading letter, admissible as admission; *Long v. Lander*, 10 Or. 175, holding admission of party to record of declaration against interest, admissible.

Cited in notes in 47 A. D. 374, on defendant's admissions as to former marriage on indictment for bigamy; 11 E. R. C. 217, on admissibility of parol admissions of a party relating to contents of a written instrument.

31 AM. REP. 579, HAYNES v. HAYNES, 33 OHIO ST. 598.**Necessity for acknowledgment of will.**

Cited in *Keyl v. Feucht*, 56 Ohio St. 424, 47 N. E. 140, holding acknowledgment of will and signature in presence of two witnesses essential to probate.

Sufficiency of publication of will.

Cited in *Super v. Werts*, 19 Or. 122, 23 Pac. 850; *Re Claflin*, 73 Vt. 129, 87 A. S. R. 698, 50 Atl. 815,—holding that to constitute publication, any communication by testator to witnesses, by words, signs, notions, or conduct, is sufficient.

Proof of due publication of will.

Cited in *Hull v. Hull*, 117 Iowa, 738, 89 N. W. 979, holding that due publication of will may be established by other than attesting witnesses; *Dana's Estate*, 5 Cof. Prob. Dec. Anno. 24, holding that mere failure of memory of subscribing witnesses to will does not defeat will if it can be proved by other testimony.

Nature of proceeding to contest will.

Cited in *Russell v. Russell*, 6 Ohio C. C. 294; *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652,—holding that will contest is in nature of appeal from probate and issue is to be tried anew.

Necessity of pleading objections to validity of will.

Cited in *Dew v. Reid*, 52 Ohio St. 519, 40 N. E. 718, holding that in will contest, its validity may be assailed upon any ground, though not pleaded.

Probate as prima facie proof of validity of will.

Cited in *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, holding that probate is prima facie evidence of validity of will and burden is upon contestant.

Signatures to wills written by another.

Cited in note in 22 L.R.A. 299, on signatures to wills written by another.

31 AM. REP. 586, WRIGHT v. WEST, 2 LEA, 78.**Election of dower.**

Cited in reference note in 35 A. R. 666, on right of widow's representative to elect under husband's will after her death.

Cited in notes in 3 L.R.A. 498, on when widow is put to election between provision in will and dower; 10 E. R. C. 369, on election by widow between testamentary provision and dower.

—For incompetent widow.

Cited in *Re Andrews' Estate*, 92 Mich. 449, 17 L.R.A. 296, 52 N. W. 743, holding election of dower made by guardian for incompetent widow, with consent of probate court, valid; *Penhallow v. Kimball*, 61 N. H. 596; *Van Steinwyck v. Washburn*, 59 Wis. 483, 48 A. R. 532, 17 N. W. 289,—holding that court may make election for insane widow between dower and provision in will.

Cited in note in 17 L.R.A. 297, on power of court to elect against a will on behalf of an insane widow.

31 AM. REP. 591, HENDERSON v. WAGGONER, 2 LEA, 133.**Validity of contract.**

Cited in notes in 1 A. S. R. 303, on what will invalidate loan for gambling purposes; 9 L.R.A. 657, on validity of contract remotely connected with illegal transaction; 12 L.R.A.(N.S.) 604, on ethics of loans in violation of law; 23 L. ed. U. S. 995, on validity of sale of goods on credit to insolvent vendee.

Effect of knowledge of intended illegal use.

Cited in *Anheuser-Busch Brewing Co. v. Mason*, 44 Minn. 318, 20 A. S. R. 580, 9 L.R.A. 506, 46 N. W. 558, holding that brewery, selling beer knowing that it was intended for use in brothel, can recover price thereof; *State v. Wheatley*, 4 Lea, 230, holding indictment, charging letting of house, knowing that lessees intended to use it for purposes of prostitution, defective; *Heart v. East Tennessee Brewing Co.* 121 Tenn. 69, 130 A. S. R. 753, 19 L.R.A.(N.S.) 904, 113 S. W. 364, holding that all contracts which call for doing things which are contrary to law, morality or public policy are void.

Cited in reference note in 32 A. R. 516, on right to purchase price of goods as affected by vendor's knowledge that they were to be used for illegal purpose.

Cited in note in 117 A. S. R. 502, on effect of knowledge of contemplated performance of contract in illegal manner.

31 AM. REP. 593, BENSTINE v. STATE, 2 LEA, 169.**Proof of unchastity of prosecutrix for rape.**

Cited in *Brown v. Com.* 102 Ky. 227, 43 S. W. 214, holding particular acts of unchastity, occurring shortly before alleged rape, admissible; *People v. Mills*, 94 Mich. 630, 54 N. W. 488, holding acts of unchastity committed at remote period of life of prosecutrix, in admissible; *Steinke v. State*, 33 Tex. Crim. Rep. 65, 24 S. W. 909, holding proof of general reputation for unchastity and acts of illicit intercourse, admissible; *State v. Ogden*, 39 Or. 195, 65 Pac. 449; *Wilson v. State*, 17 Tex. App. 525,—holding proof of unchastity limited to general reputation and to acts of illicit intercourse with accused alone.

Cited in reference note in 52 A. R. 501, on admissibility of evidence of specific unchaste acts in trial for rape.

Cited in note in 14 L.R.A.(N.S.) 714, 717, 721, 722, on evidence of specific instances to prove character for chastity for prosecutrix on prosecution for rape.

Proof of complaint by prosecutrix.

Cited in *People v. Clemons*, 37 Hun, 580, holding name of defendant given on complaint by prosecutrix, inadmissible; *Barnett v. State*, 83 Ala. 40, 3 So. 612; *Hill v. State*, 5 Lea, 725,—holding details of complaint of prosecutrix admissible in corroboration of her testimony; *People v. Clemons*, 3 N. Y. Crim. Rep. 65; *State v. Hunter*, 18 Wash. 670, 52 Pac. 247,—holding complaints of prosecutrix immediately after rape, but not details thereof, admissible.

Cited in reference notes in 1 A. S. R. 389, on inadmissibility in chief of details of complaint by prosecutrix in trial for rape; 40 A. S. R. 282, on proof of complaint charging rape, by prosecutrix.

31 AM. REP. 598, SANDERS v. MARTIN, 2 LEA, 213.**Liability to contribution for party wall.**

Cited in *Welford v. Gerard*, 108 Ky. 322, 56 S. W. 416, holding plaintiff, permitting defendant to attach building to his wall, entitled to recover half of value thereof; *Sharp v. Cheatham*, 88 Mo. 498, 57 A. R. 433, holding that purchaser with notice of party wall agreement is burdened with liability for half of cost upon availing himself of benefit; *Kennedy v. Ballard*, 39 Mo. App. 340, holding that contribution can be recovered under parol contract for erection of party wall; *Spaulding v. Grundy*, 126 Ky. 510, 128 A. S. R. 328, 13 L.R.A.(N.S.) 149, 104 S. W. 293, 15 A. & E. Ann. Cas. 1105, holding that person who uses party wall must pay fair price for use, estimated as of time user takes place.

Cited in notes in 44 A. S. R. 353; 89 A. S. R. 940,—on contribution for use of party wall.

Rights as to party wall.

Cited in notes in 92 A. D. 296, on right of owner of party wall to repair underpinning and add to height; 8 A. S. R. 35, on right of owner of party wall to remove, rebuild or repair.

Creation of easement by party fence.

Cited in *Louisville & N. R. Co. v. Webster*, 160 Tenn. 586, 61 S. W. 1018, holding that contract between adjacent owner and railroad to erect and maintain fence does not pass easement in land.

Effect of void conveyance.

Cited in *Fowler v. Stoneum*, 11 Tex. 478, 62 A. D. 490, holding that conveyance, void as to creditors, is effectual to vest title in grantee.

31 AM. REP. 602, ROBERTSON v. STATE, 2 LEA, 239.**Unintentional killing.**

Cited in *State v. Turnage*, 138 N. C. 566, 49 S. E. 913, holding that involuntary manslaughter is where death results unintentionally from unlawful act not amounting to felony, or from negligent lawful act.

Cited in reference notes in 53 A. R. 466, on negligent killing as manslaughter; 8 A. S. R. 426, on accidental killing of another while attempting to commit suicide; 78 A. S. R. 37, on homicide by one recklessly using firearms.

Cited in notes in 90 A. S. R. 582, on unintentional homicide in pointing gun or pistol at another; 63 L.R.A. 388, on homicide while drawing dangerous weapon contrary to law; 3 L.R.A.(N.S.) 1159, on proper precaution to avoid mischief as constituent element for homicide by misadventure; 3 L.R.A.(N.S.) 1161, on burden and measure of proof as to homicide by misadventure.

Recovery against perpetrator of practical joke.

Cited in note in 40 A. R. 591, on recovery against perpetrator of practical joke.

When act is criminal.

Cited in note in 8 E. R. C. 55, on necessity of guilty intent to make act crime.

31 AM. REP. 607, MUSE v. SWAYNE, 2 LEA, 251.**Validity of contract in restraint of trade.**

Cited in *Bradford v. Montgomery Furniture Co.* 115 Tenn. 610, 9 L.R.A.(N.S.) 979, 92 S. W. 1104; *Turner v. Abbott*, 116 Tenn. 718, 6 L.R.A.(N.S.) 892, 94 S. W. 64, 8 A. & E. Ann. Cas. 150,—holding contract not to engage in one's business or profession at particular place or for period of time, valid.

Measure of damages for breach of contract.

Cited in *Jackson v. Byrnes*, 103 Tenn. 698, 54 S. W. 984, holding that measure of damages for breach of contract not to engage in certain business is actual provable loss to date of action.

Liquidated damages or penalty.

Cited in *Keeble v. Keeble*, 85 Ala. 552, 5 So. 149, construing covenant to forfeit one thousand dollars as liquidated damages to mean liquidated damages and not penalty.

Cited in reference note in 57 A. R. 783, on distinction between penalty and liquidated damages.

Cited in notes in 108 A. S. R. 60, on contract not to follow business or calling as one for liquidated damages; 6 E. R. C. 561, on distinction between a penalty and liquidated damages mentioned as payable in event of nonperformance of contract.

31 AM. REP. 609, TAYLOR v. FRENCH, 2 LEA, 257.**Parol evidence as to liability of endorser.**

Cited in *Miller v. Ridgely*, 22 Fed. 889, holding parol evidence admissible

to show liability of indorser in blank; *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886, holding parol evidence of facts showing waiver of presentment admissible in action against indorser in blank; *Sloan v. Gibbes*, 56 S. C. 480, 76 A. S. R. 559, 35 S. E. 408, holding parol evidence admissible to show that indorsers in blank agreed that liability should be that of cosureties.

Cited in reference notes in 34 A. R. 432, on parol evidence to show character in which negotiable instrument signed; 35 A. R. 604, on parol evidence of waiver of demand and notice as between indorser and immediate indorsee; 35 A. R. 651, on admissibility of agreement contemporaneous with parol evidence to vary liability of one indorsing after payee; 39 A. R. 116, on admissibility of parol evidence to vary liability of one indorsing after payee; 69 A. R. 353, on admissibility of evidence to limit liability of one indorsing note before payee.

Cited in notes in 57 A. D. 665, on parol testimony of waiver of right to demand and notice on part of indorser; 4 E. R. C. 548, on order of liability of parties to bill or note.

31 AM. REP. 612, ANDERSON v. HAMMOND, 2 LEA, 281.

Creation of precatory trust.

Cited in *Keely v. Weir*, 38 Fed. 291, on creation of precatory trust by gift to wife for purpose of educating children; *Clark v. Hill*, 98 Tenn. 300, 39 S. W. 339, holding that request that if any property is unconsumed at her death, testator's wife if she wishes shall give specified amount to another, does not impress trust; *Hadley v. Hadley*, 100 Tenn. 446, 45 S. W. 342; *Ensley v. Ensley*, 105 Tenn. 107, 58 S. W. 288,—holding that precatory words to raise trust, must be imperative and subject and object of wish must be certain.

Cited in reference notes in 33 A. R. 293, on effect of precatory words in will; 2 A. S. R. 662, on precatory words in will; 3 A. S. R. 548, on what words raise precatory trust; 10 A. S. R. 533, on creation of trust by use of precatory words.

Question of intent of testator.

Cited in *Long v. Read*, 9 Lea. 538, holding that intent of testator determines whether provision for child is charge upon land.

Liability for charges imposed by will.

Cited in note in 129 Am. St. R. 1057, on personal liability of devisees for charges imposed by the will.

31 AM. REP. 616, MUMFORD v. MEMPHIS & C. R. CO. 2 LEA, 393.

Release of surety by change in principal's duty.

Cited in *Lafayette v. James*, 92 Ind. 240, 47 A. R. 140, holding surety of superintendent of waterworks released by imposition of duty of collecting water rents; *First Nat. Bank v. Gerke*, 68 Md. 449, 6 A. S. R. 453, 13 Atl. 358, holding surety for bank clerk released by his promotion to position of note teller.

Cited in note in 6 A. S. R. 459, on release of surety by imposition of new duty on principal.

Parol evidence as to writing.

Cited in *Nashville L. Ins. Co. v. Mathews*, 8 Lea. 499, holding answer of agent to insured, at time of taking out policy, as to meaning of clause, inad-

missible, in action for breach thereof; *Morley v. Power*, 10 Lea, 219; *Scott v. Baltimore & O. R. Co.* 93 Md. 475, 49 Atl. 327; *Knoxville, C. G. & L. R. Co. v. Beeler*, 90 Tenn. 548, 18 S. W. 391,—holding parol evidence admissible to show circumstances surrounding parties at execution of instrument.

Cited in reference note in 17 A. D. 271, on parol evidence to vary, add to, or alter written contract.

When construction of writing is a question of fact.

Cited in *Barker v. Freeland*, 91 Tenn. 112, 18 S. W. 60, holding construction of writing, question of fact, when parol evidence, required by ambiguity, is conflicting.

Review without motion for new trial.

Cited in *London & L. F. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140, holding that appellate court will pass upon errors of law, but not upon facts, without motion for new trial.

Distinguished in *Lancaster v. Fisher*, 94 Tenn. 222, 28 S. W. 1094, holding that appellate court will pass upon sufficiency of facts in case tried by judge, though no motion for new trial was made in court below.

31 AM. REP. 623, McCAMPBELL v. McCAMPBELL, 2 LEA, 661.

Contract between husband and wife.

Cited in *Carpenter v. Franklin*, 89 Tenn. 142, 14 S. W. 484; *Snodgrass v. Hyder*, 95 Tenn. 568, 32 S. W. 764; *Barnum v. Le Master*, 110 Tenn. 638. 69 L.R.A. 353, 75 S. W. 1045,—holding that gift of personalty by husband vests in wife technical separate estate.

Cited in reference note in 36 A. R. 725, on validity of note of husband to wife for separate moneys of wife lent to husband.

Cited in notes in 69 L.R.A. 369, on consideration of conveyance by husband to wife; 69 L.R.A. 356, on effect of gifts of personalty by husband to wife.

—Enforcement in equity.

Cited in *Pillow v. Sentelle*, 49 Ark. 430, 5 S. W. 783, holding that equity will enforce promise by husband to wife to repay bona fide loan from her separate estate; *Fowle v. Torrey*, 135 Mass. 87 (dissenting opinion), on maintenance of bill in equity by wife against partners, of which husband is one, for loan to firm; *Chadbourn v. Gilman*, 64 N. H. 353, 10 Atl. 701, holding that mortgage by husband to wife will be sustained in equity; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898, holding that note by husband to wife for realty inherited by her is enforceable in equity; *Riggan v. Riggan*, 93 Va. 78, 24 S. E. 920, holding that agreement by husband to hold property for wife's separate use creates trust, enforceable in equity, rights of creditors not being affected.

Cited in note in 73 A. S. R. 272, on suits in equity between husband and wife.

Effect of marriage of woman to her creditor.

Cited in *Schilling v. Darmody*, 102 Tenn. 439, 73 A. S. R. 892, 52 S. W. 291, holding that marriage extinguishes debt of woman to man, evidenced by note and secured by trust deed of her realty.

Husband as trustee of wife's property.

Cited in *Wadsworthville Poor School v. Bryson*, 34 S. C. 401, 13 S. E. 619, holding that receipt by husband of wife's inheritance is as trustee of her separate estate.

31 AM. REP. 626, RENEAU v. STATE, 2 LEA, 720.**Use of force to arrest or prevent escape.**

Cited in *Thomas v. Kinkad*, 55 Ark. 502, 29 A. S. R. 68, 15 L.R.A. 558, 18 S. W. 854, holding that officer cannot kill misdemeanor to prevent escape though no other means are available; *Jackson v. State*, 76 Ga. 473, holding that to justify homicide of convict by guard, circumstances must impress him, as reasonable man, with necessity thereof to prevent escape; *State v. Phillips*, 119 Iowa, 652, 67 L.R.A. 292, 94 N. W. 229, holding that officer in making arrest cannot use any more force than ordinarily prudent person would deem necessary; *State v. Smith*, 127 Iowa, 534, 109 A. S. R. 402, 70 L.R.A. 246, 103 N. W. 944, 4 A. & E. Ann. Cas. 758; *Brown v. Weaver*, 76 Miss. 7, 71 A. S. R. 512, 42 L.R.A. 423, 23 So. 388,—holding that officer is not justified in shooting fleeing misdemeanor to make arrest or to prevent escape.

Cited in reference notes in 38 A. S. R. 84, on killing misdemeanor who offers armed resistance to officer as justifiable; 10 A. S. R. 113, giving instances of killings adjudged to be manslaughter only.

Cited in notes in 8 L.R.A. 534, on right of officer to kill in arresting for misdemeanor; 67 L.R.A. 302, on homicide by officer of justice in preventing escape or rescue in case of misdemeanor; 67 L.R.A. 306, as to when use of deadly weapon by officer of justice is justifiable.

31 AM. REP. 629, HAMBRIGHT v. NATIONAL BANK, 3 LEA, 40.**Recovery of usury from national bank.**

Cited in *Barrett v. National Bank*, 85 Tenn. 426, 3 S. W. 117, holding that bill in equity will not lie to recover usury from national bank; *First Nat. Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371, holding usury unavailable by way of setoff, recoupment or counterclaim, either in defense or by crossbill, in action by national bank on note.

Cited in notes in 56 L.R.A. 676, on exclusiveness of Federal penalty for taking or reserving illegal interest by national bank; 56 L.R.A. 677, on state courts following Federal decisions as to forfeiture or other effect of taking or reserving illegal interest by national bank; 23 L. ed. U. S. 197, on usury by national banks.

31 AM. REP. 630, SPIRO v. PAXTON, 3 LEA, 75.**Exemption of partnership property.**

Cited in *Cowan v. Their Creditors*, 77 Cal. 403, 11 A. S. R. 294, 19 Pac. 755, holding partnership property not exempt; *J. I. Case Co. v. Joyce*, 89 Tenn. 337, 12 L.R.A. 519, 16 S. W. 147, holding that homestead law does not exempt undivided interest in land.

Cited in reference notes in 11 A. S. R. 297, on exemptions of partnership property; 1 A. S. R. 593; 38 A. R. 232; 45 A. R. 474,—on right of partner to exemption from execution out of partnership property.

31 AM. REP. 631, MOBILE L. INS. CO. MORRIS, 3 LEA, 101.**Admissibility of declarations of insured.**

Cited in *Mutual L. Ins. Co. v. Selby*, 19 C. C. A. 331, 44 U. S. App. 282, 72 Fed. 980, holding declarations of insured, as to physical condition, before application, inadmissible, in action on policy; *Supreme Lodge, K. H.*

v. Wollschlager, 22 Colo. 213, 44 Pac. 598, holding declarations of insured, as to age, before application, inadmissible; Penn Mut. L. Ins. Co. v. Wiler, 100 Ind. 92, 50 A. R. 769, holding declarations of insured, not part of *res gestæ*. inadmissible to show breach of warranty; Reichenbach v. Ellerbe, 115 Mo. 588, 22 S. W. 573, holding declaration of insured that he had received notice of assessment, incompetent; Fidelity Mut. L. Ins. Co. v. Winn, 96 Tenn. 224, 33 S. W. 1045, holding declarations of insured as to forfeiture for nonpayment of premiums, admissible, in action by wife on policy.

Cited in reference notes in 34 A. R. 448, on declarations of insured; 52 A. R. 227, on admissibility of insured's declarations tending to contradict statements in application.

Cited in note in 11 L.R.A.(N.S.) 93, on admissions or statements by assured outside of application as evidence against beneficiary.

Effect of misstatements in application for insurance.

Cited in McCarthy v. Catholic Knights, 102 Tenn. 345, 52 S. W. 142, holding that innocent misstatement as to applicant's age will not defeat recovery under policy.

31 AM. REP. 633, BUTTERTON v. ROOPE, 3 LEA, 215.

Duty and liability of creditor as to collateral.

Cited in Scott v. First Nat. Bank, 5 Ind. Terr. 292, 68 L.R.A. 488, 82 S. W. 751, holding that bank, to which debtor assigns note as collateral, is liable to debtor for loss through its lack of diligence in collecting note; Semple & B. Mfg. Co. v. Detwiler, 30 Kan. 386, 2 Pac. 511, holding that creditor, allowing notes, given as collaterals, to become barred, must account to debtor for loss; Harper v. Second Nat. Bank, 12 Lea, 678, holding that failure of creditors to issue execution on judgment, assigned as collateral, when it could have been collected, charges creditor with loss; Kirkpatrick v. Puryear, 93 Tenn. 409, 22 L.R.A. 785, 24 S. W. 1130, holding that failure to present check of another, given in payment of debt, until failure of bank, extinguishes liability upon check and upon debt.

Cited in notes in 34 A. D. 452, on diligence required in collection of negotiable paper by one holding same as collateral security; 79 A. D. 503, on pledgee's remedy upon pledge of commercial paper; 49 A. R. 595, on duty of creditor to use diligence in realizing on collateral; 32 A. S. R. 719, on duties of holder of collateral security; 22 L.R.A. 786, on release of indorser of check by delay in presenting it; 4 E. R. C. 530, on duty of holder of collateral.

31 AM. REP. 637, GETTYS v. GETTYS, 3 LEA, 260.

Validity of decree of divorce of another state.

Cited in Gregory v. Gregory, 78 Me. 187, 57 A. R. 792, 3 Atl. 280, holding that decree of divorce of another state is void, when plaintiff was not bona fide resident thereof; Chaney v. Bryan, 15 Lea, 589, holding that decree of divorce of another state is void, where plaintiff was not resident of that state and defendant was not personally served; Edgar v. State, 96 Tenn. 690, 36 S. W. 379, holding that decree of divorce, fraudulently obtained in another state where neither party resided is null and void.

Cited in reference note in 33 A. S. R. 54, on validity of divorce decree when neither party resides in jurisdiction.

Cited in notes in 19 L.R.A. 814, on validity of decree of divorce obtained on publication or service out of state where defendant did not appear; 59 L.R.A. 145, on jurisdiction of subject matter of divorce when neither party is domiciled or permanently residing at the forum.

Setting aside fraudulent decree of divorce.

Cited in *Wills v. Wills*, 104 Tenn. 382, 58 S. W. 301, holding that remedy for fraudulent decree granting divorce is by bill in equity to set it aside.

31 AM. REP. 639, SWAFFORD v. FERGUSON, 3 LEA, 292.

Validity of infant's contract.

Cited in *Green v. Wilding*, 59 Iowa, 679, 44 A. R. 696, 13 N. W. 761, holding that infant's contract is voidable, when it is of an uncertain nature, as to benefit or prejudice; *Scobey v. Harris*, 10 Lea, 551, holding that assignment of policy of insurance by infant is void; *Robinson v. Coulter*, 90 Tenn. 705, 25 A. S. R. 708, 18 S. W. 250, holding that infant's deed, without consideration, is void.

Cited in reference notes in 18 A. S. R. 577, on infants' contracts as void or voidable; 25 A. S. R. 710, on validity of infants' deed without consideration.

Cited in notes in 18 A. S. R. 576, on infants' contracts as void or voidable; 18 A. S. R. 583, on validity of infant's deed of conveyance; 18 A. S. R. 628, on validity of infant's deeds; 6 E. R. C. 54, on validity of infant's contracts.

—Disaffirmance during minority.

Cited in *Lane v. Dayton Coal & I. Co.* 101 Tenn. 581, 48 S. W. 1094, on whether infant can, during minority, disaffirm compromise of action for damages; *International Land Co. v. Marshall*, 22 Okla. 693, 19 L.R.A.(N.S.) 1056, 98 Pac. 951, to the point that deed of infant may be avoided during minority.

Cited in note in 18 A. S. R. 671, on disaffirmance during minority of deeds, leases, and mortgages.

When resulting trust arises.

Cited in notes in 127 Am. St. Rep. 255, on resulting trust in favor of spouse who pays purchase price and takes title in name of other spouse; 69 L.R.A. 367, on effect of conveyance to wife by third person at instance of husband.

31 AM. REP. 642, RUOHS v. HOOKE, 3 LEA, 302.

Loss of homestead by fraudulent conveyance.

Cited in *First Nat. Bank v. Kennedy*, 113 Ala. 279, 36 L.R.A. 327, 21 So. 387 (dissenting opinion), on estoppel of fraudulent grantor to claim homestead upon conveyance being annulled by creditors.

Cited in reference notes in 31 A. R. 756, on effect upon homestead right of owner's misconduct in conveying the land in fraud to creditors; 39 A. R. 1, on voluntary conveyance of homestead as fraud on creditors; 2 A. S. R. 332, on effect of sale, fraudulent as to creditors, as forfeiture of homestead right; 35 A. S. R. 289, on fraudulent conveyance of property not subject to execution; 72 A. S. R. 913, on homestead in property fraudulently conveyed.

—From husband to wife.

Cited in *Luhrs v. Hancock*, 181 U. S. 517, 45 L. ed. 1005, 21 Sup. Ct. Rep. 726, holding that property does not lose its homestead character by conveyance from husband to wife; *Re Tollett*, 54 L.R.A. 222, 46 C. C. A. 11, 106 Fed. 866 (reversing 105 Fed. 425), holding that homestead is not lost by voluntary con-

veyance by bankrupt to wife and reconveyance to him; *Howell v. Thompson*, 95 Tenn. 396, 32 S. W. 309, holding that wife is not estopped to claim homestead by setting aside by creditors of conveyance to her without consideration by husband, she not participating in fraud; *Roisenbaum v. Davis*, 106 Tenn. 51, 60 S. W. 497, holding that wife's right to homestead is not defeated by voluntary conveyance by husband to her, set aside by creditors as fraudulent in law merely; *Hamby v. Lane*, 107 Tenn. 698, 64 S. W. 1067, holding that wife's right of homestead is not defeated by husband's fraudulent conveyance to her of property to which that right has attached, though she participated in fraud.

Distinguished in *Nichol v. Davidson County*, 8 Lea, 389, holding homestead lost by deed by husband to wife, surrendering homestead, which is set aside by creditors as fraudulent.

Validity of conveyance of homestead by husband to wife generally.

Cited in *Turner v. Bernheimer*, 95 Ala. 241, 36 A. S. R. 207, 10 So. 750, holding that conveyance by husband of homestead to wife is not void; *Burkett v. Burkett*, 78 Cal. 310, 12 A. S. R. 58, 3 L.R.A. 781, 20 Pac. 715, holding that husband can convey homestead to wife.

Rights of creditors in homestead.

Cited in *Eagle v. Smylie*, 126 Mich. 612, 86 A. S. R. 562, 85 N. W. 1111, holding that creditors cannot complain of voluntary conveyance of homestead; *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460, holding that creditors can subject property, purchased by husband in wife's name, to their claims subject only to his right of homestead; *Bridgers v. Howell*, 27 S. C. 425, 3 S. E. 790, holding that creditors cannot follow funds in property purchased by husband in wife's name, with exempt property.

31 AM. REP. 648, JOHNSON v. STATE, 3 LEA, 469.

Revocation of liquor license by repeal of charter of town.

Cited in *Webster v. State*, 110 Tenn. 491, 82 S. W. 179, holding that repeal of charter of town revokes liquor license.

Cited in reference note in 38 A. R. 193, on effect on ordinance for licensing liquor selling, originally void, by repeal of constitutional prohibition.

Regulation of liquor traffic by state.

Cited in note in 35 A. D. 331, on how far state may regulate or prohibit sale of intoxicating liquors.

31 AM. REP. 652, WILLIAMSON v. STEELE, 3 LEA, 527.

Sale or mortgage of future crops.

Cited in notes in 76 A. D. 728, on mortgage of future crops; 46 A. D. 715, on mortgage of after acquired property and of property having only potential existence; 23 L.R.A. 464, as to what crop or part of crop sale or mortgage of future crops extends to; 23 L.R.A. 458, on description on sale or mortgage of future crops; 23 L.R.A. 463, on necessity and effect of recording sale or mortgage of future crops.

Conveyance void for uncertainty in description.

Cited in *Dodds v. Neel*, 41 Ark. 70, holding that chattel mortgage of ten bales of each annual crop of cotton is void for uncertainty; *Sonders v. Voorhees*, 36 Kan. 138, 12 Pac. 526, holding that chattel mortgage of six hundred bushels of growing corn is void for uncertainty in description; *Sparks v. Deposit Bank*,

115 Ky. 461, 78 S. W. 171, holding that description of property as thirty-six head of yearling cattle on specified farm, is sufficient; *Wattles v. Cobb*, 60 Neb. 403, 83 A. S. R. 537, 83 N. W. 195, holding that chattel mortgage on 340 acres of corn, which was part of growing crop of 425 acres, is void for uncertainty of description.

Distinguished in *Puckett v. Richardson*, 6 Lea, 49, holding conveyance not rendered void by reservation of grantor's homestead right.

— Cure by delivery of property.

Cited in *Frank v. Myers*, 97 Ala. 437, 11 So. 832, holding that delivery of property covered by assignment cures uncertainty of description; *Springfield Engine & Thresher Co. v. Glazier*, 55 Mo. App. 95; *Ottumwa Nat. Bank v. Tottem*, 114 Mo. App. 97, 89 S. W. 65,—holding that insufficient description of property covered by chattel mortgage is cured by delivery of possession, as against subsequent attachment.

31 AM. REP. 655, JACKSON v. RUTLEDGE, 3 LEA, 626.

Enforcement of vendor's lien against married woman's property.

Cited in *Meagher v. Hollenburg*, 9 Lea, 392, holding vendor's lien enforceable for unpaid purchase money of personalty, bought by married woman; *Hook v. Donaldson*, 9 Lea, 56; *Browning v. Browning*, 11 Lea, 106,—holding vendor's lien enforceable on land held by married woman; *Theus v. Dugger*, 93 Tenn. 41, 23 S. W. 135; *Blanz v. Bain*, 95 Tenn. 87, 31 S. W. 159,—holding premises, contracted for by married woman, may be sold for unpaid purchase money; *Snodgrass v. Hyder*, 95 Tenn. 568, 32 S. W. 764, holding vendor's lien on land sold to married woman enforceable, whether payments were made from her separate or general estate.

Cited in reference note in 34 A. R. 614, on vendor's lien against married woman.

Recovery by married woman of payments on land contract.

Cited in *Bedford v. Burton*, 106 U. S. 338, 27 L. ed. 112, 1 Sup. Ct. Rep. 98, holding that married woman cannot recover payments made on land contract; *Edwards v. Stacey*, 113 Tenn. 257, 106 A. S. R. 831, 82 S. W. 470, holding that married woman, electing to rely upon disability to evade performance of land contract, cannot recover money paid.

Personal liability of married woman.

Cited in *Federlicht v. Glass*, 13 Lea, 481, holding that married woman is not liable personally on notes by husband in her name for goods.

Validity of contract by married woman.

Cited in *Hager v. National German-American Bank*, 105 Ga. 116, 31 S. E. 141, holding that married woman cannot make valid note.

Right of married woman to dispose of separate estate.

Cited in *Cummings v. Stovall*, 6 Lea, 679; *Scobey v. Harris*, 10 Lea, 551; *Hardison v. Billington*, 14 Lea, 346; *Cannon v. Apperson*, 14 Lea, 553,—holding that married woman has right to dispose of separate estate.

Cited in note in 70 A. D. 258, on rights of married woman as separate estate.

Estoppel to resist vendor's lien.

Cited in *Holbert v. Edens*, 5 Lea, 204, 40 A. R. 26, holding vendee, by going into possession under contract, estopped to resist enforcement of vendor's lien.

31 AM. REP. 660, CARTER v. DALE, 3 LEA, 710.**Right to curtesy.**

Cited in *Neelly v. Lancaster*, 47 Ark. 175, 1 S. W. 66, holding that statute, excluding husband's marital rights during wife's life, does not take away his right to curtesy; *Frey v. Allen*, 9 App. D. C. 400, holding husband entitled to curtesy in property, conveyed to him in trust for her sole use; *Meacham v. Bunting*, 156 Ill. 586, 47 A. S. R. 239, 28 L.R.A. 618, 41 N. E. 175, holding tenancy by curtesy initiate created in husband, where land purchased by him was conveyed to him for use of wife; *Luntz v. Greve*, 102 Ind. 173, 26 N. E. 128, holding that husband is entitled to curtesy in land conveyed to wife, without any express and clear restrictions of his rights; *Woodward v. Woodward*, 148 Mo. 241, 49 S. W. 1001, holding that husband is entitled to curtesy in wife's separate equitable estate, though limited to her separate use; *Bingham v. Weller*, 113 Tenn. 70, 106 A. S. R. 803, 69 L.R.A. 370, 81 S. W. 843, holding that conveyance to woman for her separate estate, with full power of disposition, does not deprive husband of curtesy.

Cited in reference notes in 3 A. S. R. 213, on when husband is entitled to curtesy; 17 A. S. R. 124, on when tenancy by the curtesy exists; 106 A. S. R. 810, on cutting off husband's right as tenant by the curtesy.

Cited in notes in 112 A. S. R. 586, on right to curtesy in separate estate created by conveyance or devise expressly excluding husband; 128 Am. St. Rep. 489, on nature and existence of estates of tenancy by the curtesy; 11 L.R.A. 826, on estate to which curtesy attaches.

31 AM. REP. 663, STATE v. ATCHISON, 3 LEA, 729.**Criminal liability of corporation.**

Cited in *Gazette Co. v. Com.* 172 Mass. 294, 52 N. E. 445, holding that corporation may be held liable for criminal contempt; *Turnpike Co. v. State*, 96 Tenn. 249, 34 S. W. 4, holding that turnpike company may be indicted for collecting tolls contrary to charter.

Cited in notes in 34 A. R. 497, on liability of corporation for malicious act; 115 A. S. R. 724, on criminal liability of corporation for libel and slander; 133 Am. St. R. 779, on prosecution and punishment of corporation for crime.

31 AM. REP. 666, BOUTELLE v. WESTCHESTER F. INS. CO. 51 VT. 4.**Avoidance of policy by overvaluation.**

Cited in *Fisher v. Crescent Ins. Co.* 33 Fed. 549, holding that overvaluation will not avoid open policy; *Walsh v. Vermont Mut. F. Ins. Co.* 54 Vt. 351, holding that policy is avoided by overvaluation.

Cited in notes in 29 A. D. 620, on overvaluation of insured property contrary to warranty or condition in policy; 35 A. R. 76, on overvaluation of property as vitiating insurance policy.

What is entire ownership of insured property.

Cited in *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418, 38 A. R. 687, holding that conditional vendor has entire ownership within meaning of policy; *Welch v. Franklin Ins. Co.* 23 W. Va. 288, to point that agreement between A. and B. that latter purchase goods for former and in lieu of brokerage should re-

ceive certain proportion of profits and share losses does not vest in B. share in goods or proceeds.

Necessity of materiality of misrepresentation by insured.

Cited in *Mosley v. Vermont Mut. F. Ins. Co.* 55 Vt. 142, holding that misrepresentation must be material to risk, unless stipulated in plain terms that any misrepresentation shall avoid policy.

Admissibility of conversations.

Cited in *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *State v. Wilkins*, 66 Vt. 1, 28 Atl. 323,—holding conversation in defendant's presence and therefore presumably in his hearing admissible.

Reversal for admission of immaterial evidence.

Cited in *State v. Plant*, 67 Vt. 454, 48 A. S. R. 821, 32 Atl. 237; *Fletcher v. Wakefield*, 75 Vt. 257, 54 Atl. 1012,—holding that admission of testimony, immaterial but not prejudicial, does not warrant reversal.

Burden of showing inadmissibility of evidence.

Cited in *Tenney v. Harvey*, 63 Vt. 520, 22 Atl. 659, holding that it is incumbent upon excepting party to show that evidence objected to was clearly inadmissible.

31 AM. REP. 669, DALE v. ROBINSON, 51 VT. 20.

Debts chargeable against wife's separate property.

Cited in *Witters v. Sowles*, 32 Fed. 767, holding that married woman's separate property can be charged to satisfy assessment levied upon shareholders on insolvency of national bank; *Sargeant v. French*, 54 Vt. 384, holding that debts of married woman, contracted in management of separate estate, will be enforced against such estate; *Hubbard v. Bugbee*, 58 Vt. 172, 2 Atl. 594, holding that money borrowed by married woman to discharge attachments for husband's debts upon property willed to her cannot be charged against such property; *Southworth v. Kimball*, 58 Vt. 337, 2 Atl. 120, holding that property delivered to married woman by mistake cannot be charged against her separate estate; *Kelsey v. Kelley*, 63 Vt. 41, 13 L.R.A. 640, 22 Atl. 597, holding that money paid on account of having become surety for husband is not chargeable against separate property of wife; *Sawyer v. Child*, 68 Vt. 360, 35 Atl. 84, as to recovery of debt out of separate property of wife; *Sowles v. Hall*, 73 Vt. 55, 50 Atl. 530, holding that compensation is not recoverable for services for benefit to married woman's property given by will before she takes possession; *Fletcher v. Brainerd*, 75 Vt. 300 55 Atl. 608, holding person, loaning money to married woman for benefit of her realty, entitled to equitable lien thereon.

31 AM. REP. 678, WHITCOMB v. JOSLYN, 51 VT. 79.

Recovery by infant on contracts.

Cited in *Bullock v. Sprowls*, 93 Tex. 188, 77 A. S. R. 849, 47 L.R.A. 326, 54 S. W. 661, holding that infant is not required to tender back consideration, spent by him for other than necessities, to recover land conveyed by him; *Kastner v. Pibilinski*, 96 Ind. 229, holding that infant wife is not precluded by indorsement of note to husband through his fraud from asserting her title thereto.

Cited in notes in 18 A. S. R. 596, on infants' sales, exchange, and assignments of personality; 18 A. S. R. 597, 598, on infants' purchases of personal property; *Am. Rep. Vol. XVII—27.*

18 A. S. R. 685, 690, 691, on infant's right to recover back money paid on disaffirmance; 26 L.R.A. 181, on necessity of returning consideration in order to disaffirm infant's contract where property has been lost or squandered.

—Effect of misrepresentation as to age.

Cited in *Tobin v. Spann*, 85 Ark. 556, 16 L.R.A. (N.S.) 672, 109 S. W. 534, holding that minor, whose appearance indicates that he is of full age, cannot, by false representation as to age, estop himself from disaffirming contract; *Watson v. Ruderman*, 79 Conn. 687, 66 Atl. 515, holding that equity will not foreclose infant's mortgage, unless he is guilty of false representation as to age; *Rice v. Boyer*, 108 Ind. 472, 58 A. R. 53, 9 N. E. 420, holding infant liable for false representation of age, when recovery can be had without giving effect to contract.

Cited in reference note in 51 A. R. 676, on estoppel of infant by representation that he was of age.

Cited in notes in 18 A. S. R. 634, on infant's concealment or misrepresentation of age affecting contracts; 37 A. R. 413, on estoppel of infant to plead infancy by representation that he was of age; 57 L.R.A. 684, on estoppel by fraud to plead infancy on contract.

31 AM. REP. 679, STATE v. SHELTERS, 51 VT. 102.

Sufficiency of indictment for forgery.

Cited in note in 31 L.R.A. (N.S.) 1050, on necessity in indictment for forgery, or uttering forged instrument, of naming person to whom instrument passed.

31 AM. REP. 682, GIDDINGS v. GIDDINGS, 51 VT. 227.

Consideration for gift.

Cited in note in 26 L.R.A. 306, on consideration for gift by promissory note.

Validity of note.

Cited in note in 6 L.R.A. 471, on necessity for delivery to validity of note.

Delivery of note in escrow.

Cited in *Daggett v. Simonds*, 173 Mass. 340, 46 L.R.A. 332, 53 N. E. 907; *Wood v. Flanery*, 89 Mo. App. 632,—holding that delivery of note in escrow is valid delivery.

Cited in notes in 5 L.R.A. 697, on commercial paper as an escrow; 27 L.R.A. (N.S.) 1020, on negotiability of note payment of which depends on termination of life.

31 AM. REP. 688, JACKSON v. JACKSON, 51 VT. 253.

Reimbursement for usury paid by surety.

Cited in *Blakeley v. Adams*, 113 Ky. 398, 66 L.R.A. 270, 68 S. W. 473 (dissenting opinion), on recovery by surety from principal of amount paid for usurious interest; *Ricker v. Clark*, 54 Vt. 289, holding that surety paying usurious interest, cannot recover same from principal; *Smith v. Lincoln*, 54 Vt. 382, holding that recognizor on writ may pay costs though barred, and recover amount from principal.

31 AM. REP. 690, STATE v. BISHOP, 51 VT. 267.

Buildings subject of burglary.

Cited in *State v. Rogers*, 54 Kan. 683, 39 Pac. 219, holding that courthouse may be subject of crime of burglary.

Cited in reference note in 34 A. R. 241, on stable as "building" within statute of burglary.

Cited in note in 2 A. S. R. 391, on applicability of burglary statute to kind of building unknown when statute was passed.

Possession of goods as evidence of burglary.

Cited in *Leisenberg v. State*, 60 Neb. 628, 84 N. W. 6; *State v. Peach*, 70 Vt. 283, 40 Atl. 732,—holding that unexplained possession of stolen goods may be considered by jury in determining guilt of burglary.

Cited in notes in 12 L.R.A. (N.S.) 210, on possession of recently stolen property as evidence for consideration of jury as to guilt of burglary; 12 L.R.A. (N.S.) 213, on sufficiency of possession of recently stolen property to sustain conviction of burglary.

31 AM. REP. 692, FIRST NAT. BANK v. WOOD, 51 VT. 471.

Sufficiency of notice of protest.

Cited in *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. 51; *Phelps v. Stocking*, 21 Neb. 443, 32 N. W. 217,—holding notice of protest actually received by endorser through mail on day following last day of grace, sufficient; *Oakley v. Carr*, 66 Neb. 751, 103 A. S. R. 739, 60 L.R.A. 431, 92 N. W. 1000, holding notice of protest sent to indorser by first mail of day following dishonor, sufficient.

Cited in reference note in 1 A. S. R. 602, on sufficiency of notice of protest by mail.

Cited in note in 38 A. D. 608, on sufficiency of actual notice of dishonor of bill.

31 AM. REP. 694, HARRIS v. WAITE, 51 VT. 480.

Implied warranty on sale.

Cited in *Curtis & Co. Mfg. Co. v. Williams*, 48 Ark. 325, 3 S. W. 517; *Warner v. Arctic Ice Co.* 74 Me. 475,—holding implied warranty of merchantable article, reasonably fit for purpose, for which purchased.

Cited in reference notes in 44 A. R. 509, on implied warranty of manufacturer to vendee; 1 A. S. R. 537, on warranty of fitness for particular purpose implied where article is ordered from manufacturer; 16 A. S. R. 759, on implied warranty on sale of personalty.

Cited in notes in 102 A. S. R. 611, on scope of implied warranty on sale of goods; 102 A. S. R. 618, on implied warranty of quality on sale of goods by manufacturer for particular purpose; 1 L.R.A. 645, on implied warranty that thing sold will be satisfactory.

Measure of damages for breach of warranty.

Cited in reference note in 35 A. R. 310, on measure of damage for breach of warranty of goods.

31 AM. REP. 695, PRIEST v. CONE, 51 VT. 495.

Debts enforceable against wife's separate estate.

Cited in *Edminston v. Smith*, 13 Idaho, 645, 121 A. S. R. 294, 14 L.R.A. (N.S.) 871, 92 Pac. 842, holding debt for necessities furnished wife upon her personal responsibility, enforceable against her separate estates; *Sargeant v. French*, 54 Vt. 384, holding debts of married women, contracted in management of separate estate, enforceable there against; *Hubbard v. Bugbee*, 58 Vt. 172, 2 Atl. 594,

holding loan by wife to discharge attachment for husband's debts upon her property, not enforceable against her separate property; *Kelsey v. Kelley*, 63 Vt. 41, 13 L.R.A. 640, 22 Atl. 597, holding money paid on account of having become surety for husband, not enforceable against wife's separate property; *Sowles v. Hall*, 73 Vt. 55, 50 Atl. 550, holding compensation for services to property, willed to wife, before she received possession thereof, not enforceable there against.

Cited in reference notes in 32 A. R. 243, on liability of married women for necessities; 1 A. S. R. 608, on liability of married woman on contract for necessities for herself and family; 64 A. S. R. 205, on liability of wife for family expenses.

Cited in note in 36 A. R. 766, on liability of married woman on her contracts made while living apart from her husband.

31 AM. REP. 698, SHURTLEFF v. STEVENS, 51 VT. 501.

Action for slander of member by association.

Cited in *Gilbert v. Crystal Fountain Lodge*, 80 Ga. 284, 12 A. S. R. 255, 4 S. E. 905, holding that action for slander of member by association will not lie against association, but against individual members.

Cited in reference note in 39 A. R. 454, on nature of libelous letter sent to an association by one not a member as privileged communication.

What communications are privileged.

Cited in *Cherry v. Des Moines Leader*, 114 Iowa, 298, 89 A. S. R. 365, 54 L.R.A. 855, 56 N. W. 323, holding that criticism of public performance by actress is privileged; *Coleman v. MacLennan*, 78 Kan. 711, 130 A. S. R. 390, 20 L.R.A. (N.S.) 361, 98 Pac. 281, holding that untrue article derogatory in character, published in good faith, relating to public officer who is candidate for re-election is privileged; *Atkinson v. Detroit Free Press Co.* 46 Mich. 341, 9 N. W. 501 (dissenting opinion), article charging lawyer with giving dishonest advice as privileged communication; *Howard v. Dickie*, 120 Mich. 238, 79 N. W. 191, holding that statement by member of conference for election of church trustees, concerning character of nominee, is privileged; *Vaughn v. Congdon*, 56 Vt. 111, 48 A. R. 753 (dissenting opinion), on privilege exempting judges from liability to action; *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488, holding that slanderous words are not privileged because spoken to pastor of church, of which plaintiff and defendant were members; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803, holding that reply by man, attached in newspaper, honestly made in self-defense and not unnecessarily defamatory, is privileged.

Cited in reference notes in 62 A. S. R. 677; 100 A. S. R. 495,—on privileged communications; 22 A. S. R. 135; 32 A. S. R. 87,—as to when slanderous words are privileged; 43 A. S. R. 596, on privilege in discussion of official conduct.

Cited in notes in 104 A. S. R. 114, on distinction between privilege, criticism, and justification; 104 A. S. R. 142, on application of doctrine of privilege to statements concerning ministers, pastors, or church officials; 107 A. S. R. 255, on repetition to friends of daughter's suitor of disparaging reports about him as slander; 20 L.R.A. (N.S.) 363, on libel and slander as privilege as affected by extent of publication; 9 E. R. C. 81, on communication made in discharge of public or private duty as privileged.

Burden of proof of malice.

Cited in *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981; *Kirkpatrick v.*

Eagle Lodge No. 32, 26 Kan. 384, 40 A. R. 316; Redgate v. Roush, 61 Kan. 480, 48 L.R.A. 236, 59 Pac. 1050; Konkle v. Haven, 140 Mich. 472, 103 N. W. 850; Landis v. Campbell, 79 Mo. 433, 49 A. R. 239; Decker v. Gaylord, 35 Hun, 584; Kent v. Bongartz, 15 R. I. 72, 2 A. S. R. 870, 22 Atl. 1023,—holding that burden is upon plaintiff to show by affirmative evidence that privileged communication was malicious.

Cited in reference note in 2 A. S. R. 873, on necessity for proof of actual malice in libel.

Damages for newspaper libel.

Cited in note in 15 A. S. R. 348, on elements increasing or mitigating damages for newspaper libel.

31 AM. REP. 716, RATCLIFFE v. ANDERSON, 31 GRATT. 105.

Province of court and legislature.

Cited in Shepherd v. Wheeling, 30 W. Va. 479, 4 S. E. 635, holding province of courts to decide what law is and of legislature what law shall be; State v. Harden, 62 W. Va. 313, 58 S. E. 715, holding that legislature cannot determine what is or has been law, for that is within exclusive province of courts.

Cited in reference note in 62 A. S. R. 934, on power of legislature to order new trial.

Impairment of obligation of judgment.

Cited in Evans-Snider-Buel Co. v. McFadden, 58 L.R.A. 900, 44 C. C. A. 494, 105 Fed. 293 (dissenting opinion), on constitutionality of act validating mortgage as against judgment creditor of mortgagor; Morrison v. McDonald, 113 N. C. 327, 18 S. E. 704; Marpole v. Cather, 78 Va. 239; Marshall v. Cheatham, 88 Va. 31, 13 S. E. 308,—holding act, authorizing reopening of judgment, unconstitutional; Myers v. Com. 90 Va. 785, 20 S. E. 152, on whether statute, providing that no judgment shall be reversed for failure of record to show venire facies, is void; Martin v. South Salem Land Co. 94 Va. 28, 26 S. E. 591, holding that legislature has no power to impair judgment; Rowe v. Heardy, 97 Va. 674, 75 A. S. R. 811, 34 S. E. 625, holding that after judgment for principal and interest, courts are without power to abate interest on debt; Merchants Bank v. Ballou, 98 Va. 112, 81 A. S. R. 715, 44 L.R.A. 306, 32 S. E. 481, holding that legislature cannot by retroactive legislation destroy or diminish value of judgment.

31 AM. REP. 722, VEST v. MICHIE, 31 GRATT. 149.

Sufficiency of proof of notice to purchaser for value.

Cited in Arbuckle Bros. v. Gates, 95 Va. 802, 30 S. E. 496; Fischer v. Lee, 98 Va. 159, 35 S. E. 441,—holding that proof must impute mala fides, to affect bona fide purchaser with notice of fraud in deed of trust; Johnson v. National Exch. Bank, 33 Gratt. 473; Hunton v. Wood, 101 Va. 54, 43 S. E. 186,—holding that to affect purchaser for value with notice of unrecorded lien, proof must show fraud; Lohr v. George, 65 W. Va. 241, 64 S. E. 609, holding that burden of proof is on party alleging, subsequent purchaser for value had notice of equitable claim; Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & C. Co. 108 Va. 862, 62 S. E. 954, holding that proof of notice by purchaser for value must be such as to affect conscience and must be so strong and clear as to fix upon him imputation of bad faith; Ellison v. Torpin, 44 W. Va. 414, 30

S. E. 183 (dissenting opinion), to point that to affect purchaser for value with notice of prior purchaser's right, evidence must show him guilty of fraud.

Cited in reference note in 40 A. R. 287, on notary's taking of acknowledgment of deed as notice to him in capacity of subsequent purchaser from grantor.

Cited in notes in 23 A. D. 50, on notice from recitals in title papers; 17 A. S. R. 288, on presumption that subsequent purchaser of land acted bona fide; 45 A. R. 190, as to when vendee has constructive notice of defect in title of vendor; 27 L. ed. U. S. 643, on record of deed and its necessity and effect.

31 AM. REP. 726, NOBLE v. RICHMOND, 31 GRATT. 271.

Liability of municipality for defects in highways.

Cited in *Carson v. Genesee*, 9 Idaho, 244, 108 A. S. R. 127, 74 Pac. 862; *Snook v. Anaconda*, 26 Mont. 128, 66 Pac. 756,—holding city, given by statute exclusive control of streets, liable for dangerous condition thereof; *Galveston v. Posnainsky*, 62 Tex. 118, 50 A. R. 517; *Clark v. Richmond*, 83 Va. 355, 5 A. S. R. 281, 5 S. E. 369,—holding city liable for injury from excavation near highway permitted to remain without proper guards; *Gordon v. Richmond*, 83 Va. 436, 2 S. E. 727, holding that it is duty of city to keep sidewalks reasonably safe for public travel; *Wheat v. Alexandria*, 88 Va. 742, 14 S. E. 672 (dissenting opinion), to point that it is duty of city to control streets.

Cited in reference note in 2 A. S. R. 169, on obligation of municipal corporation to keep streets and highways in safe condition.

Cited in notes in 30 A. S. R. 385, on municipal liability for negligence of officers and agents as to public streets; 103 A. S. R. 262, on municipal liability for injuries caused by defective streets; 108 A. S. R. 160, on municipal liability for injuries from defective public places where omitted act is one imposed by municipal charter or general law; 10 L.R.A. 734, on municipal duty to keep streets and sidewalks in safe condition, and liability for failure to do so; 20 L.R.A.(N.S.) 519, 520, on liability of municipality for defects or obstructions in streets; 33 L. ed. U. S. 334, on liability of municipalities and individuals for obstructions or nuisances in street or want of repair thereof.

Distinguished in *Mitchel v. Richmond*, 107 Va. 193, 11 L.R.A.(N.S.) 1114, 57 S. E. 570, 12 A. & E. Ann. Cas. 1015, holding that city is not bound to keep gutter safe for pedestrians.

—Created by others.

Cited in *Ericsson v. Manchester*, 3 Hughes, 191, Fed. Cas. No. 4,511, holding city liable for defective condition of street in proprietorship of private corporation; *McCoull v. Manchester*, 85 Va. 579, 2 L.R.A. 691, 8 S. E. 379, holding city liable for injury from building materials placed in street under ordinance; *Chalkley v. Richmond*, 88 Va. 402, 29 A. S. R. 730, 14 S. E. 339, holding city liable for negligent alteration of sewer with its permission and aid; *Terry v. Richmond*, 94 Va. 537, 38 L.R.A. 834, 27 S. E. 429, holding city not liable for defective construction of tunnel under street by railroad with city's permission; *Hicks v. Chesapeake & O. R. Co.* 102 Va. 197, 45 S. W. 888, holding that municipality cannot relieve itself of its duty to keep its streets in safe condition.

—Notice of defects.

Cited in *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387, holding that notice of defect may be imputed to city from existence for unreasonable time; *Chapman v. Milton*, 31 W. Va. 384, 7 S. E. 22, holding unnecessary to allege and

prove notice when statute imposes absolute liability upon municipality to keep highways in repair; *Roanoke v. Harrison*, 1 Va. Dec. 801; *Biggs v. Huntington*, 32 W. Va. 55, 9 S. E. 51,—holding that plaintiff must allege and prove notice to municipal corporation of defect in highway; *Portsmouth v. Houseman*, 109 Va. 554, 65 S. E. 11, holding city is liable for injury from defective streets where it has had reasonable time to repair defect.

Liability of governmental agency for neglect of duty.

Cited in *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341, holding city, assuming duty of supplying water, liable for burning of property because of insufficient water; *Maia v. Eastern State Hospital*, 97 Va. 507, 47 L.R.A. 577, 34 S. E. 617, holding that state hospital is not liable for injury to inmate through negligence of managers and employees; *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37, holding city liable for defective lighting whether duty imposed by charter or not.

Liability of municipal corporations generally.

Cited in reference notes in 94 A. D. 468, on liability of municipal corporations; 94 A. D. 455, on liability of municipal corporation for acts of its agents in exercising ministerial functions; 100 A. D. 359, on liability of city for acts of its officers or agents within the scope of the powers of the corporation and of their employment.

Private action for violation of statute.

Cited in notes in 9 L.R.A.(N.S.) 384, on private action for violation of statutory municipal obligations; 9 L.R.A.(N.S.) 388, on remedy for violation of statute not expressly conferring private action; 9 L.R.A.(N.S.) 344, on beneficiaries of statutes indirectly conferring right of private action for violation thereof.

When demurrer lies.

Cited in *Duncan v. Lynchburg*, 2 Va. Dec. 700, 34 S. E. 964, holding that question whether nuisance created by city was within its powers is properly raised by demurrer.

31 AM. REP. 732, WOODY v. OLD DOMINION INS. CO. 31 GRATT. 362.

Equitable relief in insurance cases.

Cited in *Sourwine v. Supreme Lodge, K. of P.* 12 Ind. App. 447, 54 A. S. R. 532, 40 N. E. 646, holding that equity will grant relief to beneficiary after death of insured, where insurer wrongfully refused to transfer insured to certain class; *Haden v. Farmers' & M. Fire Asso.* 80 Va. 683; *Croft v. Hanover F. Ins. Co.* 40 W. Va. 508, 52 A. S. R. 902, 21 S. E. 854; *Summers v. Mutual L. Ins. Co.* 12 Wyo. 369, 109 A. S. R. 992, 66 L.R.A. 812, 75 Pac. 937,—holding oral agreement for insurance enforceable in equity.

Cited in reference note in 52 A. S. R. 910, on enforcement of oral insurance contract in equity.

"Unconditional owner" within meaning of policy.

Cited in *Loventhal v. Home Ins. Co.* 112 Ala. 108, 57 A. S. R. 17, 33 L.R.A. 258, 20 So. 419, holding that vendee in possession under executory contract, holding bond of vendor to give title, is unconditional owner; *Germania F. Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. 286, holding that condition that change of interest should avoid policy is not violated by execution of

mortgage; *Virginia F. & M. Ins. Co. v. Kloeber*, 31 Gratt. 749, holding that contingent right of dower is not such interest as shows that insured had less than perfect title; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 53 A. S. R. 848, 24 S. E. 393, holding that condition avoiding policy if interest of assured is other than unconditional, is not broken by existence of mortgage; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 99 A. S. R. 923, 44 S. E. 896, holding that interest of assured continues unconditional, notwithstanding deed of trust; *Westchester F. Ins. Co. v. Ocean View Pleasure Pier Co.* 106 Va. 633, 56 S. E. 584, holding that insurer cannot defeat recovery on policy, void if insured is not unconditional owner, by showing that property is on bed of bay; *Rochester German Ins. Co. v. Monumental Sav. Asso.* 107 Va. 701, 60 S. E. 93, holding that insured is unconditional owner, though he has given option, or made conditional sale of property.

Cited in reference note in 99 A. S. R. 928, on existence of lien for purchase money as breach of condition in policy for absolute title.

Cited in note in 7 L.R.A.(N.S.) 628, on vendor's lien as affecting sole and unconditional ownership.

Sufficiency of payment of insurance premium.

Cited in *Kerlin v. National Acci. Asso.* 8 Ind. App. 628, 35 N. E. 39, holding that promise by agent to apply debt owing by him to insured on premium is valid payment of premium.

Cited in reference note in 39 A. R. 584, on effect of nonpayment by agent to insurance company of premium on rights of insured.

Cited in note in 57 A. R. 514, 515, on sufficiency of payment of insurance premium.

Insurance agent as agent of assured.

Cited in note in 77 A. D. 727, on effect of stipulations seeking to make agent of insurer agent of assured.

What constitutes insurance contract.

Cited in note in 21 A. S. R. 883, on what constitutes a contract of insurance.

Completion of insurance contract.

Cited in note in 69 A. S. R. 150, on completion of insurance contract by payment of premium.

"Immediate notice" of loss.

Cited in *Van Buren Company v. American Surety Co.* 137 Iowa, 490, 126 A. S. R. 290, 115 N. W. 24, to the point that "immediate notice" of loss in insurance policy may mean two days or two months.

31 AM. REP. 742, SANDS v. RICHMOND, 31 GRATT. 571.

Constitutionality of sidewalk and paving acts.

Cited in *Speer v. Athens*, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802, holding act authorizing assessment of costs of making sidewalks against abutting owners, constitutional; *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760; *Lincoln v. Janesch*, 63 Neb. 707, 93 A. S. R. 478, 56 L.R.A. 762, 89 N. W. 280, holding statute requiring abutting owners to build and repair sidewalks constitutional; *Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730, on constitutionality of act authorizing local assessments on part of city for public improvements; *Wilson v. Philippi*, 39 W. Va. 75, 19 S. E. 553, holding act, assessing expense of paving sidewalk against abutting owners, on their refusal to pave side-

walk, constitutional; *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2; *Violett v. Alexandria*, 92 Va. 561, 53 A. S. R. 825, 31 L.R.A. 382, 23 S. E. 909; *Parkersburg v. Tavenner*, 42 W. Va. 486, 26 S. E. 179,—holding act, assessing expense of paving street against abutting owners, constitutional; *Dancer v. Mannington*, 50 W. Va. 322, 40 S. E. 475, holding act, requiring abutting owners to pave between sidewalks, constitutional.

Cited in reference notes in 34 A. R. 451, on power of municipal corporation to make assessments for sidewalks; 37 A. S. R. 782, on municipal power to require construction of sidewalks.

Cited in notes in 14 L.R.A. 759, on right to charge burden of street improvements on abutting lot directly; 21 L.R.A. 566, on validity of assessment for sidewalk on abutting property made by charging on each piece the cost of improvement in front of it.

31 AM. REP. 746, FROMMER v. RICHMOND, 31 GRATT. 646.

Validity of license tax by city.

Cited in *Ft. Smith v. Scrugs*, 70 Ark. 549, 91 A. S. R. 100, 58 L.R.A. 921, 69 S. W. 679, holding that city can impose tax on residents for privilege of keeping and using vehicle; *Davis v. Macon*, 64 Ga. 128, 37 A. R. 60, holding that city can impose license tax on wagon of nonresident butcher; *Harmon v. Chicago*, 140 Ill. 374, 29 N. E. 732, holding that city can impose license tax on vessels; *Mason v. Cumberland*, 92 Md. 451, 48 Atl. 136, holding that city can impose license tax on vehicles on nonresident, using streets of city; *Petersburg v. Cocke*, 94 Va. 244, 36 L.R.A. 432, 26 S. E. 576, holding that city can impose license tax on nonresident lawyers, having office in city; *Blanchard v. Bristol*, 100 Va. 469, 41 S. E. 948, holding that city can impose license tax on lawyers; *Standard Oil Co. v. Fredericksburg*, 105 Va. 82, 52 S. E. 817, holding that city can impose license tax upon nonresident oil company delivering oil from warehouse in city; *White Oak Coal Co. v. Manchester*, 109 Va. 749, 132 A. S. R. 943, 64 S. E. 944; *Harders' Fire Proof Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245, 14 A. & E. Ann. Cas. 536,—holding that statute authorizing imposition of license fee upon vehicles is valid.

Cited in notes in 129 Am. St. R. 269, on constitutional limitations on power to impose license or occupation taxes; 24 L.R.A. 586, on tax on markets; 36 L.R.A. 414, on authority of municipality to impose license fees for use of streets by vehicles beyond city limits; 21 L.R.A.(N.S.) 280, on validity of license tax on vehicles used in business for which general occupation tax required.

31 AM. REP. 750, RICHMOND & D. R. CO. v. ANDERSON, 31 GRATT. 812.

Recovery notwithstanding contributory negligence.

Cited in *Chicago, B. & Q. R. Co. v. Flint*, 22 Ill. App. 502, holding that plaintiff, though negligent, may recover if act of defendant was, under circumstances, equivalent to intentional mischief; *McKeon v. Steinway R. Co.* 20 App. Div. 601, 47 N. Y. Supp. 374, holding street railway liable for failure to avoid striking man lying unconscious on track because of his negligence in being struck by prior car; *Richmond & D. R. Co. v. Yeamans*, 86 Va. 860, 12 S. E. 946, holding that instruction that if plaintiff contributed to injury, his

right to recover is not affected thereby, unless he was in fault in so contributing, is erroneous; *Richmond Pass. & Power Co. v. Gordon*, 102 Va. 498, 46 S. E. 772, holding street railway liable if failure to keep proper lookout was proximate cause of injury, though plaintiff was negligent in going on track; *McCarty v. Boise City Canal Co.* 2 Idaho, 245, 10 Pac. 623; *Dunn v. Seaboard & R. R. Co.* 78 Va. 645, 49 A. R. 388; *Shenandoah Valley R. Co. v. Moose*, 83 Va. 827, 3 S. E. 796; *Virginia Midland R. Co. v. White*, 84 Va. 498, 10 A. S. R. 874, 5 S. E. 573; *Norfolk & W. R. Co. v. Spencer*, 104 Va. 657, 52 S. E. 310,—holding that defendant is liable if he could have avoided accident, though plaintiff is negligent; *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 86, 24 L.R.A. 50, 19 S. E. 571, holding that plaintiff can recover, though negligent, if injury would have happened, nevertheless, from defendant's negligence.

Cited in notes in 55 A. D. 668, on contributory negligence not preventing recovery unless it contributes to occurrence of injury; 55 A. D. 669, on necessity that contributory negligence be proximate cause of injury to prevent recovery; 12 L.R.A. 282, on effect upon liability for injury of concurrent or co-operating causes; 55 L.R.A. 463, on doctrine of last clear chance; 31 L.R.A. (N.S.) 1033, 1043, on intoxication of persons on track as affecting applicability of doctrine of last clear chance.

What constitutes contributory negligence.

Cited in *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241; *Sheeler v. Chesapeake & O. R. Co.* 81 Va. 188, 59 A. R. 654,—holding that plaintiff cannot recover, if his want of ordinary care directly contributed to injury; *Gordon v. Richmond*, 83 Va. 436, 2 S. E. 727, holding that use of sidewalk by traveler having actual knowledge of danger, is not per se negligence; *Norfolk & W. R. Co. v. Harman*, 83 Va. 553, 8 S. E. 251, holding that person walking along track without looking out for trains is guilty of contributory negligence; *New York, P. & N. R. Co. v. Kellam*, 83 Va. 851, 3 S. E. 703, holding that traveler in top buggy, failing to look until horse was on track, was guilty of contributory negligence; *Richmond & D. R. Co. v. Pickleseimer*, 85 Va. 798, 10 S. E. 144, holding that contributory negligence consists in such want of care, as co-operating with defendant's negligence, is proximate cause of injury; *Moore v. Norfolk & W. R. Co.* 87 Va. 489, 12 S. E. 968, holding that fireman, while off duty, negligently placing himself in such position that passing train must strike him, cannot recover; *Marks v. Petersburg R. Co.* 88 Va. 1, 13 S. E. 299; *Norfolk & W. R. Co. v. Stone*, 88 Va. 310, 13 S. E. 432; *Beyel v. Newport News & M. Valley R. Co.* 34 W. Va. 538, 12 S. E. 532,—holding that failure to give signal does not excuse duty of traveler to look and listen before crossing railroad; *Jammison v. Chesapeake & O. R. Co.* 92 Va. 327, 53 A. S. R. 813, 23 S. E. 758, to the point that passenger voluntarily placing himself in position of peril cannot recover for injury caused by negligence of railroad; *Norfolk & W. R. Co. v. Jackson*, 1 Va. Dec. 680 (dissenting opinion), on contributory negligence of brakeman grasping slipping push-pole.

Cited in note in 55 A. D. 667, on general principles of law of contributory negligence.

Liability of railroad company for injury to trespasser.

Cited in *Atlantic, M. & O. R. Co.'s Case*, 4 Hughes, 157, Fed. Cas. No. 13,358, holding railroad not liable, where engineer does everything in his power to stop train after trespasser comes on track; *Miles v. Receivers*, 4 Hughes, 172, Fed. Cas. No. 9,544, holding railroad not liable for injury to lame boy,

stealing ride on cowcatcher, where engineer immediately stopped on discovering him; *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257, 4 S. W. 782; *Candelaria v. Atcheson, T. & S. F. R. Co.* 6 N. M. 266, 27 Pac. 497,—holding railroad only liable for negligence after discovery of trespasser on track; *Virginia Midland R. Co. v. Barksdale*, 82 Va. 330, holding that railroad is not liable for killing man on trestle on dark night; *Virginia Midland R. Co. v. Boswell*, 82 Va. 932, 7 S. E. 383, holding railroad not liable where its track-walker found plaintiff asleep on track and aroused him and then left him; *Seaboard & R. R. Co. v. Joyner*, 92 Va. 354, 23 S. E. 773, holding railroad liable for negligently running down trespasser; *Bowles v. Chesapeake & O. R. Co.* 61 W. Va. 272, 57 S. E. 131, holding railroad, backing train on dark night over crossing without warning of any kind, liable though plaintiff reached crossing by walking between tracks.

Cited in note in 38 A. R. 637, on railroad's responsibility for negligence to trespasser.

Who are trespassers.

Distinguished in *Norfolk & W. R. Co. v. Carper*, 88 Va. 556, 14 S. E. 328, holding that deceased was not on track as trespasser, but as licensee, when track where he was killed had long been used by public with railroad's knowledge and acquiescence.

Effect of demurrer to evidence.

Cited in *Creekmur v. Creekmur*, 75 Va. 430; *Richmond & D. R. Co. v. Moore*, 78 Va. 93; *Clark v. Richmond & D. R. Co.* 78 Va. 709, 49 A. R. 394,—holding that by demurrer to evidence demurrant waives all of his evidence conflicting with adversary's evidence; *Johnson v. Chesapeake & O. R. Co.* 91 Va. 171, 21 S. E. 238, holding that by demurrer to evidence demurrant is considered as admitting truth of adversary's evidence and all inferences properly deducible therefrom; *Allen v. Bartlett*, 20 W. Va. 46, holding that on demurrer to evidence demurrant must be considered as allowing full credit to all evidence of demurree.

31 AM. REP. 757, SWEENEY v. BAKER, 13 W. VA. 158.

Privileged publication regarding candidate for office.

Cited in *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530, holding that false allegations of fact charging candidate with disgraceful conduct are not privileged; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216; *Jones & Co. v. Townsend*, 21 Fla. 431; *Upton v. Hume*, 24 Or. 420, 41 A. S. R. 863, 21 L.R.A. 493, 33 Pac. 810; *Bronson v. Bruce*, 59 Mich. 467, 60 A. R. 307, 26 N. W. 671,—holding that publication, falsely imputing crime to candidate, is not privileged; *Arnold v. Savings Co.* 76 Mo. App. 159, holding that garbled extracts and false reports of privileged communication are not protected under guise of freedom of press; *Mertens v. Bee Pub. Co.* 5 Neb. (Unof.) 592, 99 N. W. 847, holding that privilege of publication regarding candidate does not extend to false statements injurious to reputation or character; *Post Pub. Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921, holding that false defamatory publication of public officer as individual is not privileged on ground that it relates to matter of public interest; *State v. Balch*, 31 Kan. 465, 2 Pac. 609; *Wheaton v. Beecher*, 66 Mich. 307, 33 N. W. 503; *People v. Glassman*, 12 Utah, 238, 42 Pac. 956,—holding that bona fide criticism of candidate is privileged; *Nichols v. Daily Reporter Co.* 30 Utah, 74, 116 A. S. R. 796, 3 L.R.A.

(N.S.) 339, 83 Pac. 573, 8 A. & E. Ann. Cas 841, holding that publication that candidate owes debt is not libelous per se; *Sheibley v. Fales* 81 Neb. 795, 116 N. W. 1035; *Smith v. Burrus*, 106 Mo. 94, 27 A. S. R. 329, 13 L.R.A. 59, 16 S. W. 881,—holding that false statements defamatory of character of candidate for public office, though made in good faith, are not privileged.

Cited in notes in 86 A. D. 88, as to what publications libelous to candidates are justifiable; 86 A. D. 91, on liability of newspapers for libel; 57 A. R. 222, 223, 226, on criticism of public officer as privileged; 58 A. R. 692, on libel of public officers and candidates for public office; 28 L.R.A. 672, on libel or slander of officers and candidates by expressing opinions or comments without misstating facts.

"Freedom of press."

Cited in notes in 32 L.R.A. 831, on constitutional freedom of speech and of the press as applied to libels: 32 L.R.A. 832, on prevention of speech or publication as interference with constitutional freedom of speech and of the press.

Damages for newspaper libel.

Cited in note in 15 A. S. R. 344, 355, 357, on elements increasing or mitigating damages for newspaper libel.

Sufficiency of plea of justification.

Cited in *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821, holding that plea of justification to general charge must specify particular facts which show truth of general charge.

Cited in notes in 91 A. S. R. 293, on plea of justification for slander or libel; 91 A. S. R. 297, 300, on form of plea of justification for slander or libel; 21 L.R.A. 503, on truth as a defense to libel or slander; 21 L.R.A. 508, on truth as justification for libel or slander by giving particulars; 31 L.R.A. (N.S.) 135, on truth as defense to civil action for defamation; 9 E. R. C. 115, on particularity required in plea of justification in action for defamation.

Definition of exemplary damages.

Cited in *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, holding that exemplary damages for selling liquor to husband are damages compensating wife for injury to means of support and for mental anguish; *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58, holding that exemplary damages are damages inflicted by way of punishment as warning to prevent repetition of wrong.

Recovery of damages for mental anguish.

Cited in *Riddle v. McGinnis*, 22 W. Va. 253, holding damages for mental anguish and shame recoverable, in action for seduction of daughter.

New trial for excessiveness of damages.

Cited in *Vinal v. Core*, 18 W. Va. 1, holding that new trial will not be granted for excessiveness of damages, unless they are so enormous as to furnish evidence of prejudice, passion, or corruption.

When demurrer lies.

Cited in *Battrell v. Ohio River R. Co.* 34 W. Va. 232, 11 L.R.A. 290, 12 S. E. 699, holding that demurrer will not lie to declaration because it alleges facts, constituting cause of action by way of recital.

Cited in *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. 999; *Martin v. Monongahela R. Co.* 48 W. Va.

542, 37 S. E. 563,—holding that demurrer will not lie because of duplicity in declaration.

Review of exercise of judicial discretion.

Cited in *Welch v. County Ct.* 29 W. Va. 63, 1 S. E. 337, holding that exercise of sound judicial discretion, if perverted and abused, is subject to review.

Sufficiency of record to have exception reviewed.

Cited in *Marion Mach. Works v. Craig*, 18 W. Va. 559, holding that record must show pleas filed, bill of exceptions, stating that evidence was offered on pleas, insufficient; *Perry v. Horn*, 22 W. Va. 381, holding that appellate court cannot review rejection of plea, if record does not show that defendant excepted thereto; *Danks v. Rodeheaver*, 26 W. Va. 274, holding that appellate court cannot review rulings unless objected to and bill of exceptions taken and new trial asked and objection to refusal on record; *Poole v. Dilworth*, 26 W. Va. 583, holding statement in record that plaintiff replied generally to plea, sufficient; *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, holding that appellate court will not regard as part of record bill of exceptions copied in record by clerk, but not referred to by any entry on record book; *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604, holding identification of instructions and showing of exception by record, whole evidence appearing, sufficient, without bill of exceptions; *Simmons v. Looney*, 41 W. Va. 738, 24 S. E. 677, holding that subsequent certificate of judge is not part of record to affect antecedent finished record; *Quesenberry v. People's Bldg. Loan & Sav. Asso.* 44 W. Va. 512, 30 S. E. 73, holding that rejection of plea will not be considered by appellate court, if neither bill of exception nor exception on record appears; *Koontz v. Koontz*, 47 W. Va. 31, 34 S. E. 752, holding that paper purporting to be bill of exceptions and copied into record will not be treated by appellate court as part of record, unless record shows order by trial court; *Kay v. Glade Creek & R. R. Co.* 47 W. Va. 467, 35 S. E. 973, holding that appellate court will consider exception distinctly specified, though there is no formal bill of exceptions; *Woods v. King*, 59 W. Va. 418, 53 S. E. 605, holding that subsequent certificate of clerk of lower court does not make omitted evidence part of record; *Smith v. White*, 63 W. Va. 472, 14 L.R.A.(N.S.) 530, 60 S. E. 404, to point that rejected plea not part of record cannot be considered on appeal.

Simultaneous motions in arrest of judgment and for new trial.

Cited in *Gerling v. Agricultural Ins. Co.* 39 W. Va. 689, 20 S. E. 691, holding that simultaneous motions in arrest of judgment and for new trial may both be acted upon by court.

New trial for disqualification of jurors.

Cited in *Flesher v. Hale*, 22 W. Va. 44, holding that verdict will not be set aside for objections to jurors on grounds existing before they were sworn, unless objecting party has suffered injustice; *Beck v. Thompson*, 31 W. Va. 459, 13 A. S. R. 870, 7 S. E. 447, holding disqualification of juror no ground for new trial when defendant was not injured by juror serving; *State v. Greer*, 22 W. Va. 800; *State v. Hobbs*, 37 W. Va. 812, 17 S. E. 380,—holding that new trial will not be granted for matter, principal cause of challenge, existing before juror was sworn, but unknown to prisoner, unless prisoner suffered injustice.

31 AM. REP. 768, BANK OF OHIO VALLEY v. LOCKWOOD, 13 W. VA. 392.

Effect of alteration of note.

Cited in notes in 3 L.R.A. 725, on alteration of note by maker as discharging indorser; 35 L.R.A. 466, on alteration in place of payment in note as affecting bona fide holders.

31 AM. REP. 775, BALTIMORE & O. R. CO. v. JAMESON, 13 W. VA. 833.

What may be set off.

Cited in *Baltimore & O. R. Co. v. Bitner*, 15 W. Va. 467, holding that in action against principal and surety on bond for faithful discharge of duty, amount due principal for services can be set off; *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 312, holding that in action for rent, defendant cannot set off any payment which is not so described in his plea, or in account filed therewith.

Cited in note in 40 A. D. 322, as to how recoupment is distinguished from setoff and counterclaim.

What may be recouped.

Cited in *Baltimore & O. R. Co. v. Bitner*, 15 W. Va. 455, 36 A. R. 820, holding that in action against surety for faithful performance of agent's duty surety cannot recoup amount due agent for services; *Sterling Organ Co. v. House*, 25 W. Va. 64, holding that defendant can have damages from breach of agency contract recouped against amount due plaintiff from defendant.

Cited in note in 40 A. D. 320 on recoupment in case of breach of contract.

NOTES

ON THE

AMERICAN REPORTS.

CASES IN 32 AM. REP.

32 AM. REP. 1, WESTERN U. TELEG. CO. v. MEYER, 61 ALA. 158.

Liability of telegraph company for loss caused by sending of false message.

Cited in *Bank of Havelock v. Western U. Teleg. Co.* 4 L.R.A.(N.S.) 181, 72 C. C. A. 580, 141 Fed. 522, 5 A. & E. Ann. Cas. 515, holding telegraph company have a right to presume that the person sending a message has a right to do so; *Western U. Teleg. Co. v. Schriver*, 4 L.R.A.(N.S.) 678, 72 C. C. A. 596, 141 Fed. 538, holding telegraph company receiving and sending a false message, not liable to undisclosed principal of addressee of such message for damage sustained by reliance on it.

Cited in notes in 81 A. D. 616, on telegraph company's liability in case of fraudulent messages; 45 A. R. 493, on liability of telegraph company for forged and fraudulent despatches; 65 L.R.A. 806, on liability of telegraph company to addressee for transmission or delivery of forged message; 4 L.R.A.(N.S.) 181, on duty of telegraph company to ascertain identity or authority of sender of message.

Liability of payor for payment of money to impostor.

Cited in *Metzger v. Franklin Bank*, 119 Ind. 359, 21 N. E. 973, holding bank paying money to impostor not liable to party on whose account it was paid, it being paid under his instructions, the bank having a right to presume that he knew with whom he was dealing.

Delivery by carrier to wrong person.

Cited in reference note in 35 A. R. 107, on carrier's liability for money delivered to wrong person.

Cited in note in 37 L.R.A. 184, on delivery by carrier to impostor who has imposed on consignor.

Sufficiency of pleading in justice court.

Cited in *Smith v. Dick*, 95 Ala. 311, 10 So. 845, holding a statement or com-

plaint in justice court claiming "one hundred dollars for a mule that plaintiff sold defendant," shows a substantial cause of action.

32 AM. REP. 3, SNOW v. CARR, 61 ALA. 363.

Bailor's right to share of loss on policy taken out by bailee.

Cited in *Johnston v. Charles Abresch Co.* 123 Wis. 130, 107 A. S. R. 995, 68 L.R.A. 934, 101 N. W. 395, holding bailor of property might recover from bailee for damage to property in bailee's possession and covered by policy of insurance taken out by bailee, but which he refused to include in his proof of loss in making a settlement with the insurance company.

Cited in note in 13 L.R.A. (N.S.) 153, on principal's right to proceeds of insurance policy taken by agent in his own name.

Distinguished in *Bradley v. Brown*, 78 Neb. 836, 126 A. S. R. 677, 13 L.R.A. (N.S.) 152, 112 N. W. 331, holding agent, who has contracted to become unconditionally and absolutely liable to his principal for loss of goods by fire, and procures insurance upon them in his own name, may hold such insurance for his exclusive benefit and advantage.

Insurance by bailee as covering bailed goods.

Cited in *Lucas v. Liverpool & L. & G. Ins. Co.* 23 W. Va. 258, 48 A. R. 383, holding policy of insurance taken out against loss by fire describing the property insured as "his stock of pianos" etc., "his own, or held in trust or on commission or sold but not delivered," would cover a piano left at store in charge of insured to be repaired; *Mitchell Furniture Co. v. Imperial F. Ins. Co.* 17 Mo. App. 627, on policy covering "goods held in trust," as covering goods held upon bailment.

— Parol evidence.

Cited in *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. Rep. 365, holding evidence was admissible to show that policy was also taken out for benefit of railroad companies and that they had an interest in the cotton held by compress company.

Insurable interest of bailee.

Cited in *Home Ins. Co. v. Peoria & P. Union R. Co.* 178 Ill. 64, 52 N. E. 862, holding railroad terminal transfer company has an insurable interest on cars of other owners while in its custody.

Admissibility of secondary evidence.

Cited in note in 11 E. R. C. 458, on admissibility of secondary evidence of contents of private document.

32 AM. REP. 8, TYSON v. NORTH & S. ALA. R. CO. 61 ALA. 554.

Liability of master for injury to servant.

Cited in notes in 36 A. D. 286, on recovery by servant for personal negligence of master; 54 L.R.A. 47, on doctrine of nondelegable duties of master.

— Injuries sustained through fault of fellow-servant.

Cited in *Texas Mexican R. Co. v. Whitmore*, 58 Tex. 276, holding defendant liable to plaintiff for injuries received through the want of care on part of fellow servant, defendants' superintendent being aware of the careless and negligent manner in which he performed his work; *Stewart v. Louisville & N. R. Co.* 83 Ala. 493, 4 So. 373; *Unfried v. Baltimore & O. R. Co.* 34 W. Va. 260, 12 S. E. 512,—on master's liability to employee for negligence of fellow servant.

Cited in reference notes in 9 A. S. R. 483, on master's liability for negligence of foreman of crew of workmen; 34 A. S. R. 284, on delegation of authority by vice principal.

Who are fellow-servants.

Cited in *Woodward Iron Co. v. Cook*, 124 Ala. 349, 27 So. 455, holding employee entrusted with keeping track in repair is a fellow servant with employee whose duty consists in "spragging" wheels to check their speed on the track; *Georgia P. R. Co. v. Davis*, 92 Ala. 300, 25 A. S. R. 47, 9 So. 252; *Krogg v. Atlanta & W. P. R. Co.* 77 Ga. 202, 4 A. S. R. 79; *Brush Electric Light & P. Co. v. Wells*, 110 Ga. 192, 35 S. E. 365,—considering who are fellow servants.

Cited in notes in 1 A. S. R. 33; 53 A. R. 46,—on who are not fellow servants; 75 A. S. R. 607, on agents as vice principals; 54 L.R.A. 38, on vice principalship as determined with reference to the character of the act which caused the injury.

—Employee standing in place of employer.

Cited in *Postal Teleg. Cable Co. v. Hulsey*, 115 Ala. 193, 22 So. 854, holding relationship of fellow servants did not cease, the parties being employed in the same undertaking by reason of fact that instructions had been delegated to one of them; *Alabama G. S. R. Co. v. Vail*, 142 Ala. 134, 110 A. S. R. 23, 38 So. 124, considering when employee stands in place of employer.

Cited in note in 75 A. S. R. 592, 598, on persons performing master's duties as vice principals.

Duty owed by master to employees in selection of coemployees.

Cited in *Nashville, C. & St. L. R. Co. v. Hembree*, 85 Ala. 481, 5 So. 173, on duty of master to employ competent servants; *Eureka Co. v. Bass*, 81 Ala. 200, 60 A. R. 152, 8 So. 216; *Holland v. Tennessee Coal, Iron & R. Co.* 91 Ala. 444, 12 L.R.A. 232, 8 So. 524,—on the duty required of master in the selection of safe machinery and appliances and employing competent workmen.

Cited in notes in 25 L.R.A. 710, on liability of master for injuries caused by employing incompetent fellow servant; 48 L.R.A. 370, on master's duty with respect to employment of servants as creating exception to doctrine of common employment; 54 L.R.A. 83, 85, on nondelegability of master's duty to hire suitable servants.

32 AM. REP. 12, WHITE v. PEOPLE, 90 ILL. 117.

Limitations upon argument of counsel.

Cited in *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, 7 A. & E. Ann. Cas. 881, holding in criminal case which lasted four days and in which twenty witnesses were examined, the court erred in limiting the time for argument to the jury to an hour and a half on each side; *Wingo v. State*, 62 Miss. 311, holding same where seventeen witnesses were examined and the testimony was conflicting; *State v. Rogoway*, 45 Or. 601, 81 Pac. 234, 2 A. & E. Ann. Cas. 431, holding same where defendants' counsel was limited to an hour for argument in a criminal trial lasting three days in which twenty witnesses were examined and fifty exhibits introduced; *State v. Verry*, 36 Kan. 416, 13 Pac. 838; *Williams v. Com.* 82 Ky. 640; *Reagan v. St. Louis Transit Co.* 180 Mo. 117, 79 S. W. 435,—in discretion vested in court to limit time of argument to jury.

Cited in reference notes in 46 A. S. R. 28, on limitations upon argument of counsel; 32 A. R. 395; 36 A. R. 89,—on right to limit time of arguments in criminal cases.

Cited in note in 25 L.R.A.(N.S.) 1028, 1035, on right to limit time of argument of counsel for accused.

32 AM. REP. 15, REYNOLDS v. ADAMS, 90 ILL. 134.

Declarations of testator as evidence.

Cited in reference note in 70 A. S. R. 641, on declarations of testator as evidence.

— On question of his mental capacity.

Cited in *Bulger v. Ross*, 98 Ala. 267, 12 So. 803, holding letters written by testatrix subsequent to time of making of will and subsequent to time mind was alleged to be impaired admissible on question of testamentary capacity; *Hill v. Bahrns*, 158 Ill. 314, 41 N. E. 912, holding declarations of testator inadmissible to show mental incapacity in case of a later will; *Compber v. Browning*, 219 Ill. 429, 109 A. S. R. 346, 76 N. E. 678, holding declarations of testatrix inconsistent with will not admissible where no dispute as mental condition of testatrix; *Cockeram v. Cockeram*, 17 Ill. App. 604, holding declarations of deceased testator made shortly before his death and before and after the execution of the will, are competent to his mental capacity and condition of mind at time of making will; *Ball v. Kane*, 1 Penn. (Del.) 90, 39 Atl. 778, holding declarations of testator made shortly after the making of the will admissible for the purpose of showing his mental condition; *England v. Fawbush*, 204 Ill. 384, 68 N. E. 526, on the admissibility of declarations of testator.

Admission of will to probate as concluding right to contest.

Distinguished in *Critz v. Pierce*, 106 Ill. 167, holding person contesting will not concluded by its admission to probate, but may contest its validity in equity if bill filed within three years.

Disease as rendering mind susceptible to influence.

Cited in *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Nicewander v. Nicewander*, 151 Ill. 156, 37 N. E. 698,—on disease as rendering mind susceptible to influence.

Validity of will.

Cited in notes in 31 A. S. R. 681, on misrepresentation and like artifices invalidating will; 31 A. S. R. 688, on inference from circumstances of undue influence in execution of will.

32 AM. REP. 22, PATTERSON v. LAWRENCE, 90 ILL. 174.

Estoppel of married woman to avoid her contracts.

Cited in *Smith v. Weeks*, 65 Vt. 566, 27 Atl. 197, holding married woman incurring debts on the representation that she is carrying on the business in her own name cannot show in defense of debt that the representations were untrue; *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793, holding married woman giving her verbal consent to the building of a tram road across her land, would after the construction of such road be enjoined in equity from obstructing such road; *Danner v. Berthold*, 11 Mo. App. 351, on married woman as estopped from denying representations she has made.

— To avoid deeds.

Cited in *Reis v. Lawrence*, 63 Cal. 129, 49 A. R. 83, holding married woman obtaining a decree of divorce which is void, and assumed her maiden name and lived apart from husband, bound by deed of her separate estate made by her and representing her to be an unmarried woman; *Dobbin v. Cordiner*, 41 Minn.

165, 16 A. S. R. 683, 4 L.R.A. 333, 42 N. W. 870, holding married woman who at husband's request executes and acknowledges deed of conveyance of real property, knowing it to be such cannot set up as against innocent purchaser that when she executed it no grantee was named in it; *Sanford v. Kane*, 133 Ill. 199, 23 A. S. R. 602, 8 L.R.A. 724, 24 N. E. 414, on married woman as estopped by covenants in a deed.

Cited in reference note in 40 A. R. 643, on estoppel of married woman to reclaim land conveyed by her.

Estoppel to plead disabilities.

Cited in *Ryan v. Growney*, 125 Mo. 474, 28 S. W. 189, holding infant representing himself as of age as an inducement to purchase land, would be estopped by such representation from avoiding his deed.

Cited in note in 57 A. S. R. 183, on estoppel of wife to assert coverture.

Power of married woman to contract.

Cited in note in 38 A. S. R. 46, on power of married women to contract with reference to separate estate.

32 AM. REP. 27, RACE v. OLDRIDGE, 90 ILL. 250.

Who is head of "family" entitled to exemptions.

Cited in *McMahill v. McMhill*, 113 Ill. 461 (dissenting opinion), on what constitutes a "family."

Cited in reference notes in 34 A. R. 759, on "householder or head of family" entitled to homestead exemption; 42 A. S. R. 471, on meaning of "head of family."

Cited in note in 6 L.R.A. 813, on what constitutes a family and who is its head.

— Woman living alone.

Cited in *Berry v. Hanks*, 28 Ill. App. 51, holding a deserted wife without children is a family within meaning of statute.

Cited in note in 4 L.R.A.(N.S.) 382, on widow with dependents as "family" under homestead and exemption laws.

— Keeper of boarding house.

Distinguished in *Robbins v. Bangor R. & Electric Co.* 100 Me. 496, 1 L.R.A. (N.S.) 963, 62 Atl. 136, holding house used as a place for keeping boarders not a dwelling house containing a family although occupant and his wife and children lived there.

Sufficiency of instructions.

Cited in *Mt. Olive & S. Coal Co. v. Rademacher*, 190 Ill. 538, 60 N. E. 888; *Chicago & A. R. Co. v. Harrington*, 192 Ill. 1, 61 N. E. 622; *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087,—holding instruction informing the jury that if the plaintiff had proved his cause of action as alleged in the declaration he was entitled to a verdict is unobjectionable; *Wiggins Ferry Co. v. Reddig*, 24 Ill. App. 260; *Heffernan v. Bail*, 109 Ill. App. 231,—holding instruction which gives but the language of the statute under which the suit was brought, is proper; *Quincy Gas & Electric Co. v. Bauman*, 104 Ill. App. 600, on sufficiency of instructions.

Harmless error in giving instructions.

Cited in *Phenix Ins. Co. v. LaPointe*, 17 Ill. App. 248, holding new trial

would not be granted for error in the giving of instruction where verdict was clearly right.

Necessity that exemplary damages be specially averred.

Cited in *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614, on necessity that in order that exemplary damages be recovered they must specially be declared for.

Complaint in action for trespass.

Cited in *Keenan v. Drew*, 144 Ill. App. 388, holding that in action for trespass in selling exempt property common form of declaration in trespass is sufficient.

32 AM. REP. 31, PETILLON v. HIPPLE, 90 ILL. 420.

Jurisdiction of equity to restrain the performance of wagering contracts.

Cited in *Jamieson v. Wallace*, 167 Ill. 388, 59 A. S. R. 302, 47 N. E. 762, holding bill for an accounting would lie against broker selling securities deposited to cover loss on gambling contract; *Baxter v. Deneen*, 98 Md. 181, 64 L.R.A. 949, 57 Atl. 601, 1 A. & E. Ann. Cas. 147; *Dauler v. Hartley*, 178 Pa. 23, 35 Atl. 857, on jurisdiction of chancery to restrain the enforcement of a wagering contract.

Cited in note in 48 L.R.A. 845, on allowing injunction, in favor of party in *pari delicto*, against enforcing or otherwise proceeding with betting and gambling contracts.

Stakeholder's liability for payment of bet.

Cited in *Oberne v. Bunn*, 39 Ill. App. 122, holding party acting as stakeholder and paying the money to winner of bet without notice of complainant's interest is not liable therefor.

Cited in note in 39 A. S. R. 703, on validity and enforceability of election wagers.

32 AM. REP. 35, MACLAY v. HARVEY, 90 ILL. 525.

Necessity that acceptance of offer be unconditional to complete contract.

Cited in *Middaugh v. Stough*, 161 Ill. 312, 43 N. E. 1061, holding contract to convey land not complete where the owner replies to offer to purchase with a counter proposition varying in terms which is unaccepted; *Ortman v. Weaver*, 11 Fed. 358, holding same where offer made to sell standing timber; *Scott v. Fowler*, 227 Ill. 104, 81 N. E. 34, holding offer to purchase farm not completed where vendor replies that he could not sign the contract unless vendee made arrangement with his tenant as he could not otherwise deliver possession on the specified date; *Brinker v. Scheunemann*, 43 Ill. App. 659, holding an order for goods not accepted where vendee changed the terms of the order as proposed by vendor before accepting; *Egger v. Nesbitt*, 122 Mo. 667, 43 A. S. R. 596, 27 S. W. 385, holding no binding contract where one offers by letter to make a quitclaim deed for a named price and the person receiving the letter accepts on condition that other deeds are turned over to him; *Nundy v. Matthews*, 34 Hun, 74, holding an offer by letter not accepted by an answer proposing modifications in it; *Howells v. Stroock*, 50 App. Div. 344, 63 N. Y. Supp. 1074, holding no contract of sale where defendants made an offer and plaintiffs replied saying they would submit order to mill and advise defendants; *Sharp v. West*, 150 Fed. 458; *Davis v. Fidelity F. Ins. Co.* 208 Ill. 375, 70 N. E. 359,—on necessity

that acceptance must conform exactly to the offer in order that contract be closed.

Cited in reference notes in 49 A. S. R. 483, on necessity for acceptance of promise.

Acceptance of offer to complete contract.

Cited in *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, on when acceptance of contract renders it complete also citing annotation on this point; *Kempner v. Cohn*, 47 Ark. 519, 58 A. R. 775, 1 S. W. 869, on whether an offer remains open as being a question of fact; *Richardson v. Lenhard*, 48 Kan. 629, 29 Pac. 1076, holding a proposition to purchase apples, submitted by mail and declined by vendor the next day and accepted eight days later imposed no obligation on the parties making the same; *Horne v. Niver*, 168 Mass. 4, 46 N. E. 393, holding an offer calling an immediate reply by telegraph not accepted in proper time, when reply made by letter two days later; *Union Nat. Bank v. Miller*, 106 N. C. 347, 19 A. S. R. 538, 11 S. E. 321, holding no title passes by the acceptance by telegraph of an offer to purchase personal property, which stipulates that the proposer "must have reply early to-morrow" where the acceptance is not received until late in the evening and is not shown to have been dispatched early in the morning; *McKee v. Harris*, 16 Phila. 149, 40 Phila. Leg. Int. 232, holding the acceptance of an offer of sale sent by mail must be written and sent without delay by return mail; *Dawley v. Potter*, 19 R. I. 372, 36 Atl. 92; *Trounstone v. Sellers*, 35 Kan. 447, 11 Pac. 441,—on time as being of the essence of the acceptance of a contract; *Boyd v. Merchants' & F. Peanut Co.* 25 Pa. Super. Ct. 199, on when acceptance of offer must be made in order to constitute a binding contract; *Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111, holding that acceptance of offer on November 11th is too late to bind under offer by telegram sent and received on November 4th; *Howells v. Stroock*, 30 Misc. 569, 62 N. Y. Supp. 870, holding no sale takes place where offer to sell requires unqualified acceptance by return mail unless notice of acceptance is so received.

Annotation cited in *Perry v. Mt. Hope Iron Co.* 15 R. I. 380, 2 A. S. R. 902, 5 Atl. 632, holding a contract was completed by the sending of a telegram accepting the offer.

Cited in reference notes in 48 A. R. 519, on offer and acceptance; 34 A. S. R. 86; 53 A. R. 634,—on offer and acceptance by letter; 50 A. R. 752, on time for acceptance of offer by letter to constitute a contract; 58 A. R. 775, on completion of contract by mail by mailing of letter of acceptance; 34 A. S. R. 344, on acceptance of offer to complete contract; 44 A. S. R. 861; 97 A. S. R. 935,—as to when contract made and accepted by letter is complete.

Cited in notes in 6 E. R. C. 90, 132, on offer and acceptance of contract made by letter; 6 E. R. C. 539, on time as essence of the contract.

Mailing of letter as equivalent to delivery of same.

Annotation cited in *Barrett v. Dodge*, 16 R. I. 740, 27 A. S. R. 777, 19 Atl. 530, on placing letter in mail as amounting to delivery of it.

32 AM. REP. 54, CHICAGO CITY R. CO. v. CHICAGO, 90 ILL. 573.

Property of street railway company subject to assessment for street improvements.

Cited in *Cicero & P. Street R. Co. v. Chicago*, 176 Ill. 501, 52 N. E. 366; *Little v. Chicago & E. Ave. R. Co.* 46 Ill. App. 534,—holding franchise, right of

way and of occupancy of street railway company in a given street may be assessed for an improvement beneficial to such property; *Pittsburgh, C. & St. L. R. Co. v. Hays*, 17 Ind. App. 261, 44 N. E. 375; *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 172, 121 A. S. R. 649, 12 L.R.A.(N.S.) 112, 104 S. W. 67, 12 A. & E. Ann. Cas. 630,—holding a portion of right of way of railroad in a special assessment district for a street improvement cannot be exempted from taxation; *Indianapolis & W. R. Co. v. Capitol Paving & Constr. Co.* 24 Ind. App. 114, 54 N. E. 1076, holding same where charter authorized taxation of abutting lands for street improvements; *Chicago v. Cummings*, 144 Ill. 446, 33 N. E. 34; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096,—on right to tax street railway company for street improvements.

Cited in reference notes in 58 A. S. R. 468; 123 A. S. R. 965,—on assessments for street improvements against railway and street railway companies.

Cited in notes in 1 L.R.A. 614, on exemptions in corporate charter not including local assessments; 28 L.R.A. 251, on liability of railroad right of way to assessment for public improvements; 45 A. D. 536, as to what property must contribute to pay damages for taking of property by eminent domain.

Right of way of street railway company as taxable realty.

Cited in *Newark v. State Bd. of Taxation*, 66 N. J. L. 466, 49 Atl. 525; *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L.R.A. 853, 11 S. W. 348,—holding right of way of street railway company over streets assessable for taxation, as realty.

Interest of street railway company in city streets.

Cited in *Chicago & W. I. R. Co. v. General Electric R. Co.* 79 Ill. App. 569, on the interest acquired by street railway company in streets of city.

Right to tax street railway company.

Cited in *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 84 A. S. R. 589, 85 N. W. 96, holding under statute requiring the assessment of a street railway track as personalty the right to use of road bed would be included within the term.

32 AM. REP. 57, PULLMAN PALACE CAR CO. v. TAYLOR, 65 IND. 153.

Purchase of ticket as amounting to binding contract.

Cited in *Baltimore & O. S. W. R. Co. v. Evans*, 169 Ind. 410, 14 L.R.A.(N.S.) 368, 82 N. E. 773, holding the purchase at reduced rate and acceptance of a coupon ticket limited to the use of purchaser and his family constitutes a contract binding on both parties; *Louisville, N. A. & C. R. Co. v. Wright*, 18 Ind. App. 125, 47 N. E. 491, holding ticket is a contract for carriage.

Cited in note in 26 A. S. R. 339, on duty of sleeping car company to furnish continuous passage.

—Effect of payment for particular space in sleeping or parlor car.

Cited in *Aplington v. Pullman Co.* 110 App. Div. 250, 97 N. Y. Supp. 329, holding plaintiff purchasing a ticket entitling him to a lower berth in a sleeping car might recover for breach of contract where such a berth was not furnished him.

Cited in notes in 5 A. S. R. 35, on nature of contract between sleeping car company and passenger; 5 L.R.A.(N.S.) 1014, on liability for failure to supply berth.

Sleeping car company as common carrier.

Cited in *Woodruff Sleeping & Parlor Coach Co. v. Diehl*, 84 Ind. 474, 43 A. R. 102; *Voss v. Wagner Palace Car Co.* 16 Ind. App. 271, 43 N. E. 20 (dissenting opinion), on whether sleeping car company is to be regarded as a common carrier.

Liability of sleeping car company for baggage.

Cited in note in 21 L.R.A. 295, on extent of liability of sleeping car company for baggage.

Effect of failure to plead after demurrer as affecting rights of parties.

Cited in *McKinney v. State*, 101 Ind. 355, holding judgment should be entered as upon default upon failure of party to plead over after demurrer has been overruled.

Right to stop off on through ticket.

Cited in note in 61 A. D. 677, on right to stop off on through ticket.

32 AM. REP. 63, PITTSBURG, C. & ST. L. R. CO. v. HOLLOWELL, 65 IND. 188.**Liability of carrier.**

Cited in *Burnham v. Alabama & V. R. Co.* 81 Miss. 46, 32 So. 912, denying recovery to shipper of perishable fruit for delay caused by overflowed tracks, against carrier using due diligence thereafter; *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 32 A. S. R. 239, 17 L.R.A. 339, 31 N. E. 781, holding it error to charge that carrier was liable to shipper of live cattle, under agent's control by special contract, for mere nondelivery; *Gratiot Street Warehouse Co. v. Missouri, K. & T. R. Co.* 124 Mo. App. 545, 102 S. W. 11, holding liability of common carrier attached on the acceptance of freight for shipment although freight charges were not paid in advance; *Simpson v. Dufour*, 126 Ind. 322, 22 A. S. R. 590, 26 N. E. 69, denying recovery to sheriff, against carrier, retaking goods wrongfully levied upon in transit.

Cited in notes in 97 A. D. 410, on liability of carrier for loss occasioned partly by act of God and partly by other means; 9 L.R.A. 836, on excuse for carrier's delay in transportation.

— For delay due to strike.

Cited in *Indianapolis & St. L. R. Co. v. Juntgen*, 10 Ill. App. 295; *Geismer v. Lake Shore & M. S. R. Co.* 102 N. Y. 563, 55 A. R. 837, 7 N. E. 828 (reversing 34 Hun, 50), denying in absence of negligence, carrier's liability to shipper of live stock for delayed delivery caused by strike; *Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* 77 Fed. 919, 35 L.R.A. 623, 23 C. C. A. 564, 40 U. S. App. 157, holding charterer of vessel not liable to owner for its detention caused by intimidation and violence of strikers; *Com. ex rel. Tuller v. Western U. Teleg. Co.* 19 Phila. 330, 45 Phila. Leg. Int. 44, denying recovery against telegraph company refusing to receive unconditioned message because of strike; *Gulf, C. & S. F. R. Co. v. Levi*, 76 Tex. 337, 18 A. S. R. 45, 8 L.R.A. 323, 13 S. W. 191, denying recovery to shipper of perishable fruit, for delay, against carrier using every effort to terminate strike; *I. & G. N. R. Co. v. Server*, 3 Tex. App. Civ. Cas. (Willson) 534, allowing recovery to shipper of live stock for loss caused by carrier's failure to call on authorities to suppress strike; *Sinsabaugh v. Cleveland, C. C. & St. L. R. Co.* 149 Ill. App. 430, holding common carrier liable for unrea-

sonable delay in transportation, though caused by refusal of employees to perform usual duties.

Cited in notes in 35 L.R.A. 624, on effect of strikes on rights and liability of carrier as to delay in transportation; 35 L.R.A. 627, on effect of violence and intimidation by striking employees on carrier's liability for delay in transportation; 11 A. S. R. 365, on carrier's liability for injury to goods by delay caused by strikes, riots, and mobs.

— For delay caused by mob or riot.

Cited in *Lake Shore & M. S. R. Co. v. Bennett*, 89 Ind. 457, denying carrier's liability to shipper of live stock, under agent's agreed supervision, for delay caused by uncontrollable mob; *Bartlett v. Pittsburgh, C. & St. L. R. Co.* 94 Ind. 281, sustaining answer by carrier setting up as excuse for delay in delivering live stock, uncontrollable riot.

— Necessity of negating contributory negligence.

Cited in *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 32 A. S. R. 239, 17 L.R.A. 339, 31 N. E. 781, dismissing complaint against carrier for failure to allege that consignor's agent, in charge of live stock, shipped, exercised due care; *Evansville & T. H. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296, holding it unnecessary to negative contributory negligence in action against carrier for loss of goods.

Waiver of prepayment of freight.

Cited in *Gratiot Street Warehouse Co. v. Missouri, K. & T. R. Co.* 124 Mo. App. 545, 102 S. W. 11, to the point that carrier waives right to prepayment of freight without exacting it in advance.

32 AM. REP. 69, STATE v. ELDER, 65 IND. 282.

Former acquittal or conviction of crime consisting in same acts.

Cited in *People v. Majors*, 65 Cal. 138, 52 A. R. 295, 3 Pac. 597, holding party killing two persons by the same act cannot plead a conviction for the killing of one of them to prosecution for the killing of the other; *State v. Caddy*, 15 S. D. 167, 91 A. S. R. 666, 87 N. W. 927, holding acquittal on charge of assault with a deadly weapon with intent to rob, no bar to a conviction on indictment charging robbery in taking money from the party against his will by force; *Davidson v. State*, 99 Ind. 366, holding conviction for unlawfully carrying a dangerous weapon, no bar to prosecution for violation of statute, against drawing of threatening to use such weapon; *De Haven v. State*, 2 Ind. App. 376, 28 N. E. 562, holding person convicted before mayor of keeping a gambling room cannot plead such conviction in bar of an indictment under statute as a common gambler; *State v. Gapen*, 17 Ind. App. 524, 47 N. E. 25, holding person not put in jeopardy "twice for the same offense" where he is acquitted of charge of selling liquor to a minor and is subsequently tried for a sale without a license; *State v. Rosenbaum*, 23 Ind. App. 236, 77 A. S. R. 432, 55 N. E. 110, holding saloon-keeper acquitted of allowing one person to go into saloon within prohibited hours cannot be prosecuted for allowing another person to do so where it was alleged that he went with the other person at the same time; *State v. Magone*, 33 Or. 570, 56 Pac. 648, holding an acquittal of a charge of malicious destruction of personal property of another, is no bar to a prosecution for the illegal disinterment of a human body, though former prosecution related to casket on which it was inclosed; *Warren v. State*, 79 Neb. 526, 113 N. W. 143, holding that acquittal of defendant upon charge of murder of L. was not bar to prose-

cution for robbery of L. committed at same time; *Wilcox v. United States*, 7 Ind. Terr. 86, 103 S. W. 774, holding that acquittal of charge of assault and battery was not bar to prosecution for disturbing peace and quiet of family of Federal officer by commission of offense, under Revised Statutes; *Hurst v. State*, 86 Ala. 604, 11 A. S. R. 79, 6 So. 120; *Jones v. State*, 61 Ark. 88, 32 S. W. 81; *State v. Hattabough*, 66 Ind. 223; *Smith v. State*, 85 Ind. 553,—on plea of former acquittal as bar to pending prosecution.

Cited in notes in 58 A. D. 541, on each offense being separately indictable where same act constitutes two or more distinct offenses; 58 A. D. 543, on conviction or acquittal of greater crime as bar to prosecution for lesser crime included within it; 31 L.R.A.(N.S.) 694, on right to convict for several offenses growing out of same facts.

Former jeopardy for same crime.

Cited in *Joslyn v. State*, 128 Ind. 160, 25 A. S. R. 425, 27 N. E. 492; *State v. Reed*, 168 Ind. 588, 81 N. E. 571; *Miller v. State*, 33 Ind. App. 509, 71 N. E. 248,—on what necessary to sustain a defense of former jeopardy; *Cook v. State*, 43 Tex. Crim. Rep. 182, 96 A. S. R. 854, 63 S. W. 872, on right to plead defense of former jeopardy.

Cited in notes in 11 A. S. R. 228, on former acquittal or conviction as defense; 92 A. S. R. 106, 109, on tests of identity of offenses within rule as to former jeopardy; 92 A. S. R. 117, on plea of former jeopardy in case of larceny of several articles; 92 A. S. R. 145, on homicide and other offenses within rule as to former jeopardy.

Duplicity in indictment.

Cited in *Peck v. State*, 54 Tex. Crim. Rep. 81, 111 S. W. 1019, 16 A. & E. Ann. Cas. 583, holding indictment for theft charging that defendant did then and there fraudulently take two bales of cotton from two different owners etc., not duplicitous.

32 AM. REP. 73, ALLEN v. MARNEY, 65 IND. 398.

Liability on official bond.

Cited in reference note in 35 A. R. 182, on effect of surety's act in leaving blanks in official bond.

Cited in note in 8 A. S. R. 247, on liability of surety when name of principal or other surety is forged.

—Bond delivered on condition.

Cited in *Byers v. Gilmore*, 10 Colo. App. 79, 50 Pac. 370; *Rhode v. McLean*, 101 Ill. 467,—holding surety could not set up that he signed upon condition that principal was not to deliver until others signed it, as against obligee who had no notice of the condition; *Markland Min. & Mfg. Co. v. Kimmel*, 87 Ind. 560, holding guarantor of contract released where agreement that it should not be delivered until parties named in sign, and the obligee had notice of the condition; *Deering Harvester Co. v. Peugh*, 17 Ind. App. 400, 45 N. E. 808, holding surety signing note under agreement that it shall not be delivered unless also signed by another, cannot be held by the payee accepting with knowledge of the condition and without signature of other surety; *Davis v. O'Bryant*, 23 Ind. App. 376, 55 N. C. 261, holding surety on appeal bond consenting to and approving the filing of the bond, without the signature of the other obligor named therein, is liable thereon; *Hendry v. Cartwright* (N. M.) 8 L.R.A.(N.S.) 1056, 89 Pac. 309, holding sureties on bond complete on face and duly acknowl-

edged, and which is duly delivered and filed, bound thereon, though one of surety executed and delivered bond on a condition not fulfilled and of which obligee was unaware; *Baker County v. Huntington*, 46 Or. 275, 79 Pac. 187, holding sureties could not deny the validity of a bond where delivered without their consent, they giving it into the possession and control of principal who wrongfully delivered.

Cited in reference notes in 6 A. S. R. 336, on effect of delivering bond on condition; 40 A. S. R. 51, on liability on bonds not executed by some of the parties; 130 Am. St. R. 931; 89 A. D. 508,—on effect of delivery of bond in escrow to procure additional sureties; 45 L.R.A. 333, 334, on conditional execution of appeal bond on parol agreement that it shall take effect until signed by others.

Distinguished in *State ex rel. McClamrock v. Gregory*, 119 Ind. 503, 22 N. E. 1, holding parties signing bond as sureties in expectation that others are also to sign, but without making any inquiry are bound thereon though others do not sign; *King County v. Ferry*, 5 Wash. 536, 34 A. S. R. 880, 19 L.R.A. 500, 32 Pac. 538, holding sureties on official bond not discharged by the erasure before delivery in the body of the instrument of the name of a person proposed as surety and the substitution of another name without consent or knowledge of sureties, signing.

32 AM. REP. 78, FRANKLIN INS. CO. v. HUMPHREY, 65 IND. 549.

Followed without discussion in *Mississippi Valley Ins. Co. v. Humphrey*, 66 Ind. 600.

Negligence of insured avoiding policy.

Cited in *Behler v. German Mut. F. Ins. Co.* 68 Ind. 347, holding policy of fire insurance not avoided by the insured's misconduct and negligence and carelessness in the use of the building, where it does not amount to an intention to destroy.

Cited in notes in 97 A. D. 575, on negligence of insured causing loss as defense to action on policy; 36 A. S. R. 853, on effect of negligence or misconduct of assured or his servants on right to recover; 1 L.R.A.(N.S.) 1100, on effect of voluntary exposure to peril on liability on marine policy.

Right to predicate fraud from acts of party.

Cited in *Coppage v. Gregg*, 127 Ind. 359, 26 N. E. 903; *Reiter v. Cumback*, 1 Ind. App. 41, 27 N. E. 443,—on right to predicate fraud from the acts of parties; *Hamilton v. Toner*, 17 Ind. App. 389, 46 N. E. 921, holding it not fraud to abstain from paying a deposit for which no demand had been made.

Distinguished in *Guilford School Twp. v. Roberts*, 28 Ind. App. 355, 62 N. E. 711, holding school teacher could not recover for breach of contract of employment where she represented that she was unmarried and would not marry during the school year when at time she signed contract she had been married four days.

Fraud when actionable.

Cited in *Howard County v. Garrigus*, 164 Ind. 589, 73 N. E. 82, on what necessary to constitute actionable fraud.

Custom or usage against law.

Cited in *Bauer v. Samson Lodge*, K. P. 102 Ind. 262, 1 N. E. 571, holding custom that a party having a claim for money due upon a contract may not pursue the usual remedies provided by law is not valid.

32 AM. REP. 86, HELPHENSTINE v. VINCENNES NAT. BANK, 65 IND. 582.

Twenty-ninth of February as a separate day in law.

Cited in *Brown v. Jones*, 125 Ind. 375, 21 A. S. R. 227, 25 N. E. 452, holding the twenty-ninth day of February counted as a distinct day in determining when a negotiable instrument becomes payable.

What constitutes a legal day.

Cited in *Miner v. Goodyear India Rubber Glove Mfg. Co.* 62 Conn. 410, 26 Atl. 643, on what constitutes a day in the eye of the law.

Cited in note in 78 A. S. R. 385, on meaning of "day" in computation of time.

Judgments subject to collateral attack.

Cited in *Lavery v. State*, 109 Ind. 217, 9 N. E. 774, holding an assignment of error that complaint did not state a cause of action, not available to reverse a judgment unless some fact essential to the existence of the cause of action has been omitted from the complaint.

Cited in note in 11 L.R.A. 159, on effect of judgment rendered before return day.

—Insufficiency of service as affecting validity of judgment.

Cited in *Dowell v. Lahr*, 97 Ind. 146; *McMullen v. State*, 105 Ind. 334, 4 N. E. 903; *Pickering v. State*, 106 Ind. 228, 6 N. E. 611,—holding judgment will be protected against collateral attack, where there is some notice though defective; *Essig v. Lower*, 120 Ind. 239, 21 N. E. 1090, holding judgment rendered upon notice by publication, before the notice has run the full period prescribed by the statute is not void, although erroneous; *McAlpine v. Sweetser*, 76 Ind. 78, holding same where judgment rendered before the return day jurisdiction having been acquired; *Anthony v. Masters*, 28 Ind. App. 239, 62 N. E. 505, holding in action on judgment rendered in another state, an answer alleging that the judgment was rendered as on default, at an earlier date than the statute permitted, does not state a defense.

Recognition of days of grace.

Cited in *Benson v. Adams*, 69 Ind. 353, 35 A. R. 220, holding no action could be maintained on a negotiable promissory note until the lapse of the full third day of grace.

32 AM. REP. 94, LOUISVILLE, N. A. & C. R. CO. v. RICHARDSON, 66 IND. 43.

Liability of railway company for fires.

Cited in reference note in 1 A. S. R. 446, 533, on liability for fire communicated by locomotives.

Cited in notes in 38 A. D. 71, on liability of railway company for fires; 95 A. D. 509, on railroad's liability for fire caused by sparks from its engine; 1 E. R. C. 307, on liability of corporation for accidental injury.

Negligence of injured party as a defense to right of action.

Cited in *Ohio & M. R. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297, holding negligence of plaintiff does not bar a recovery unless it contributes to the injury; *Nave v. Flack*, 90 Ind. 205, 46 A. R. 205; *Matchett v. Cincinnati, W. & M. R. Co.* 132 Ind. 334, 31 N. E. 792,—on negligence of plaintiff not contributing to the injury as not being a ground of defense.

—Exposure to danger from fire.

Cited in *St. Louis, A. & T. R. Co. v. Fire Asso. of Philadelphia*, 55 Ark. 163, 18 S. W. 43, holding owner of cotton not guilty of contributory negligence in placing it on a platform near tracks, where he had a right to place it for shipment.

Cited in reference note in 40 A. R. 734, on duty of owner of land near railroad as to combustible matter.

Duty to anticipate negligence.

Cited in *Indiana Clay Co. v. Baltimore & O. S. W. R. Co.* 31 Ind. App. 258, 67 N. E. 704, on party as not required to anticipate and take precautions against the negligence of third persons.

Question of fact for jury.

Cited in *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210, holding question one of fact for jury under proper instructions from court where more than one inference may be drawn from the facts established by the evidence.

—Negligence.

Cited in *Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110, holding in action against railroad company for the burning of property by fire from locomotive it was not erroneous to charge that the question of negligence was one for jury; *Ramsey v. Rushville & M. Gravel Road Co.* 81 Ind. 394; *Louisville, N. A. & C. R. Co. v. Krimming*, 87 Ind. 351,—on question of negligence as one for jury; *Binford v. Johnston*, 82 Ind. 426, 42 A. R. 508, holding court might charge that an act in violation of a criminal law was an act of negligence; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Louisville, N. A. & C. R. Co. v. Stevens*, 87 Ind. 198, holding it a question for jury where evidence was conflicting as to whether or not the alleged negligence was proven; *Hawkins v. Johnson*, 105 Ind. 29, 55 A. R. 169, 4 N. E. 172, holding it was erroneous for court to charge as a matter of law that plaintiff was guilty of negligence where from the facts established by evidence other inferences might be drawn; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 A. R. 168; *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186,—on question of negligence as one of law or of fact for the jury.

Impeachment of witness for reputation.

Cited in *Watkins v. State*, 82 Ga. 231, 14 A. S. R. 155, 8 S. E. 875, holding the character of a witness in a criminal case may be impeached by proof of bad character in place of former residence; *Gemmell v. State*, 16 Ind. App. 154, 43 N. E. 909, holding the credibility of a witness may be impeached by evidence of his reputation for veracity in place in which he had lived nearly all his life; *Lake Lighting Co. v. Lewis*, 29 Ind. App. 164, 64 N. E. 35, holding court might properly permit testimony as to the general reputation of a witness for truth and veracity at a place where he had lived some four or five years before the trial where some evidence was before jury of his reputation in neighborhood in which he resided at time of trial; *State v. Bryan*, 34 Kan. 63, 8 Pac. 260, holding it was competent for a witness to testify as to the general reputation for chastity of prosecutrix in neighborhood in which she formerly lived and of which witness was a resident.

Cited in note in 15 L. ed. U. S. 470, on admissibility of evidence of character. **Wife as not bound by admission of husband.**

Cited in *Long v. Brown*, 66 Ind. 160, holding admissions of a husband not admissible to bind wife, there being no proof of his agency.

32 AM. REP. 99, GETIG v. STATE, 66 IND. 94.**Competency of jurors having formed opinions.**

Cited in *Brown v. State*, 70 Ind. 576, holding juror clearly incompetent who had formed an opinion from the readings of newspapers as to evidence on former trial, although his opinion would yield if evidence materially different was given; *State v. Walton*, 74 Mo. 270, holding juror not rendered incompetent as such from fact that he has formed an opinion which would require evidence to remove it appearing to satisfaction of court that such opinion will readily yield to the evidence in the case; *Elliott v. State*, 73 Ind. 10; *Woods v. State*, 134 Ind. 35, 33 N. E. 901; *Shields v. State*, 149 Ind. 395, 49 N. E. 351,—on the qualification and competency of jurors; *Moynihan v. State*, 70 Ind. 126, 36 A. R. 178, holding that new trial will not be granted upon ground that juror expressed opinion as to guilt of defendant, where he denied having so expressed opinion; *State v. Culler*, 82 Mo. 623 (dissenting opinion), on party forming an opinion from the reading of evidence in newspaper as disqualified as a juror; *State v. Jacques*, 30 R. I. 578, 76 Atl. 652, holding that reviewing court should not set aside finding of trial court unless it affirmatively appears that juror entertained fixed opinion which would bias his verdict.

Cited in reference note in 33 A. S. R. 604, on opinions from reading newspapers as disqualification of juror.

Cited in notes in 36 A. D. 528, on whether opinion is such as to influence mind of juror as test of competency; 36 A. D. 529, on opinion formed from rumors, newspaper accounts, etc., as disqualifying juror; 20 L. ed. U. S. 660, on causes of challenge of jurors and their qualifications; 41 L. ed. U. S. 106, on challenges to jurors and to the array.

Distinguished in *Chandler v. Ruebelt*, 83 Ind. 139, holding one who is firm in the belief that none but an immoral man would sell intoxicating liquors not a competent juror in a case of application for such license; *State v. Bryant*, 93 Mo. 273, 6 S. W. 102 (dissenting opinion), as to the competency of person as juror who has formed opinion from newspaper report.

Responsibility for crime.

Cited in reference note in 27 A. S. R. 810, on insanity as defense to crime.

Cited in notes in 18 L.R.A. 228, on effect of disease to create irresistible impulse upon its validity as defense to crime; 10 L.R.A.(N.S.) 1035, on responsibility for crime committed in fit of anger.

Anger, passion or hatred as not amounting to insanity.

Cited in *Sanders v. State*, 94 Ind. 147, holding an ungovernable passion is not insanity; *Copeland v. State*, 41 Fla. 320, 26 So. 319, on heat of passion produced by motives of anger, hatred or revenge as not being insanity.

Weight of expert opinions.

Cited in *Anderson v. Husted*, 79 Conn. 535, 66 Atl. 7; *Sexton v. Bradley*, 110 Ill. App. 495,—on the consideration to be given expert testimony by jury.

Cited in reference note in 23 A. S. R. 469, on weight to be given expert evidence.

Cited in notes in 39 L.R.A. 328, 329, on weight of expert opinion as to sanity or insanity; 39 L.R.A. 334, on weight of expert opinion as to sanity or insanity as compared with nonexpert opinion.

—Functions of court and jury.

Cited in *Buckalew v. Quincy, O. & K. C. R. Co.* 107 Mo. App. 575, 81 S. W. 1176, on the competency of an expert witness being a question for the court;

Cleveland, C. C. & St. L. R. Co. v. Hadley, 170 Ind. 204, 16 L.R.A.(N.S.) 527, 82 N. E. 1025, 16 A. & E. Ann. Cas. 1, holding that jury is not bound to act upon opinions of medical experts to exclusion of other evidence.

Basis of expert testimony.

Cited in *Burns v. Barenfield*, 84 Ind. 43, holding an expert cannot be asked to express an opinion based on facts personally known to him; *Elliott v. Russell*, 92 Ind. 526, holding an expert cannot be asked to give an opinion based upon his own understanding of the evidence of others; *Sauntman v. Maxwell*, 154 Ind. 114, 54 N. E. 397, holding the opinion of an expert witness must be based upon facts admitted to be true, or assumed, or previously testified to by witness; *Williams v. State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687, holding expert witness cannot give his opinion as to the sanity of a person based on evidence of only one of several witnesses and on an account of the evidence in the same case on a former trial published in a newspaper.

— Sufficiency of hypothetical questions.

Cited in *Baker v. State*, 30 Fla. 41, 11 So. 492; *Grand Lodge, I. O. M. A. v. Wieting*, 168 Ill. 408, 61 A. S. R. 123, 48 N. E. 59; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572,—holding a party propounding a hypothetical question may assume such facts within the range of the evidence as he believes the evidence tends to establish; *Indianapolis Traction & Terminal Co. v. Formes*, 40 Ind. App. 202, 80 N. E. 872, holding hypothetical question not erroneous where plaintiff had introduced evidence from which jury might infer that condition described in the hypothetical question was produced by the injury complained of; *Doolittle v. State*, 93 Ind. 272; *Goodwin v. State*, 96 Ind. 550; *Craig v. Noblesville & S. C. Gravel Road Co.* 98 Ind. 109; *Deig v. Morehead*, 110 Ind. 451, 11 N. E. 458; *State v. Anderson*, 10 Or. 448,—holding hypothetical questions propounded to expert witness must be based upon the facts appearing in the proofs; *North American Acci. Asso. v. Woodson*, 12 C. C. A. 392, 24 U. S. App. 364, 64 Fed. 689; *Maynard v. Oregon R. Co.* 43 Or. 63, 72 Pac. 590,—holding it was error to allow expert to answer hypothetical question which was not based on evidence previously testified to; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778, holding it was not a material error to permit a physician to answer a hypothetical question as to the cause of death where question stated all the facts essential to enable witness to form an intelligent opinion but did not state all the facts; *Benjamin v. Metropolitan Street R. Co.* 50 Mo. App. 602, on the sufficiency of hypothetical questions.

Cited in reference note in 61 A. S. R. 131, on hypothetical questions to witnesses.

Cited in notes in 53 A. R. 309, on hypothetical questions to experts; 39 L.R.A. 314, on hypothesis for expert opinion as to sanity or insanity; 39 L.R.A. 315, on evidence in support of hypothesis used for basis of expert opinion as to sanity or insanity.

Burden of proof on defense of insanity to crime.

Cited in *Hodge v. State*, 26 Fla. 11, 7 So. 593, holding in criminal case an instruction that the burden of proof was on the party alleging insanity, erroneous; *Plummer v. State*, 135 Ind. 308, 34 N. E. 968, holding instruction erroneous that charged that jury should find defendant guilty unless they found beyond a reasonable doubt that he was insane.

Cited in reference notes in 36 A. R. 468, on burden of proof to show sanity

in criminal case; 7 A. S. R. 501, on burden of proof as to insanity set up as defense to criminal charge.

Cited in notes in 97 A. D. 178; 76 A. S. R. 93,—on burden of proof as to insanity set up as an excuse for crime; 35 A. R. 32, on burden of proof as to insanity in trial for homicide.

Presumption as to sanity.

Cited in *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, holding in action testing validity of a will court erred in refusing an instruction to the effect that every person is presumed to be of sound mind until the contrary is shown.

Cited in note in 36 L.R.A. 722, on presumption of sanity with relation to criminal acts.

Degree of proof of insanity as defense.

Cited in note in 39 L.R.A. 743, 745, 746, on reasonable doubt of insanity in criminal cases.

Disapproved in *State v. Lewis*, 20 Nev. 333, 22 Pac. 241, holding insanity as a defense to crime must be established by a preponderance of evidence; *Ford v. State*, 71 Ala. 385; *Kelch v. State*, 55 Ohio St. 146, 60 A. S. R. 680, 39 L.R.A. 737, 45 N. E. 6,—holding accused on trial for murder setting up defense of insanity is bound to establish it by a preponderance of evidence.

"Circuit" courts in Indiana.

Cited in *Hench v. State*, 72 Ind. 297, holding criminal circuit courts are not circuit courts but inferior courts within meaning of constitution.

Validity of acts creating courts.

Cited in *Woods v. McCay*, 144 Ind. 316, 33 L.R.A. 97, 43 N. E. 269, on the validity of act creating a circuit court; *Smith v. Smith*, 77 Ind. 80, holding legislature had power to establish courts; *Elkhart County v. Albright*, 168 Ind. 564, 81 N. E. 578, on validity of legislative acts creating courts.

32 AM. REP. 109, YANDES v. WRIGHT, 66 IND. 319.

Rights and duties as between surface owner and owner of subjacent mine.

Cited in *Western Indiana Coal Co. v. Brown*, 36 Ind. App. 44, 114 A. S. R. 367, 74 N. E. 1027; *Big Six Development Co. v. Mitchell*, 1 L.R.A.(N.S.) 332, 70 C. C. A. 569, 138 Fed. 279 (opinion of lower court),—on right of owner of surface to damage for the sinking thereof by the operation of a mine below.

Cited in reference notes in 34 A. R. 242,—on duty of one mining on land of another to leave support for soil; 6 A. S. R. 724; 24 A. S. R. 556,—on right of owner of surface to support as against owner of subjacent mine.

Cited in notes in 33 A. S. R. 451, 452, on effect of grants or special agreements upon right of support of natural soil; 135 Am. St. Rep. 134, 136, 139, 146, on rights of owner of surface as against owner of minerals thereunder; 68 L.R.A. 675, on right to subjacent support of land in its natural condition under voluntary agreement of severance of surface and subjacent strata: 68 L.R.A. 680, on what is included in "surface" within rule as to subjacent support of land; 68 L.R.A. 692, on negligence as an element in liability for removal of lateral or subjacent support of land; 2 L.R.A.(N.S.) 1117, on right to subjacent support for coal lands; 1 L.R.A.(N.S.) 336, on injunction against mining operations by lessee pending dispute as to forfeiture of lease;

17 E. R. C. 421, on duty of miner to leave sufficient support to uphold surface.

Distinguished in *Griffin v. Fairmont Coal Co.* 59 W. Va. 480, 2 L.R.A.(N.S.) 1115, 53 S. E. 24, holding owner of land who has granted the right to enter and remove coal cannot maintain action for the caving in of the surface in the removal of the coal.

32 AM. REP. 114, HINDS v. OVERACKER, 66 IND. 547.

Servant's liability for injuries caused fellow servant.

Cited in *Rogers v. Overton*, 87 Ind. 410; *Osborn v. Morgan*, 130 Mass. 102, 39 A. R. 437,—holding one servant liable to action by fellow-servant for damages occasioned by negligence of the first in such employment; *Steinhauser v. Spraul*, 114 Mo. 551, 21 S. W. 859, holding servant might maintain action against master's wife as a fellow servant for injuries received through the negligence of the wife; *Hare v. McIntire*, 82 Me. 240, 17 A. S. R. 476, 8 L.R.A. 450, 19 Atl. 453, on servant as liable to fellow servant for injury caused through his negligence.

Cited in notes in 28 L.R.A. 440, on liability of servant to fellow servant for his own negligence or nonfeasance; 64 A. D. 60; 17 E. R. C. 245,—on liability of servant for negligence toward fellow servant.

32 AM. REP. 116, JONES v. LEONARD, 50 IOWA, 106.

Person as "fugitive" from justice.

Cited in *State v. Hall*, 115 N. C. 811, 44 A. S. R. 501, 28 L.R.A. 289, 20 S. E. 729, holding no one can in any sense be alleged to have fled from the justice of a state in the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime; *Re Mitchell*, 4 N. Y. Crim. Rep. 506, holding the extradition will not be ordered of a person who was not actually present in state where he is alleged to have committed the crime at the time of commission thereof, and has not actually fled from the justice of that state; *People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 92 A. S. R. 706, 60 L.R.A. 774, 64 N. E. 825, 17 N. Y. Crim. Rep. 79, on when person may be said to be a fugitive from justice.

Cited in reference note in 44 A. S. R. 510, on defining "fugitive from justice."

Cited in notes in 57 A. D. 396, on who are fugitives from justice; 28 L.R.A. 289, to point that there can be no constructive presence in demanding state so as to justify extradition; 47 L. ed. U. S. 657, on necessity for extradition purposes of actual presence of accused in demanding state.

Discharge from extradition warrant on habeas corpus.

Cited in *Poor v. Cudihee*, 37 Wash. 609, 79 Pac. 1105, holding a prisoner held under an extradition warrant is entitled to a discharge on a writ of habeas corpus where it appears he is not a fugitive from justice.

Conclusiveness of governor's determination in extradition proceedings.

Cited in *United States v. Fowkes*, 49 Fed. 50, 1 Pa. Dist. R. 99, on governor's determination in extradition proceedings as not conclusive in habeas corpus proceedings; *Re Waterman*, 29 Nev. 288, 11 L.R.A.(N.S.) 424, 89 Pac. 291, 13 A. & E. Ann. Cas. 926, holding that court may on habeas corpus examine into sufficiency upon which executive warrant for fugitive from justice was issued.

Cited in note in 57 A. D. 393, on jurisdiction of courts to inquire into cause of detention of fugitives from justice in another state.

—As to fact of flight from demanding state.

Cited in *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456; *Re Cook*, 49 Fed. 833; *Re Mohr*, 73 Ala. 503, 49 A. R. 63; *Com. v. Trach*, 3 Pa. Co. Ct. 65; *State ex rel. Munsey v. Clough*, 71 N. H. 594, 67 L.R.A. 946, 53 Atl. 1086,—holding a determination by the governor that a person demanded upon requisition from another state is a fugitive from justice is not conclusive upon the court in habeas corpus proceedings; *Wilcox v. Nolze*, 34 Ohio St. 520, holding in a proceeding on habeas corpus for discharge from a warrant of extradition issued by the governor parol evidence admissible to show that there had been no actual presence of the accused in the demanding state.

Papers necessary in extradition proceedings.

Cited in note in 28 L.R.A. 802, on papers necessary to obtain surrender of fugitive in another state.

32 AM. REP. 119, BRUNSWICK v. VALLEAU, 50 IOWA, 120.

Recovery on contract as affected by illegal ulterior purpose.

Cited in *Jackson v. City Nat. Bank*, 125 Ind. 347, 9 L.R.A. 657, 25 N. E. 430, holding mere knowledge on the part of a person making a loan that the borrower intends to use it by engaging in the purchase of options in grain, will not defeat a recovery; *Anheuser-Busch Brewing Asso. v. Mason*, 44 Minn. 318, 20 A. S. R. 580, 9 L.R.A. 506, 46 N. W. 558, holding plaintiff could recover for beer sold to defendant although agent in making the sale had every reason to believe that it was being purchased for an unlawful use.

Cited in reference notes in 31 A. R. 591, on validity of note when payee knew its proceeds would be used for unlawful purpose; 32 A. R. 516, on right to purchase price of goods as affected by vendor's knowledge that they were to be used for illegal purpose; 52 A. R. 382, on validity of sale of house to be used as bawdyhouse; 52 A. R. 547, on validity of sale of liquor to be sold in foreign state contrary to law; 60 A. R. 354, on loan for purpose of gambling; 20 A. S. R. 583, on recovery of price of goods sold for unlawful use.

Cited in notes in 1 A. S. R. 303, on enforcement of loan or gambling purposes; 32 A. S. R. 453, on sales having in view the subsequent violation of foreign or domestic law; 117 A. S. R. 502, on effect of knowledge of contemplated performance of contract in illegal manner; 117 A. S. R. 506, on enforceability of contracts partially in violation of gaming laws; 9 L.R.A. 506, as to when party may enforce contract promotive of illegal transaction; 9 L.R.A. 657, on validity of contract remotely connected with illegal transaction; 15 L.R.A. 836, on right to recover price of property sold in aid of lotteries or gambling; 6 E. R. C. 336, on validity of contract tainted with illegal or immoral purpose known to both parties.

32 AM. REP. 128, STATE v. MIZNER, 50 IOWA, 145.

Punishment of pupils by teacher.

Cited in reference note in 3 A. S. R. 650, on powers and liabilities of teachers concerning punishment of pupils.

Cited in notes in 76 A. D. 166, on authority, duties, and powers of school teachers; 162 A. S. R. 541, 542, on criminal liability of teacher for excessive
Am. Rep. Vol. XVII.—29.

punishment; 6 L.R.A. 535, on right of teacher to chastise pupil; 65 L.R.A. 893, on liability of school teacher for excessive restraint or correction of pupil; 65 L.R.A. 895, on presumption of proper motive of school teacher in excessive restraint or correction of pupil; 65 L.R.A. 897, on liability of school teacher for personal injury to pupil when cause of punishment is unknown to pupil; 65 L.R.A. 897, on liability of school teacher for punishment of pupil inflicted without proper cause.

Right to exclude, suspend or expel pupils.

Cited in note in 41 L.R.A. 600, 602, on right to exclude, suspend, or expel pupils for failure to participate in certain studies and exercises.

32 AM. REP. 134, STATE v. ATHERTON, 50 IOWA, 189.

What constitutes rape.

Cited in note in 8 L.R.A. 297, on definition of rape.

Rape of woman too imbecile to resist or assent.

Cited in *Gore v. State*, 119 Ga. 418, 100 A. S. R. 182, 46 S. E. 671, holding man having sexual intercourse with an imbecile female who is mentally incapable of expressing any intelligent assent or dissent is guilty of rape; *State v. Trusty*, 122 Iowa, 82, 97 N. W. 989, on right to convict of rape where prosecutrix so weak of mind as to be incapable of giving consent; *Rahke v. State*, 168 Ind. 615, 81 N. E. 584, on elements essential to constitute crime of rape.

Cited in reference note in 32 A. R. 546, on sexual intercourse with weak minded woman by means of fictitious marriage as rape.

Cited in notes in 80 A. D. 366, on consent of woman non compos mentis to rape; 59 A. S. R. 220, on rape of female mentally disordered.

Evidence of mentality of woman on question of rape.

Cited in *State v. McDonough*, 104 Iowa, 6, 73 N. W. 357, holding evidence of the mental weakness of the prosecutrix was admissible as bearing on the question of consent although not alleged in the indictment that she was feeble minded.

Conviction of assault with intent to commit rape under indictment for rape.

Cited in *State v. Trusty*, 118 Iowa, 498, 92 N. W. 677, holding that under an indictment for rape party might be convicted of assault with intent to commit rape; *State v. Mueller*, 85 Wis. 203, 55 N. W. 165; *State v. Barkley*, 129 Iowa, 484, 105 N. W. 506,—holding defendant could not complain of a conviction of assault with intent to commit rape where indicted for rape and there was evidence that the jury might have found him guilty of that offense.

— When consent followed force.

Cited in *State v. DeLong*, 96 Iowa, 471, 65 N. W. 402; *People v. Marrs*, 125 Mich. 376, 84 N. W. 284,—holding a conviction of assault with intent to commit rape will be upheld, although the prosecutrix afterwards yielded to sexual intercourse; *State v. Ragan*, 41 Minn. 285, 43 N. W. 5, holding man could be convicted of assault with intent to commit rape if the woman resisted to the utmost, although the resistance not so continued as to prove guilt of the higher crime of rape; *State v. Pilkington*, 92 Iowa, 92, 60 N. W. 502, on right to convict of assault with intent to commit rape where before

the consent was given defendant used such force as to evince an intention to commit rape.

32 AM. REP. 136, LORING v. SMALL, 50 IOWA, 271.

Immunity of public property from mechanics' liens.

Cited in *Parke County v. O'Conner*, 86 Ind. 531, 44 A. R. 338; *Lewis v. Chickasaw County*, 50 Iowa, 234; *Whiting v. Storey County*, 54 Iowa, 81, 37 A. R. 189, 6 N. W. 137; *Breneman v. Harvey*, 70 Iowa, 479, 30 N. W. 846,—holding a mechanic's lien cannot be enforced against the property of a county; *Charnock v. District Twp.* 51 Iowa, 70, 33 A. R. 116, 50 N. W. 286, holding same where attempt made to attach a school house; *Knapp v. Swaney*, 56 Mich. 345, 56 A. R. 397, 23 N. W. 162, holding builder's liens could not attach to public buildings, unless permitted by statute; *Portland Lumbering & Mfg. Co. v. School Dist. No. 13* Or. 283, 10 Pac. 350, holding in absence of provision to that effect a mechanic's lien could not be acquired against public property held for public use; *First Nat. Bank v. Malheur County*, 30 Or. 420, 35 L.R.A. 141, 45 Pac. 781, holding a bridge that is part of the public highway not being liable to judicial sale is not subject to a mechanic's lien; *Halm v. Wickham*, 55 Iowa, 545, 8 N. W. 358, on county property as being exempt from mechanic's lien; *Fluty v. School Dist.* 49 Ark. 94, 4 S. W. 278; *Arrison v. Company D. North Dakota Nat. Guard*, 12 N. D. 554, 98 N. W. 83, 1 A. & E. Ann. Cas. 368; *Whitehouse v. American Surety Co.* 117 Iowa, 328, 90 N. W. 727; *Camden v. Camden*, 77 Me. 530, 1 Atl. 689,—on public property as being exempt from lien statutes; *Scruggs v. Decatur*, 155 Ala. 616, 46 So. 989, holding that city school building cannot be subjected to lien for material or work done thereon.

Cited in reference notes in 45 A. D. 680, on right to mechanics' lien against public property; 78 A. D. 696, on liability of public buildings to mechanics' liens; 33 A. R. 116, on right to mechanics' lien on public school house.

Cited in note in 35 L.R.A. 141, on mechanics' lien on public property.

Property not subject to a judgment lien.

Cited in *Turrill v. McCarthy*, 114 Iowa, 681, 87 N. W. 667, on property which cannot be levied upon as not being subject to a judgment lien.

Personal judgment in foreclosure of mechanic's lien.

Cited in *Volker-Scowcroft Lumber Co. v. Vance*, 36 Utah, 348, 24 L.R.A. (N.S.) 321, 103 Pac. 970, to the point that personal judgment cannot be given in action to foreclose mechanics' lien.

32 AM. REP. 138, SHIRAS v. OLINGER, 50 IOWA, 571.

What constitutes nuisance.

Cited in *McGill v. Pintsch Compressing Co.* 140 Iowa, 429, 20 L.R.A. (N.S.) 466, 118 N. W. 786, holding that every chimney emitting smoke or noisome fumes is not nuisance per se, but only if makes such emission in unreasonable amount or manner.

Cited in notes in 42 A. R. 542, on acts constituting nuisance; 51 A. R. 467, on factories or shops as nuisances; 9 L.R.A. 712, as to when conduct of business is a nuisance.

— Livery stable as.

Cited in *Shibery v. Streeper*, 24 Fla. 103, 3 So. 865, holding a livery stable adjoining a hotel in a city not prima facie a nuisance; *Metropolitan Sav.*

Bank v. Marion, 87 Md. 68, 38 Atl. 90, holding a livery stable in a city not per se a nuisance; *Durfey v. Thalheimer*, 85 Ark. 544, 109 S. W. 519; *Chicago v. Stratton*, 162 Ill. 494, 53 A. S. R. 325, 35 L.R.A. 84, 44 N. E. 853; *Crowley v. West*, 52 La. Ann. 526, 78 A. S. R. 355, 47 L.R.A. 652, 27 So. 53,—on livery stable as not being a nuisance per se; *Keiser v. Lovett*, 85 Ind. 240, 44 A. R. 10, holding that stable is not nuisance per se, when erected twenty-five or thirty feet from dwelling.

Cited in reference notes in 45 A. R. 505, on stable in city as nuisance; 41 A. S. R. 235, on livery stable in city as nuisance; 78 A. S. R. 363, on livery stables as nuisances.

Cited in note in 107 A. S. R. 240, on public and private stables as public nuisances.

Right to enjoin threatened nuisance.

Cited in *Keiser v. Lovett*, 85 Ind. 240, 44 A. R. 10, holding the erection of a stable would not be restrained at instance of adjoining lot owner where it does not appear that stable will ever be used or complainant injured thereby; *Payne v. Wayland*, 131 Iowa, 659, 109 N. W. 203, holding equity would enjoin the location of a cemetery at a place where it is shown that it would work an irreparable injury by polluting the water, on the ground of nuisance; *Chambers v. Cramer*, 49 W. Va. 395, 54 L.R.A. 545, 38 S. E. 691, holding equity would not interfere to restrain the erection of a blacksmith shop as a nuisance it not appearing clearly that it would necessarily constitute a nuisance; *Lewis v. Sandell*, 118 La. 852, 43 So. 526, on right to have a threatened nuisance enjoined.

Right to enjoin the maintenance of a nuisance.

Cited in *Faucher v. Grass*, 60 Iowa, 505, 15 N. W. 302; *Hughes v. Scheuerman Bros.* 134 Iowa, 742, 112 N. W. 198,—holding the keeping of a blacksmith shop might be enjoined where the manner in which it was conducted constituted it a nuisance; *Hockaday v. Wortham*, 22 Tex. Civ. App. 419, 54 S. W. 1094, holding plaintiff might have injunction to have use of barn as such abated where maintained in such a manner as to constitute a nuisance; *Littleton v. Fritz*, 65 Iowa, 488, 54 A. R. 19, 22 N. W. 641, on right to have the maintenance of a nuisance enjoined.

Cited in notes in 73 A. D. 114, 116, on injunctions against threatened nuisances; 89 A. R. 707, on right of near resident to enjoin erection of planing mill and cotton gin as nuisance.

—Where annoyance is removable.

Cited in *Richards v. Holt*, 61 Iowa, 529, 16 N. W. 595; *Baker v. Bohannan*, 69 Iowa, 60, 23 N. W. 435,—holding the use of feed lots as such causing a nuisance might be enjoined, it not appearing that such condition could be relieved; *Shively v. Cedar Rapids, I. F. & N. W. R. Co.* 74 Iowa, 169, 7 A. S. R. 471, 37 N. W. 133, holding the keeping of a stockyard might be enjoined where defendants failed to show that annoyance and damage caused by its operation could be avoided; *Weaver v. Kuchler*, 17 Okla. 189, 87 Pac. 600, holding an order enjoining slaughter house as a nuisance would be modified where it appeared it was not a nuisance per se and it could be carried on without constituting such a nuisance.

Right to subject business to municipal regulations.

Cited in *Scranton City v. Straff*, 28 Pa. Super. Ct. 258, on right to subject business to municipal regulation although not per se a nuisance.

Cited in reference note in 65 A. S. R. 744, on power of municipality to declare nuisances.

Cited in note in 38 L.R.A. 654, on municipal power over nuisances relating to livery stables.

32 AM. REP. 143, PETERSON v. WHITEBREAST COAL & MIN. CO. 50 IOWA, 673.

Injuries to servant through negligence of fellow servant.

Cited in *Troughear v. Lower Vein Coal Co.* 62 Iowa, 576, 17 N. W. 775, holding mining company not liable for injury occasioned to employee by negligence of coemployee; *Manning v. Burlington, C. R. & N. R. Co.* 64 Iowa, 240, 20 N. W. 169, holding sweeper in round house could not recover for injury received through the negligence of other employees in the round house; *Foley v. Chicago, R. I. & P. R. Co.* 64 Iowa, 644, 21 N. W. 124, holding car repairer could not recover for injury received through the negligence of employee of company assisting him in his work; *Cushman v. Carbondale Fuel Co.* 116 Iowa, 618, 88 N. W. 817; *Mitchell v. Wabash R. Co.* 97 Mo. App. 411,—on principal is not liable for injuries to employee through negligence of coemployee.

Cited in notes in 36 A. D. 280, on employer's liability to servant for injuries from negligence or misconduct of fellow servant; 17 E. R. C. 242, on liability of master for injury to servant through negligence of another employee; 25 L. ed. U. S. 612, on who are coservants within rule that the master is not responsible for injuries to servant occasioned by negligence of coservants.

—Negligence of higher servant.

Cited in *Baldwin v. St. Louis, K. & N. R. Co.* 68 Iowa, 37, 25 N. W. 918, holding foreman of a gang a fellow servant with the laborers of the gang; *Wilson v. Dunreath Red-Stone Quarry Co.* 77 Iowa, 429, 14 A. S. R. 304, 42 N. W. 360, holding principal not liable for injury to servant through act of fellow servant, notwithstanding he is higher in authority than the one receiving the injury; *Hathaway v. Illinois C. R. Co.* 92 Iowa, 337, 60 N. W. 651, holding machinist in shop a fellow servant with other employees in shop although he had authority to ask them to help him; *Newbury v. Getchel & M. Lumber & Mfg. Co.* 100 Iowa, 441, 62 A. S. R. 582, 69 N. W. 743, holding the mere fact that one servant had authority over others does not charge the master with his negligence; *Willis v. Oregon R. & Nav. Co.* 11 Or. 257, 4 Pac. 121, holding employer not liable for injury to one of gang of laborers employed through the negligence of foreman engaged to direct work; *Hughes v. Oregon Improv. Co.* 20 Wash. 294, 55 Pac. 119, holding pit boss and outside boss of mine having no authority to employ or discharge men were fellow servants with the miners working underground.

Cited in notes in 67 A. D. 591, on liability of master for injury to servant from negligence of superior servant; 51 L.R.A. 590, on master's liability for breach of nondelegable duties by superior servant.

Who are fellow servants.

Cited in *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322, holding brakeman and engineer on another train of company were fellow servants; *Pyne v. Chicago, B. & O. R. Co.* 54 Iowa, 223, 37 A. R. 198, 6 N. W. 281, holding private detective employed by rail-

road and train engineer were fellow servants; *Fosburg v. Phillips Fuel Co.* 93 Iowa, 54, 61 N. W. 400, holding roof repairer of a mine and a coal miner in mine were fellow servants; *Treka v. Burlington C. R. & N. R. Co.* 100 Iowa, 205, 69 N. W. 422, holding employee operating a machine in shops a fellow servant with machinist engaged in placing shafting though not controlled by same foreman; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 A. R. 590; *Indiana Car Co. v. Parker*, 100 Ind. 181,—considering who are fellow servants; *Remmert v. Pennsylvania R. Co.* 18 Pa. Dist. R. 372, holding that locomotive engineers in employment of same railroad, though running different engines are fellow servants.

Cited in notes in 36 A. D. 287, on who are fellow servants; 53 A. R. 46, on who are fellow servants; 1 A. S. R. 32, on who are fellow servants; 51 L.R.A. 518, on doctrine that viceprincipalship is not deducible merely from power of control over injured servant; 51 L.R.A. 610, on viceprincipalship with reference to relative rank of negligent servant.

32 AM. REP. 146, WATERTOWN F. INS. CO. v. GROVER & B. SEWING MACH. CO. 41 MICH. 131, 1 N. W. 961.

Validity of assignment of insurance.

Cited in note in 56 A. D. 747, 754, on when assignment of insurance valid.

Right of assignee of policy to sue in own name.

Cited in *Donaldson v. Sun Mut. Ins. Co.* 95 Tenn. 280, 32 S. W. 251, holding action for loss under policy of insurance might be maintained by appointee in his own name; *Fire Ins. Co. v. Felrath*, 77 Ala. 194, 54 A. R. 58, on right of assignee of policy to sue in his own name.

Sufficiency of notice of loss under policy of insurance.

Cited in *Gould v. Dwelling-House Ins. Co.* 90 Mich. 302, 51 N. W. 455, on sufficiency of notice of loss under policy of insurance.

Cited in reference note in 64 A. S. R. 297, as to sufficiency of notice of loss.

Cited in note in 14 L.R.A.(N.S.) 460, on effect of mortgagor's failure to give notice or proof of loss on mortgagee's right to recover under policy.

Proof of loss by agent.

Cited in *Burns v. Michigan Mfrs. Mut. F. Ins. Co.* 130 Mich. 561, 90 N. W. 411, holding proof of loss may be made by agent where insured was critically ill and disabled to attend to business.

Notice of mortgagee's interest.

Cited in *Agricultural Sav. & L. Co. v. Liverpool & L. & G. Ins. Co.* 3 Ont. L. Rep. 127, to the point that under policy made payable to mortgagee company has notice of latter's interest.

Persons insured within meaning of policy.

Cited in *Westchester F. Ins. Co. v. Dodge*, 44 Mich. 420, 6 N. W. 865, on mortgagee as one of persons insured within meaning of policy.

Encumbrances avoiding policy of insurance.

Cited in *Continental Ins. Co. v. Vanlue*, 126 Ind. 410, 10 L.R.A. 843, 26 N. E. 119, holding mortgage by assured to his father providing that he should maintain him on his conveyance of land to him such an encumbrance as would avoid the policy.

Failure of wife to join in mortgage of homestead as affecting its validity.

Cited in *Sherrid v. Southwick*, 43 Mich. 515, 5 N. W. 1027, holding the mort-

gage of a homestead by a married man without his wife's signature is absolutely void; *Rogers v. Day*, 115 Mich. 664, 69 A. S. R. 593, 74 N. W. 190, holding a covenant of warranty of title in a mortgage of a homestead which was void because mortgagor's wife did not join therein did not operate to cure the invalidity upon subsequent granting of a divorce to the wife.

Fire insurance as security.

Cited in note in 135 Am. St. Rep. 758, on fire insurance as security for a mortgagee or other lien holder.

32 AM. REP. 148, PENNOCK v. FULLER, 41 MICH. 153, 2 N. W. 176.

"Professional" employments.

Cited in *O'Reilly v. Erlanger*, 108 App. Div. 318, 95 N. Y. Supp. 760, on the term "professional" as only relating to occupations universally classed as professions; *People v. Converse*, 74 Mich. 478, 16 A. S. R. 648, 42 N. W. 70, on what meant by statute imposing a penalty for misconduct in professional employment; *Conkey v. Carpenter*, 106 Mich. 1, 63 N. W. 990, holding one holding himself out as a veterinary surgeon undertakes that he possesses ordinary professional skill.

32 AM. REP. 149, GALLERY v. NATIONAL EXCH. BANK, 41 MICH. 169, 2 N. W. 193.

Use of corporate funds by directors.

Cited in *Hart v. Brockaway*, 57 Mich. 189, 23 N. W. 725, holding an individual director of a corporation cannot apply funds collected by him as subscriptions to the building of a road, to the payment of his own personal share of any obligation made jointly with the rest.

Cited in reference note in 3 A. S. R. 69, on powers of corporate director.

Disability of president or director of corporation by reason of personal interest.

Cited in *Park Hotel Co. v. Fourth Nat. Bank*, 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 742, holding the general authority of president of a business corporation to make and discount its promissory notes gives him no power to make a note of the corporation payable to his own order; *Wallace v. Oceanic Packing Co.* 25 Wash. 143, 64 Pac. 938, holding president of corporation could not rescind contract entered into by him in behalf of the corporation where corporation had not authorized him to rescind, and his own private interests would be advanced by the rescission.

Cited in reference note in 12 A. S. R. 55, on rights of corporate director to act where his interests are adverse to those of corporation.

Cited in note in 17 A. S. R. 304, on transactions between director and corporation.

Powers of bank cashier to compromise debts.

Cited in note in 77 A. D. 762, on power of bank cashier to collect debts and compromise same.

Notice through agent, when acting for himself.

Cited in *Peckham v. Hendren*, 76 Ind. 47, holding knowledge of officer of corporation will not be imputed to corporation in a transaction between himself and corporation in which he is acting for himself; *State Sav. Bank v. Mont-*

gomery, 126 Mich. 327, 83 N. W. 879, holding knowledge of a bank cashier's fraud in falsely representing to a maker and indorser of certain notes for his accommodation, discounted by him at bank that they were renewals of other notes, when such notes had been paid, not imputable to bank; *Clark v. Marshall*, 62 N. H. 498, holding party purchasing property for full value of one who is his agent is not charged with constructive notice of grantor's undisclosed purpose to hinder and delay his creditors.

Cited in note in 29 L.R.A.(N.S.) 560, on imputation of knowledge of personally interested officers to bank.

Effect of agreement on nonliability on note.

Cited in *State Bank v. Forsyth*, 41 Mont. 249, 28 L.R.A.(N.S.) 501, 108 Pac. 914, holding that maker of note given to cashier of bank to be substituted for latter's note, is liable though given with understanding that maker would not be liable thereon.

32 AM. REP. 152, *SPIGIER v. EARL*, 41 MICH. 191, 1 N. W. 923.

Infant's liability on executed contracts.

Cited in *Robinson v. Van Vleet*, 91 Ark. 262, 121 S. W. 288, holding infant bound by terms of contract for services, voluntarily executed, if contract was reasonable; *Hall v. Butterfield*, 59 N. H. 354, 47 A. R. 209, holding infant purchasing goods on credit, who does not return them is liable for so much of the price as is equal to the benefit derived by him from the purchase.

Cited in notes in 18 A. S. R. 622, 624, on infants' contracts for services; 18 A. S. R. 644, on infant's express contracts for necessities; 18 A. S. R. 720, on infant's ratification by miscellaneous acts; 15 L.R.A. 212, 214, on right of infant to repudiate contract for services and sue on quantum meruit; 6 E. R. C. 56, on validity of infant's contracts; 42 L. ed. U. S. 327, on power and right of infant to disaffirm contract without restoring consideration.

—Executory contracts.

Cited in *Wallin v. Highland Park Co.* 127 Iowa, 131, 102 N. W. 839, 4 A. & E. Ann. Cas. 421, holding minor might disaffirm his contract for necessities and recover back any unearned portion which has been paid in advance.

Parol modification of contract.

Cited in *Wilson v. Godkin*, 136 Mich. 106, 98 N. W. 985, holding plaintiff employed under a written contract for a certain wage, might, under parol agreement to other work at higher wages, recover such higher wages.

Cited in note in 34 L.R.A. 39, on consideration for promise of additional compensation for completing contract.

32 AM. REP. 156, *STAMP v. CASE*, 41 MICH. 267, 2 N. W. 27.

Assignment of creditors, taking effect of.

Cited in *Rendlemann v. Willard*, 15 Mo. App. 375, holding the beneficial interest of the creditors under an assignment for their benefit completely vests as soon as the deed of assignment is recorded, irrespective of whether the assignee accepts the trust.

Possession of property by assignor as evidence of fraud.

Cited in *Lowe v. Matson*, 140 Ill. 108, 28 N. E. 1036, on possession of property by assignor for benefit of creditor as evidence of fraud.

32 AM. REP. 160, HIGGINS v. KUSTERER, 41 MICH. 318, 2 N. W. 13.
Title to ice.

Cited in *Brown v. Cunningham*, 82 Iowa, 512, 12 L.R.A. 583, 48 N. W. 1042, holding riparian owner had no title to ice where the title to the bed of the stream was in the government; *Wood v. Fowler*, 26 Kan. 682, 40 A. R. 330, holding riparian owner on a navigable stream does not own the ice formed on the stream; *Barrett v. Rockport Ice Co.* 84 Me. 155, 16 L.R.A. 774, 24 Atl. 802, on ownership of ice as resting in owner of soil; *Sterling v. Jackson*, 69 Mich. 488, 13 A. S. R. 405, 37 N. W. 845 (dissenting opinion), on where the ownership of ice formed in streams and ponds rests.

Cited in reference notes in 14 A. S. R. 426, on ownership in ice; 45 A. S. R. 242, on right of owner of soil to ice; 63 A. S. R. 424, on right to cut ice; 83 A. S. R. 410, on privilege of gathering ice from public waters.

Cited in notes in 54 A. D. 586, on ownership of ice; 38 A. R. 258, on right to take ice from streams; 12 L.R.A. 584, on parol sale of ice.

Explained in *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134, 46 A. R. 580, holding the owner of an easement to overflow another's land is not entitled to the ice which forms on the water covering the land; *Bigelow v. Shaw*, 65 Mich. 341, 8 A. S. R. 902, 32 N. W. 800, holding title to ice formed in stream and pond belonged to the owner of the land which was subject to flowage.

32 AM. REP. 168, SEARS v. GIDDEY, 41 MICH. 590, 2 N. W. 917.

Liability for funeral expenses.

Cited in *E. R. Butterworth & Sons v. Teale*, 54 Wash. 14, 102 Pac. 768, 18 A. & E. Ann. Cas. 854, holding wife's separate estate liable for funeral expenses of husband, he having left no property.

Cited in notes in 78 A. S. R. 183, on power of executors as to funeral expenses; 14 L.R.A. 85, on rights and duties in regard to burial of the dead; 33 L.R.A. 662, on ultimate liability of estates of deceased married women and infants for funeral expenses.

— Of married woman.

Cited in *Staples's Appeal*, 52 Conn. 425; *Kenyon v. Brightwell*, 120 Ga. 606, 48 S. E. 124, 1 A. & E. Ann. Cas. 169; *Stonesifer v. Shriver*, 100 Md. 24, 59 Atl. 139; *Galloway v. McPherson*, 67 Mich. 546, 11 A. S. R. 596, 35 N. W. 114, —holding it to be the duty of husband to pay wife's funeral expenses; *Wilcox v. Wilmington City R. Co.* 2 Penn. (Del.) 157, 44 Atl. 686, on husband as liable for funeral expenses of wife.

Cited in reference notes in 11 A. S. R. 597; 47 A. R. 408,—on husband's liability for expenses of wife's funeral; 4 A. S. R. 312, on liability of married woman's separate estate for her funeral expenses; 27 A. S. R. 732, on husband's recovery for wife's funeral expenses.

Cited in notes in 90 A. D. 370, on deed of separation as releasing surviving husband from obligation to bury his wife; 6 L.R.A.(N.S.) 917, on liability of separate estate of wife for her funeral expenses.

Distinguished in *McClellan v. Filsom*, 44 Ohio St. 184, 58 A. R. 814, 5 N. E. 861, holding estate of married woman might be held liable for the funeral expenses, although she leaves surviving a husband having property.

Party present and assisting in choice as joint purchaser of goods.

Cited in *Lazenby v. Omo*, 50 Mich. 52, 14 N. W. 697, on mere presence of a party assisting in the selection or ordering of goods as not necessarily rendering him liable as joint purchaser.

32 AM. REP. 170, BEWICK v. FLETCHER, 41 MICH. 625, 3 N. W. 162.**When property becomes a fixture.**

Cited in *Young v. Chandler*, 102 Me. 251, 66 Atl. 539, on structure on land of another, when not deemed part of the realty.

When reversal will not be granted.

Cited in *Re Stockdale*, 157 Mich. 593, 122 N. W. 279, holding that case should not be reversed for errors in favor of party thereto, who is not entitled to judgment.

32 AM. REP. 172, WOODIN v. PHOENIX, 41 MICH. 655, 2 N. W. 923.**Sufficiency of personal answer to writ of certiorari to officer.**

Cited in *People v. Brennan*, 79 Mich. 362, 44 N. W. 618, holding the personal answer of an ex-circuit judge to a writ of certiorari directed to the circuit court over which he presided is a voluntary proceeding and not a component part of the return.

Right to writ of certiorari.

Cited in note in 40 A. S. R. 30, on absence of other adequate remedy on ground for certiorari.

32 AM. REP. 174, STATE v. GRAHAM, 41 N. J. L. 15.**Confession of accomplice on promise of immunity as defense.**

Cited in *Com. v. St. John*, 173 Mass. 566, 73 A. S. R. 321, 54 N. E. 254, holding a promise by police officers of immunity to accused person without consent or authority of district attorney cannot be pleaded in bar of indictment against him for the crime; *Whitney v. State*, 53 Neb. 287, 73 N. W. 696, holding agreement made to turn state's evidence made with the prosecuting officer alone without the court's advice or consent affords defendant no protection when placed on trial in violation of the agreement; *Long v. State*, 86 Ala. 36, 5 So. 443, on use of accomplice as witness for prosecution, as grounds for dismissing prosecution against him; *Lowe v. State*, 111 Md. 1, 24 L.R.A.(N.S.) 439, 73 Atl. 637, 18 A. & E. Ann. Cas. 744, holding that accomplice testifies against associate, under agreement with prosecuting officer, that he should be immune from prosecution, he becomes equitably entitled to such exemption.

Cited in reference notes in 31 A. R. 526, on rights of accomplice testifying for the state; 73 A. S. R. 323, on agreement to turn state's evidence.

Cited in notes in 40 A. S. R. 768, 774, on agreements concerning state's evidence; 24 L.R.A.(N.S.) 439, 440, on effect of agreement for immunity of accomplice testifying for prosecution.

Control of courts over discharge of indictments.

Cited in *State v. Hickling*, 45 N. J. L. 152, on control of court over discharge of an indictment.

Cited in note in 35 L.R.A. 710, on power of public prosecutor to dismiss

prosecution as to one joint defense for purpose of qualifying him as a witness against others.

— **To order acquittals of accomplices.**

Cited in *State v. Addy*, 43 N. J. L. 113, 39 A. R. 547, on right of court to direct an order of acquittal.

32 AM. REP. 180, WRIGHT v. REMINGTON, 41 N. J. L. 48, Affirmed in 43 N. J. L. 451.

Married woman's liability upon contracts.

Cited in *Witte v. Wolfe*, 16 S. C. 256; *Clinkscales v. Hall*, 15 S. C. 602,—holding a married woman may be sued at law upon her personal contracts entered into as surety for husband; *Pelzer R. & Co. v. Campbell*, 15 S. C. 581, 40 A. R. 705, holding same where married woman signed notes of son as surety.

Cited in reference note in 2 A. S. R. 320, on note of married woman.

Cited in note in 46 A. S. R. 455, on enforcement of married woman's obligation.

— **Effect of duress.**

Cited in reference notes in 37 A. R. 833, on duress on wife inducing execution of instrument; 1 A. S. R. 449, on effect of duress by husband on instrument executed by wife.

Cited in note in 38 A. R. 624, on avoidance of deed executed by married woman in consequence of threats.

Enforcement of foreign contracts valid where made.

Cited in *Garrigue v. Kellar*, 164 Ind. 676, 108 A. S. R. 324, 69 L.R.A. 870, 74 N. E. 523; *Ross v. Ross*, 129 Mass. 243, 37 A. R. 321,—on validity of contract as determined according to laws of state where made; *Rupe v. Buck*, 124 Mo. 178, 46 A. S. R. 439, 25 L.R.A. 178, 27 S. W. 412 (dissenting opinion), on enforcement of contract valid in state where made; *Lower v. Segal*, 59 N. J. L. 46, 34 Atl. 945, on the recognition and enforcement of laws of sister state.

Cited in notes in 46 A. S. R. 448, on law of place of contract; 85 A. S. R. 569, on conflict of laws as to right of married women to contract.

— **Married women's contracts.**

Cited in *Matthews v. Dickinson*, 36 Misc. 187, 73 N. Y. Supp. 190; *Holmes v. Reynolds*, 55 Vt. 39,—holding contract entered into by married woman and valid where made would be enforced by courts of this state; *Thompson v. Taylor*, 66 N. J. L. 253, 88 A. S. R. 485, 54 L.R.A. 585, 49 Atl. 544, holding same in case of contract of suretyship entered into by married woman and valid where made.

Cited in notes in 25 L.R.A. 178, on enforceability of contracts of married women outside of state in which they are legally made; 17 L.R.A.(N.S.) 426, on enforcement of wife's liability under statute of another state for debt contracted by her husband; 26 L.R.A.(N.S.) 775, on enforcement of personal contract of married woman capable of contracting under law of state or country where contract made.

Threats amounting to duress.

Cited in *Van Deventer v. Van Deventer*, 46 N. J. L. 460, on threats as amounting to duress; *Camden v. Green*, 54 N. J. L. 591, 33 A. S. R. 686, 25 Atl. 357, on what might constitute duress.

Cited in note in 36 A. R. 70, as to what duress will avoid contract.

—Threats against husband of promisor.

Cited in *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. 8, holding threats by third person to have husband imprisoned sufficient grounds for the setting aside of contract entered into by married woman through fear of such threats; *Girty v. Standard Oil Co.* 1 App. Div. 224, 37 N. Y. Supp. 369, holding a threat by a man to his wife that, unless she signed certain papers he would be arrested for embezzlement, and would commit suicide does not constitute duress.

Distinguished in *Jaeger v. Koenig*, 30 Misc. 580, 62 N. Y. Supp. 803, holding plaintiff might recover money paid to defendant under fear excited by threats that unless she did so he would have her husband imprisoned for stealing money.

Parol to vary terms of written instrument.

Cited in *Middleton v. Griffith*, 57 N. J. L. 442, 51 A. S. R. 617, 31 Atl. 405; *First Nat. Bank v. Foote*, 12 Utah, 157, 42 Pac. 205,—holding parol testimony inadmissible to vary or contradict the terms of a promissory note; *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190, 46 Atl. 535, holding same where attempt was made to vary terms of lease by oral declarations; *Stiles v. Vandewater*, 48 N. J. L. 67, 4 Atl. 658, holding same where evidence offered that a note payable in three months was given upon an agreement that it should be renewed when it became due; *Buchanon v. Adams*, 49 N. J. L. 636, 60 A. R. 666, 10 Atl. 662; *Pelzer, R. & Co. v. Campbell*, 15 S. C. 586, 40 A. R. 705,—on parol as inadmissible to vary terms of written instrument; *Farmers' Bank v. Wickiffe*, 131 Ky. 787, 116 S. W. 249, holding parol evidence inadmissible to show that mortgage given to surety on note given to bank was in fact given to him only to hold for bank with understanding that he was not to be liable on note.

Cited in reference notes in 50 A. S. R. 893, on admissibility of parol to contradict promissory note; 73 A. S. R. 307, on parol agreement not to enforce negotiable instrument.

Cited in notes in 1 L.R.A. 594, on admissibility of parol evidence to vary maker's liability on commercial paper; 43 L.R.A. 450, on contemporaneous parol agreements that note is not to be paid as a defense; 4 E. R. C. 549, on order of liability to parties to bill or note.

Distinguished in *State, Cummings, Prosecutor, v. Casa*, 52 N. J. L. 77, 18 Atl. 972, holding fraudulent oral representations by a vendor in respect to quality of an article sold, admissible in evidence to show deceit.

Unconscionable pleas of legal defenses.

Cited in *O'Brien v. Paterson Brewing & Malting Co.* 69 N. J. Eq. 117, 61 Atl. 437, as a law case which recognized the injustice of a plea unconscionably made.

32 AM. REP. 186, TICHENOR v. HAYES, 41 N. J. L. 193.**Survival of causes of action.**

Cited in *Dodd v. Wilkinson*, 41 N. J. Eq. 566, 7 Atl. 337 (appeal from decree advised in 40 N. J. Eq. 123, 3 Atl. 360), holding executors liable on the death of a party defaulting; *Weller v. Jersey City, H. & P. Street R. Co.* 66 N. J. Eq. 11, 57 Atl. 730, holding that a right of action for personal injury survives to the executors and administrators of the injured person; *McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156,—on cause of action as surviving against legal representative of decedent; *Cooper v. Shore Electric Co.* 63 N. J. L. 558, 44 Atl. 633,—holding statutory action for negligent killing was distinct from actionable injury, which might have survived.

Cited in notes in 53 A. R. 530, on survival of actions *ex delicto*; 2 E. R. C. 17, on survival of actions of tort and contract.

Distinguished in *Boor v. Lowrey*, 103 Ind. 468, 53 A. R. 519, 3 N. E. 151, holding action against surgeon for malpractice to recover for injuries does not survive to personal representative of decedent.

32 AM. REP. 193, *IRONS v. WEBB*, 41 N. J. L. 203.

Time for entry and removal under contract for sale of standing timber.

Cited in *Carson v. Three States Lumber Co.* 108 Tenn. 681, 69 S. W. 320, holding under contract for sale of standing timber which contains no provision as to time for cutting and removing, grantee has right to enter and cut and remove within a reasonable time; *Walcutt v. Treisch*, 82 Ohio St. 263, 29 L.R.A. (N.S.) 554, 92 N. E. 423, holding that under reservation in deed of standing timber, with privilege of removing same within certain time, grantor may remove cut timber after expiration of period; *Sanborn v. Franklin County Lumber Co.* 55 Fla. 389, 46 So. 85; *Indiana & A. Lumber & Mfg. Co. v. Eldridge*, 89 Ark. 361, 116 S. W. 1173,—holding that under contract for sale of growing timber to be removed in certain time, title to timber cut within such period passes to grantee, and may be removed thereafter within reasonable time.

Cited in reference notes in 35 A. R. 683, on effect of deed reserving timber for stated time; 123 A. S. R. 67, on grantor's right to remove timber reserved by deed; 119 A. S. R. 719, on time in which purchaser of standing timber must remove it.

Cited in notes in 55 L.R.A. 530, on necessity of removing standing timber purchased as well as cutting same; 3 L.R.A.(N.S.) 651, on effect of reservation of right to remove timber within specified time.

—**Effect of failure to remove within agreed time.**

Cited in *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 123 A. S. R. 58, 9 L.R.A.(N.S.) 663, 42 So. 858; *Erskine v. Savage*, 96 Me. 57, 51 Atl. 242; *Alexander v. Bauer*, 94 Minn. 174, 102 N. W. 387,—holding on sale of standing timber, a failure to remove the timber cut, within the time limit did not cause title to reinvest in owner of land; *Dyer v. Hartshorn*, 73 N. H. 59, 63 Atl. 231, holding title in standing timber not rendered conditional by fact that deed provided for their removal from land within certain time; *Mahan v. Clark*, 219 Pa. 229, 68 Atl. 667, 12 A. & E. Ann. Cas. 729, holding vendee of standing timber might remove after the expiration of the time limit where the timber was already severed and ready for removal before expiration of time set for removal; *Watson v. Adams*, 32 Ind. App. 281, 69 N. E. 696; *St. Louis Cypress Co. v. Thibodaux*, 120 La. 834, 45 So. 742; *Donworth v. Sawyer*, 94 Me. 242, 47 Atl. 521; *Smith v. Furbish*, 68 N. H. 123, 47 L.R.A. 226, 44 Atl. 398,—on failure of vendee to remove timber within reasonable time as affecting title to it; *Ciapusci v. Clark*, 12 Cal. App. 44, 106 Pac. 436, to the point that under contract for sale of timber to be removed within certain time, grantee does not forfeit right to timber cut by not removing it within period specified.

Cited in notes in 55 L.R.A. 528, on effect of failure to remove standing timber within time specified in contract of sale; 29 L.R.A.(N.S.) 550, on rights and remedies of landowner and owner of timber after expiration of time stipulated for removal.

Conversion of realty into personalty by agreement for severance.

Cited in *Dudley v. Foote*, 63 N. H. 57, 56 A. R. 489, holding hay scales an-

nexed for use to land in the usual manner could not be sold as personalty by a bill of sale not under seal.

Standing trees as personalty.

Disapproved in *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574, on standing timber as being realty, not personalty.

32 AM. REP. 198, STATE v. HICKLING, 41 N. J. L. 208.

Indictability of conspiracy to slander.

Cited in reference note in 56 A. R. 271, on indictability of conspiracy to slander.

Cited in note in 51 A. D. 90, on conspiracy to arrest, or maliciously prosecute, or to charge one with bastardy, lunacy, or a crime.

Sufficiency of indictment for conspiracy.

Cited in *Madden v. State*, 57 N. J. L. 324, 30 Atl. 541, holding indictment which sets out that certain persons, in certain stated way conspired to cheat city is good.

Distinguished in *Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 930, holding a complaint charging defendants with a conspiracy to slander plaintiff, but failing to sufficiently plead the slander as against either is demurrable.

32 AM. REP. 201, EVANS v. WALSH, 41 N. J. L. 281.

Priority of executions.

Cited in *Hall v. Nash*, 58 N. J. Eq. 554, 43 Atl. 683, holding a writ of execution from the time of its delivery to the sheriff binds the goods of the defendant as against himself and assigns; *Olden v. Sassman*, 72 N. J. Eq. 637, 66 Atl. 603, holding that personalty not levied upon before return of execution may be subjected to subsequent judgment creditor's execution.

Cited in note in 29 L.R.A. 280, on nature and extent of priority of claims for taxes against assets of debtor.

32 AM. REP. 210, COOLEY v. PERRINE, 41 N. J. L. 322, Affirmed in 42 N. J. L. 623.

Limitations on power of special agent to sell.

Cited in *Kinser v. Calumet Fire Clay Co.* 165 Ill. 505, 46 N. E. 372 (affirming 64 Ill. App. 437), holding agent employed to sell sewer pipe had no general authority to bind his employer by a contract of indemnity; *Braun v. S. F. Heas & Co.* 187 Ill. 283, 79 A. S. R. 221, 58 N. E. 371, holding agent having general authority to sell tobacco could not bind principal by contract to guaranty purchaser against loss of rebates from another seller of tobacco; *Milne v. Kleb*, 44 N. J. Eq. 328, 14 Atl. 646, holding a simple parol authority to sell will not authorize agent to sign a written contract for principal; *Dowden v. Cryder*, 55 N. J. L. 320, 26 Atl. 941, holding special agent authorized to negotiate a draft for cash at a reasonable discount is not empowered to negotiate it for cash and merchandise.

— Warranties by special agent.

Cited in *State, Decker, Prosecutor, v. Fredericks*, 47 N. J. L. 469, 1 Atl. 470, holding a vendor of a horse, sold by his agent authorized to sell for a fixed sum, is not responsible for a breach of warranty made by such agent.

Cited in reference notes in 34 A. R. 4, on power of agent to warrant; 37 A. S. R. 205, on power of selling agent to warrant.

Distinguished in *Talmage v. Bierhouse*, 103 Ind. 270, 2 N. E. 716, holding agent having general authority to sell will be presumed to have authority to warrant.

Ratification of illegal acts.

Cited in *Wilkinson v. Dodd*, 40 N. J. Eq. 123, 3 Atl. 360, holding an agreement to relieve parties from liability no ratification of their illegal acts where ignorant of their breach of trust.

32 AM. REP. 219, FERRY v. WILLIAMS, 41 N. J. L. 332.

Right of public to inspect public documents and records.

Cited in *Sloan Filter Co. v. El Paso Reduction Co.* 117 Fed. 504, holding user of machine claimed to infringe a patent has such an interest in suit between other parties in which validity of such patent in issue, to inspect and have copy of record in such suit; *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146, holding citizens and taxpayers had a right to inspect the public records and documents kept in office of auditor of accounts; *State ex rel. Nevada Title Guaranty & T. Co. v. Grimes*, 29 Nev. 50, 124 A. S. R. 883, 5 L.R.A.(N.S.) 545, 84 Pac. 1061, holding that abstract companies have right to inspect records of conveyances and to make extracts therefrom.

Cited in reference note in 49 A. S. R. 816, on right to examine and copy public records for private purposes.

Cited in notes in 60 A. R. 767, on right to examine public records; 27 L.R.A. 85, on right to inspect liquor records; 64 L.R.A. 420, on necessity of a sufficient purpose to entitle taxpayer to inspect books of municipality; 64 L.R.A. 422, on what is a sufficient purpose to entitle taxpayer to inspect books of municipality.

Availability of mandamus.

Cited in note in 16 E. R. C. 782, on when mandamus available remedy.

— Mandamus to compel enforcement of right.

Cited in *State ex rel. Higgins v. Lockwood*, 74 N. J. L. 158, 64 Atl. 184; *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262,—holding mandamus would lie to compel a registrar to allow any citizen to take copies of registration books; *State ex rel. Colseott v. King*, 154 Ind. 621, 57 N. E. 535, holding same to enforce the right of citizen and taxpayer of county to examine records in county auditors office; *Brown v. Knapp*, 54 Mich. 132, 52 A. R. 800, 19 N. W. 778, holding same to compel a county treasurer to permit the inspection of liquor bonds filed in his office; *Com. ex rel. Biddle v. Walton*, 6 Pa. Dist. R. 287, holding same to compel the right of inspection of books and records of city controller; *Re Marriage License Docket*, 4 Pa. Dist. R. 284, on mandamus to enforce right to inspect public record; *State ex rel. Thomas v. Hoblitzelle*, 85 Mo. 620, holding mandamus lies to compel recorder of voters to permit inspection of registration lists by citizen; *Re Freeman*, 75 N. J. L. 329, 68 Atl. 222, to point that citizen has right to mandamus to compel custodian of public records to permit inspection of records in aid of litigation.

Cited in note in 89 A. D. 736, on mandamus to enforce right to inspect and copy public records.

— Mandamus to cause performance of official duty.

Cited in *Bacon v. Cumberland County*, 69 N. J. L. 195, 54 Atl. 234, holding mandamus would lie to compel public officers to do their duty; *State ex rel. Lay v. Hoboken*, 75 N. J. L. 315, 67 Atl. 1024, holding mandamus lies at suit

of citizen and taxpayer to compel municipal officer to perform statutory duty purely ministerial in character.

Distinguished in *State ex rel. Carpenter v. Atkinson*, 65 N. J. L. 171, 46 Atl. 690, holding mandamus would be denied where relator not entitled to have decided the question to be passed on in awarding the writ.

Right to have court review acts of public bodies or officials.

Cited in *State, Dufford, Prosecutor, v. Staats*, 54 N. J. L. 286, 23 Atl. 667, holding certiorari would lie to review order of a local body granting a license to sell intoxicating liquors where such body has no authority to grant it; *State, Dufford, Prosecutor, v. Nolan*, 46 N. J. L. 87, holding same proper to question the determination of a court that borough council had jurisdiction to grant licenses to sell intoxicating liquors; *State, Austin, Prosecutor, v. Atlantic City*, 48 N. J. L. 118, 3 Atl. 65, holding same where remonstrants against granting licenses were refused a hearing by council on facts affecting jurisdiction of council; *Oliver v. Jersey City*, 63 N. J. L. 96, 42 Atl. 782, holding the validity of the act of a public officer might be challenged by certiorari proceedings; *McCullough v. Blackwell*, 51 Ark. 159, 10 S. W. 259, on right of remonstrance by certiorari against an order of county court.

— Person entitled to sue.

Cited in *State v. Robbins*, 54 N. J. L. 560, 25 Atl. 471, holding party threatened with special injury by an order for special election might challenge validity of such order on certiorari; *Bott v. Wurts*, 63 N. J. L. 289, 45 L.R.A. 251, 43 Atl. 744, holding a citizen might by certiorari have supreme court review the determination of a commission appointed to ascertain result of a popular vote on amendments to constitution; *Jersey City v. State*, 53 N. J. L. 434, 22 Atl. 190; *Middleton v. Robbins*, 53 N. J. L. 555, 22 Atl. 481,—on right of private individual to have certiorari to review acts of public body.

Cited in note in 19 L.R.A.(N.S.) 611, as to who is entitled to invoke certiorari to review a decree or order affecting the sale of intoxicating liquors.

32 AM. REP. 225, ORDINARY OF STATE v. THATCHER, 41 N. J. L. 403.

Delivery in escrow.

Cited in *Nichols & S. Co. v. First Nat. Bank*, 6 N. D. 404, 71 N. W. 135, holding no delivery in escrow where maker of promissory notes placed them in hands of third party with instructions not to deliver until maker so directed; *Atlantic City v. Atlantic City Steel Pier Co.* 62 N. J. Eq. 139, 49 Atl. 822, holding upon the facts the easement deed made to complainants was not an escrow but was absolutely delivered.

Cited in reference note in 37 A. S. R. 262, on requisites of delivery in escrow.

Cited in notes in 53 A. S. R. 556, on delivery of deed in escrow; 130 Am. St. R. 924, 929, 956, on escrows.

— Delivery to opposite party or his agent.

Cited in *Hubbard v. Greeley*, 84 Me. 340, 17 L.R.A. 511, 24 Atl. 799, holding a deed could not be delivered to attorney of grantee to be held as an escrow; *Darling v. Butler*, 10 L.R.A. 469, 45 Fed. 332; *Dyer v. Skadan*, 128 Mich. 348, 92 A. S. R. 461, 87 N. W. 277,—on fact that deed could not be delivered in escrow to the grantee.

Sufficiency of delivery of a deed.

Cited in *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 21 Atl. 627, on what necessary to constitute a good delivery of a deed.

Acts of parties to instrument as discharging sureties.

Cited in *King County v. Ferry*, 5 Wash. 536, 34 A. S. R. 880, 19 L.R.A. 500, 32 Pac. 538, holding sureties would be held on bond although before delivery name of one surety was erased and another substituted without their knowledge or consent, the obligee having no notice of the change; *Mathis v. Morgan*, 72 Ga. 517, 53 A. R. 847; *Bopp v. Hansford*, 18 Tex. Civ. App. 340, 45 S. W. 744,—on sureties on official bond when discharged by act of parties to it.

Liability of surety on bond delivered in violation of condition.

Cited in *Lewis v. Gordon County*, 70 Ga. 486; *Benton County Sav. Bank v. Boddicher*, 105 Iowa, 548, 67 A. S. R. 310, 45 L.R.A. 321, 75 N. W. 632,—holding the breach of condition on which a surety signs a bond that it will not be delivered until other sureties sign it will not prevent him from being held liable where obligee received it in good faith without notice of the condition; *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190, 46 Atl. 535, holding guarantor of payment of rent bound when guaranty was delivered with nothing to indicate the existence of oral condition not to deliver until lessor consented to reduction of rent.

Cited in note in 45 L.R.A. 339, on conditional execution of guardians' bonds under parol agreement not to take effect until signed by others.

33 AM. REP. 237, MANUFACTURER'S NAT. BANK v. DICKERSON, 41 N. J. L. 448.**Discharge of surety or guarantor by making principal obligation more onerous.**

Cited in *Lafayette v. James*, 92 Ind. 240, 47 A. R. 140, holding surety on bonds of superintendent of water works discharged where to his duties was added the duty of collecting water rents; *Kellogg v. Scott*, 58 N. J. Eq. 344, 44 Atl. 190, holding surety on bond of party as bookkeeper, discharged where employer increases his duties to that of cashier of the business; *John H. Lyon & Co. v. Plum*, 75 N. J. L. 883, 127 A. S. R. 858, 14 L.R.A.(N.S.) 1231, 69 Atl. 209, 15 A. & E. Ann. Cas. 1019, holding a guaranty to a firm of a customer's running account is not operative as to credit extended after admission into such firm of a member; *First Nat. Bank v. Gerke*, 68 Md. 449, 6 A. S. R. 453, 13 Atl. 358, on obligations of surety as not to be extended beyond what the terms of the contract fairly import; *Fourth Nat. Bank v. Spinney*, 47 Hun, 293 (dissenting opinion); *State ex rel. Leidigh v. Holcomb*, 46 Neb. 612, 65 N. W. 873,—on surety's discharge by the imposition of new burdens upon the principal.

Cited in reference note in 31 A. R. 616, on discharge of surety by change in principal's duty.

Cited in note in 6 A. S. R. 459, on release of surety by imposition of new duty on principal.

33 AM. REP. 243, WILSON v. HERBERT, 41 N. J. L. 454.**Right of married woman to contract.**

Cited in *Condon v. Barr*, 49 N. J. L. 53, 6 Atl. 614, holding plaintiff could not recover loan made defendant during coverture, on strength of promise to

Am. Rep. Vol. XVII.—30.

pay, made after death of husband she having no separate estate; *Morris v. Lind-sley*, 45 N. J. L. 436, on the extent to which a married woman might contract; *Powers v. Totten*, 42 N. J. L. 442, on right to maintain suit at law against married women.

Cited in reference notes in 31 A. R. 698, on liability of separate estate of married woman for necessities sold on her credit; 34 A. R. 600, on married woman's right to charge separate property; 39 A. R. 674, on liability of married woman for necessities purchased on her own credit; 1 A. S. R. 608, on liability of married woman on contract for necessities for herself and family.

Cited in notes in 6 E. R. C. 70, on contracts of married woman as binding on her separate property; 55 A. D. 609, on validity of personal judgment against married woman under statute allowing her to sue and be sued as feme sole.

—For payment of husband's debt.

Cited in *State, Mather, Prosecutor v. Brokaw*, 43 N. J. L. 587, holding judgment on a bond signed by wife as security for husband will be vacated as to her but will stand as to him; *Reeves v. Morgan*, 48 N. J. Eq. 415, 21 Atl. 1040; *Bradley v. Johnson*, 46 N. J. L. 271,—on liability of married woman on bond made by herself and husband.

Wife as presumptively agent of husband.

Cited in *Vusler v. Cox*, 53 N. J. L. 516, 22 Atl. 347, on authority of wife to contract in behalf of husband when presumed.

Cited in note in 65 L.R.A. 539, on presumptive agency of wife to purchase necessities arising from cohabitation.

—In making household purchases.

Cited in *Chester v. Pierce*, 33 Minn. 370, 23 N. W. 539, holding no action could be maintained against wife purchasing articles for domestic use in the family she living with her husband; *Feiner v. Boynton*, 73 N. J. L. 136, 62 Atl. 420, holding wife in purchasing articles of clothing for her own use, when living with husband will be presumed to be acting as agent for her husband.

Cited in note in 65 L.R.A. 552, on statutory liability of husband for necessities furnished wife while living with him.

Construction of statutes prospectively.

Cited in *Phillips v. Jollisaint*, 7 Ind. App. 458, 34 N. E. 653, holding act repealing former acts on collecting assessments for street improvements does not repeal the remedy as to existing contracts; *Barnaby v. Bradley & C. Co.* 60 N. J. L. 158, 37 Atl. 764, holding statute would not be construed so as to affect rights already vested or accrued on passage of the act.

Powers of legislature to adopt saving clauses.

Cited in *Thatcher v. Steuben County*, 21 Misc. 271, 47 N. Y. Supp. 124, on power of legislature to pass a general saving clause in a statute.

32 AM. REP. 247, *HALSTED v. STATE*, 41 N. J. L. 552.

Necessity of showing criminal intent as element of crime.

Cited in *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45, holding a criminal intent need not be shown where act made indictable in general terms; *United States v. Curtis*, 16 Fed. 184; *United States v. 1150½ Pounds of Celluloid*, 27 C. C. A. 231, 54 U. S. App. 273, 82 Fed. 627; *Sykes v. People*, 127 Ill. 117, 2 L.R.A. 461, 19 N. E. 705; *Folwell v. State*, 49 N. J. L. 31, 6 Atl. 619; *State, Bayles, Prosecutor, v. Newton*, 50 N. J. L. 549, 18 Atl. 77; *People v. Grim*, 3 N. Y. Crim. Rep.

317; *Com. v. Lewis*, 25 W. N. C. 432; *State, Newark, Prosecutor, v. Essex Club*, 53 N. J. L. 99, 20 Atl. 769,—on its being unnecessary to aver or prove criminal intent under indictment for violation of criminal statute.

Cited in note in 8 E. R. C. 47, on necessity of guilty intent to make act crime.

— **Particular crimes.**

Cited in *State v. Reynolds*, 65 N. J. L. 424, 47 Atl. 644, holding unnecessary to allege that defendant took money to his own use with intent to steal if the indictment charges the language in the words of the statute; *State v. Hopkins*, 56 Vt. 250, holding a criminal intent need not be shown under statute making it larceny for an insurance agent to appropriate money received by him as agent to his own use; *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 955, holding same under statute making it a crime to receive money when bank insolvent; *State v. Trolson*, 21 Nev. 419, 32 Pac. 930, holding same under statute making it embezzlement to appropriate money intrusted to defendant; *Board of Health v. Vandruens*, 77 N. J. L. 443, 72 Atl. 125, holding person selling milk of quality condemned by statute guilty, though he did nothing to produce condition.

Cited in reference note in 34 A. R. 2, on intent in bigamy.

Knowledge as element of crime.

Cited in *Vandegrift v. Meihle*, 66 N. J. L. 92, 49 Atl. 16, holding under statute providing a penalty for adulteration of milk it is unnecessary to aver or prove that the milk in question was to the knowledge of defendant below the required standard; *State, Waterbury, Prosecutor v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604, holding same where statute provided penalty for the coloring of oleomargarine with annatto; *State v. Denoon*, 31 W. Va. 122, 5 S. E. 315, holding party not excused from liability for a sale of intoxicating liquors by his clerk in violation of statute, by fact that it was made without his knowledge and contrary to instructions.

Cited in reference note in 50 A. R. 270, on criminal liability of saloon keeper for act of agent in keeping it open illegally.

Distinguished in *Newark v. East Side Coal Co.* 77 N. J. L. 732, 73 Atl. 484, holding coal dealer not guilty under statute, because servant through mistake attempted to deliver to customer less than ton when order was for one ton.

Validity of municipal contracts in excess of revenue or appropriation.

Cited in *Atlantic City Waterworks Co. v. Read*, 50 N. J. L. 665, 15 Atl. 10, holding it criminal for city council to incur obligations for a stated period in excess of amount set for the particular purpose by ordinance; *State, Humphreys, Prosecutor, v. Bayonne*, 55 N. J. L. 241, 26 Atl. 81, holding city had no power to make a contract for lighting street for a period of years when no provision is made to meet the obligations of the city to pay the price named in the contract; *Marley v. State*, 58 N. J. L. 207, 33 Atl. 208; *Mason v. Cranbury Twp.* 68 N. J. L. 149, 52 Atl. 568,—on contract creating an obligation in excess of the appropriation provided by law as being void.

Validity of legislative act making act criminal regardless of intent.

Cited in *Jaycox v. United States*, 47 C. C. A. 83, 107 Fed. 938, holding act not unconstitutional because it makes the master of a tugboat criminally liable for the forbidden acts of his associates in the course of their general undertaking, though he may be innocent of criminal intent; *State v. Adams*, 108 Mo. 208, 18 S. W. 1000, holding legislature might make or declare an act criminal irre-

spective of the motive with which it was committed; *State v. Shevlin-Carpenter Co.* 99 Minn. 158, 108 N. W. 935, 9 A. & E. Ann. Cas. 634, on right of legislature to declare an act criminal irrespective of motive or knowledge of its criminality.

President of board as "member" thereof.

Cited in *State, Schermerhorn, Prosecutor, v. Jersey City*, 53 N. J. L. 112, 20 Atl. 829, holding president of board of aldermen one of the body of aldermen with powers of such.

32 AM. REP. 259, GLOBE MARBLE MILLS CO. v. QUINN, 76 N. Y. 23.

Mortgagee as affected by agreements entered into by mortgagor with others.

Cited in reference note in 1 A. S. R. 379, on what are fixtures as between mortgagor and mortgagee.

Distinguished in *McFadden v. Allen*, 134 N. Y. 489, 19 L.R.A. 446, 32 N. E. 21, holding agreement between mortgagor and tenant entering after execution of mortgage that tenant might remove improvements made by him not binding on mortgagee who was not a party to the agreement.

When chattel a fixture.

Cited in *Henry v. Von Brandenstein*, 12 Daly, 480, on when chattels treated as fixtures.

Cited in reference note in 35 A. R. 346, on right to fixtures as between vendor and vendee failing to comply with contract of purchase.

Cited in note in 19 L.R.A. 442, on effect of agreement to prevent fixtures from becoming part of realty.

— Trade fixtures.

Cited in *Bergh v. Herring-Hall-Marvin Safe Co.* 70 L.R.A. 756, 69 C. C. A. 212, 136 Fed. 368, holding tenant on termination of lease was entitled to remove trade fixtures used in his business when such removal would not cause material injury to the building; *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93, holding on sale of trade fixtures attached to leased premises with the taking of a chattel mortgage for the purchase price, it would be presumed that parties intended that the chattels be treated as personalty; *Re Buffalo*, 17 N. Y. S. R. 371, 1 N. Y. Supp. 763, on property so attached to building as to be regarded as fixtures; *Trowbridge v. Hayes*, 21 Misc. 234, 45 N. Y. Supp. 635, 79 N. Y. S. R. 635, on when machinery affixed to premises to be considered as personalty.

Right of tenant to remove fixtures.

Cited in *Andrews v. Day Button Co.* 132 N. Y. 348, 30 N. E. 831, on right of tenant to remove improvements or structures erected by him on premises for use in his business.

32 AM. REP. 262, STRYKER v. CASSIDY, 76 N. Y. 50.

Who entitled under law protecting wages of "laborers."

Cited in *Flagstaff Silver Min. Co. v. Cullins*, 104 U. S. 176, 26 L. ed. 704, holding person hired to oversee miners and direct the working and development of a mine entitled to protection of lien law for his services; *Re Lawler*, 3 N. B. N. Rep. 974, 110 Fed. 135, holding travelling salesman of a lumber company within the provisions of act given every person performing labor for any person,

company, etc., a prior lien for wages; *Heckman v. Tammen*, 184 Ill. 144, 56 N. E. 361 (affirming 84 Ill. App. 537), holding claims of compositors, pressmen and cylinder feeders would be included within meaning of act to protect employees and laborers in their claims for wages; *Pendergast v. Yandea*, 124 Ind. 159, 8 L.R.A. 849, 24 N. E. 724, holding superintendent of the construction pipe lines for gas company was a laborer within the meaning of statute giving them preferred claims for wages; *Charron v. Hale*, 25 Misc. 34, 54 N. Y. Supp. 411, holding a law preferring wages of employees, operatives, and laborers of corporation becoming insolvent does not protect a contractor; *Wick v. Ft. Plain & R. S. R. Co.* 27 App. Div. 577, 50 N. Y. Supp. 479, considering who within terms of act giving a lien to railroad employees wages.

Cited in reference note in 58 A. S. R. 303, as to whether architects are laborers.

Cited in notes in 33 A. R. 350, on who are "laborers" within statute making stockholder liable for wages; 58 A. S. R. 309, on architects as laborers.

Who entitled to mechanic's lien.

Cited in *Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413, holding time and labor of a watchman and custodian on the property in taking care of it is labor done on the claim so as to entitle him to lien; *Nanz v. Cumberland Gap Park Co.* 103 Tenn. 299, 76 A. S. R. 650, 47 L.R.A. 273, 52 S. W. 999, holding a florist not entitled to a mechanic's lien on hotel for setting out flowers and shrubs and improving the appearance of grounds generally.

Cited in reference notes in 47 A. R. 227, on what are personal services within lumberman's lien statute; 1 A. S. R. 697, as to what mechanic's lien is given for.

—Superintendents, architects and contractors.

Cited in *Little Rock, H. S. & T. R. Co. v. Spencer*, 65 Ark. 183, 42 L.R.A. 334, 47 S. W. 196, holding contractor who furnishes the labor and appliances to build the roadbed of a railroad and pays for the same is not entitled to a mechanics' lien; *St. Louis, I. M. & S. R. Co. v. Love*, 74 Ark. 528, 86 S. W. 395, holding foreman who superintends and directs laborers in the work of construction or repair of a railroad is entitled to protection of a mechanics' lien for his services; *Wetzel & T. R. Co. v. Tennis Bros. Co.* 75 C. C. A. 266, 145 Fed. 458, 7 A. & E. Ann. Cas. 426, holding same in case of corporation engaged to superintend the construction of a railroad through its officers; *Fischer v. Hanna*, 8 Colo. App. 471, 47 Pac. 303, holding party superintending the construction of a building is entitled to a mechanics' lien for his services; *Hughes v. Torgerson*, 96 Ala. 346, 38 A. S. R. 105, 16 L.R.A. 600, 11 So. 209; *Friedlander v. Taintor*, 14 N. D. 393, 116 A. S. R. 697, 104 N. W. 527, 9 A. & E. Ann. Cas. 96; *Von Dorn v. Mengedocht*, 41 Neb. 525, 59 N. W. 800; *Johnson v. McClure*, 10 N. M. 506, 62 Pac. 983; *Field v. Consolidated Mineral Water Co.* 25 R. I. 319, 105 A. S. R. 895,—holding architect who prepares plans and specifications for and supervises the construction of a building entitled to mechanics' lien for labor expended.

Cited in reference notes in 60 A. S. R. 407, on architects' liens; 36 A. S. R. 88; 51 A. S. R. 344,—on right of architect to mechanics' lien.

Cited in note in 16 L.R.A. 601, on right of architect to mechanics' lien.

Distinguished in *Rinn v. Electric Power Co.* 3 App. Div. 305, 38 N. Y. Supp. 345, holding architect who makes plans but does not actively work on the building not entitled to lien.

Estate subject to mechanic's lien.

Cited in reference note in 9 A. S. R. 538, as to what estate mechanics' lien attaches to.

Party as precluded by the giving of a receipt.

Cited in *Reardon v. Clover*, 81 Ill. App. 526, holding the rendering of a statement of account would not prevent creditor in suit to recover from amending his declaration by increasing the *ad damnum*; *Paterson v. Houston*, 92 Ill. App. 624, holding the rendering of a statement of account not conclusive but is to be regarded as an admission of the strongest kind; *Bratt v. Scott*, 44 N. Y. S. R. 727, 18 N. Y. Supp. 507, holding a receipt for the amount sent to attorney on settlement for his services does not preclude him from thereafter claiming and recovering a large sum upon proof of value of services.

Cited in reference note in 62 A. D. 91, on effect as account stated of account rendered not assented to.

Cited in note in 27 L.R.A. 818, on effect upon person rendering of failure to accept account.

Who considered "laborers" within meaning of act.

Cited in *Viele v. Wells*, 9 Abb. N. C. 277, holding the term labor was used in act rendering stockholders "liable for all labor performed for such company," does not include services rendered by secretary; *People v. E. Remington & Sons*, 45 Hun, 329; *Wakefield v. Fargo*, 90 N. Y. 213,—on who to be considered "servants, laborers and apprentices" within meaning of statute.

Independent contractor's relation to principal.

Cited in *Burke v. Ireland*, 166 N. Y. 305, 59 N. E. 914, holding owner of land not responsible for negligence of independent contractor and architect in construction of building thereon.

Mechanic's lien as assignable chose.

Cited in *Midland R. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506, holding a mechanics' lien was assignable.

32 AM. REP. 267, RICHARDSON v. HUGHITT, 76 N. Y. 55.**Test of partnership.**

Cited in *Taylor v. Bush*, 75 Ala. 432; *Culley v. Edwards*, 44 Ark. 423, 51 A. R. 614,—on what constitutes the test of partnership.

Cited in reference note in 30 A. S. R. 829, on agreements between parties not constituting partnership.

Cited in note in 115 A. S. R. 406, on what constitutes a partnership.

Sharing in profits as rendering party a partner.

Cited in *Merchants' Nat. Bank v. Barnes*, 32 App. Div. 92, 52 N. Y. Supp. 786, holding partnership not created by agreement by which one party is to put in his time and the other party is to pay expenses, sell the product, and pay a certain per cent of proceeds to former; *Hull v. Barth*, 37 App. Div. 359, 55 N. Y. Supp. 1103, holding landlord leasing hotel, with agreement to furnish the necessary capital for its operation and he have proportionate share of profits, a partner with tenant in the undertaking; *Dake v. Butler*, 7 Misc. 302, 28 N. Y. Supp. 134, holding agreement whereby owner of hotel was to share with tenant in the profits did not constitute him a partner with tenant; *Cassidy v. Hall*, 97 N. Y. 159; *Waverly Nat. Bank v. Hall*, 23 Pittsb. L. J. N. S. 102, 24 Atl. 665,—holding agreement of defendants to furnish third party certain

amount of money from time to time, taking a chattel mortgage on machinery for security and sharing in profits during time he retained money, did not make them partners with him; *Re Schenkein*, 113 Fed. 421; *Le Fevre v. Castagnio*, 5 Colo. 564; *Dutcher v. Buck*, 96 Mich. 160, 20 L.R.A. 776, 55 N. W. 676; *Burnett v. Snyder*, 81 N. Y. 550, 37 A. R. 527; *Wright v. Delaware & H. Canal Co.* 40 Hun, 343; *Black v. Vanderbilt*, 70 App. Div. 16, 74 N. Y. Supp. 1095 (dissenting opinion); *Lefevre v. Silo*, 112 App. Div. 464, 98 N. Y. Supp. 321 (dissenting opinion); *W. D. Wilson Printing Ink Co. v. Bowker*, 27 Abb. N. C. 153, 15 N. Y. Supp. 293; *First Nat. Bank v. Gallaudet*, 122 N. Y. 655, 6 N. Y. Supp. 371, 3 Silv. Ct. App. 132, 25 N. E. 909; *De Cordova v. Powder*, 8 N. Y. S. R. 431; *Conklin v. Tuthill*, 10 N. Y. S. R. 624; *First Nat. Bank v. Staples*, 34 N. Y. S. R. 503, 11 N. Y. Supp. 809; *Delise v. Palladino*, 16 Misc. 74, 37 N. Y. Supp. 705; *Bradley v. Wolfe*, 40 Misc. 592, 83 N. Y. Supp. 13; *Smith v. Dunn*, 44 Misc. 288, 89 N. Y. Supp. 881; *Waverly Nat. Bank v. Hall*, 150 Pa. 466, 30 A. S. R. 823, 24 Atl. 665,—on sharing in profits as not rendering party liable as partner.

Cited in reference note in 39 A. S. R. 893, as to whether a loaning money or sharing profits constitutes a partnership.

Cited in notes in 37 A. R. 610, on agreement to share profits as partnership; 49 A. R. 255, on participation in profits as rendering the participator a partner; 58 A. R. 99, on participation in profits as constituting partnership; 18 L.R.A.(N.S.) 993, on necessity of sharing in profits and losses to constitute partnership; 18 L.R.A.(N.S.) 1005, on net-profit rule as test of existence of partnership; 16 L. ed. 250, as to when a community of profits creates a partnership.

Distinguished in *Haas v. Root*, 26 Hun, 632, holding party loaning money under agreement that upon payment of all expenses he was to receive it back together with one-half the profits, was a partner as to third persons.

— Profits given as compensation.

Cited in *Meehan v. Valentine*, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 972; *Re Kenney*, 2 N. B. N. Rep. 140, 97 Fed. 554; *Hazell v. Clark*, 89 Mo. App. 78,—holding receiving of share of profits in lieu of interest on a loan does not make the lender a partner; *Keogh v. Minrath*, 30 N. Y. S. R. 129, 8 N. Y. Supp. 816; *Hayward v. Barron*, 46 N. Y. S. R. 665, 19 N. Y. Supp. 383,—holding party sharing in profits of business for compensation without sharing in the losses is not a partner; *Jackson v. Haynie*, 106 Va. 365, 56 S. E. 148, holding a miller who is employed by owner of mill to take charge of mill and who is to receive share of profits for services is not a partner of the mill owner; *Riedenburg v. Schmitt*, 71 Wis. 644, 38 N. W. 336, holding mere fact of sharing in profits did not make party a partner in firm where it only amounted to compensation for the use of his property in the business; *Rider v. Hammell*, 63 Kan. 733, 66 Pac. 1026, on loaning of money with agreement to share in profits as not constituting a partnership; *Clark v. Barnes*, 72 Iowa, 563, 34 N. W. 419; *Curry v. Fowler*, 87 N. Y. 33, 41 A. R. 343; *Magovern v. Robertson*, 40 Hun, 166; *Wisotzkey v. Niagara F. Ins. Co.* 112 App. Div. 599, 98 N. Y. Supp. 760,— holding party, making a loan for use in a business, which was to be repaid, and sharing in profits for compensation not a partner; *Boston & C. Smelting Co. v. Smith*, 13 R. I. 27, 43 A. R. 3, holding agreement under seal for a loan, with notes given as security and party making loan to receive share in profits as compensation for, and borrower agreeing to conduct business

to best advantage and keep accounts open to lender's examination, did not constitute parties partners; *American Seeding Mach. Co. v. John Conklin's Sons Co.* 64 Misc. 652, 120 N. Y. Supp. 592; *Russell v. Herrick*, 127 App. Div. 503, 111 N. Y. Supp. 974,—holding party who has interest in profits of business only as compensation for money advanced not partner; *Thomson v. Batcheller*, 134 App. Div. 506, 119 N. Y. Supp. 577, to point that sharing in profits of business in compensation for services does not create partnership; *Hathaway v. Clendenen Co.* 135 App. Div. 407, 119 N. Y. Supp. 984, holding that contract employing one to manage hotel at fixed salary with percentage of net profits does not make partnership.

Cited in notes in 58 A. R. 101, on participation in profits for services as constituting partnership; 18 L.R.A.(N.S.) 1057, 1059; 58 A. R. 101, 103,—on participation in profits for use of money as constituting partnership; 115 A. S. R. 441, on effect of sharing of profits as interest on loans or advances as constituting partnership; 18 L.R.A.(N.S.) 1033, on creation of partnership liability by taking profits as compensation for work and labor of agents and servants; 18 L.R.A.(N.S.) 1050, on creation of partnership liability by taking profits as compensation for investment of capital.

Agreements rendering parties partners.

Cited in *Walton v. Rafel*, 7 Misc. 663, 28 N. Y. Supp. 10; *Rosenfield v. Haight*, 53 Wis. 260, 40 A. R. 770, 10 N. W. 378,—holding on facts contract between parties constituted one of partnership.

Distinguished in *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745 (affirming 14 Daly, 210, 6 N. Y. S. R. 265); *Southern Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. 467,—holding on facts agreement to contract constituted a partnership.

Contract void for usury.

Cited in *Johnston v. Ferris*, 14 Daly, 302, holding agreement under which plaintiff was to receive one half of defendant's share of profits in a business as compensation for a loan of money is not necessarily void for usury; *Orvis v. Curtiss*, 157 N. Y. 657, 68 A. S. R. 810, 52 N. E. 690, holding defense of usury not available where one party advances money for use in business with agreement for its repayment and a right to share in profits of undertaking.

Cited in note in 18 L.R.A.(N.S.) 1062, on question of usury as affecting creation of partnership liability by taking profits as compensation for use of money.

Action for share in profits.

Cited in *Weldon v. Brown*, 84 App. Div. 482, 82 N. Y. Supp. 1051, on profits as compensation being recoverable at law.

32 AM. REP. 271, LYNCH v. NEW YORK, 76 N. Y. 60.

Liability of municipality for damages to private property in the making of public improvements.

Cited in *Sadlier v. New York*, 185 N. Y. 408, 78 N. E. 272 (affirming 104 App. Div. 82, 93 N. Y. Supp. 342), holding municipal corporation not liable for consequential damages to property owners from construction and maintenance of a bridge; *Heiser v. New York*, 104 N. Y. 63, 9 N. E. 866; *Porter v. Attica*, 33 Hun, 605,—on no liability resting on city for damage to property resulting from improvement of streets.

—Injury from sewerage or drainage.

Cited in *Sayre v. Newark*, 60 N. J. Eq. 361, 83 A. S. R. 629, 48 L.R.A. 722 45 Atl. 985, holding riparian owner on tidal waters could not recover for damage to property by emptying of sewers into waters near his lands, the sewers being properly constructed; *Schreiber v. New York*, 11 Misc. 551, 32 N. Y. Supp. 744, holding city not liable for the results of improper construction of drain where defects due to error of judgment in making plans.

Cited in notes in 1 L.R.A. 297, on duties and liabilities of municipal corporations in regard to drainage and sewage; 5 L.R.A. 123, on liability of municipal corporation for discharging sewage on private property; 16 E. R. C. 626, on liability of municipal corporation in respect to sewers.

Distinguished in *Seifert v. Brooklyn*, 101 N. Y. 136, 54 A. R. 664, 4 N. E. 321 (affirming 15 Abb. N. C. 97), holding city liable for damages to land of plaintiff where city negligent in maintaining a sewer after it proved inadequate to needs of community.

—Flowage by surface water.

Cited in *Congress & E. Spring Co. v. Saratoga Springs*, 6 N. Y. S. R. 385, holding same where plaintiff was injured by insufficiency of sewer to carry off surface water; *Lampe v. San Francisco*, 124 Cal. 546, 57 Pac. 461; *Watson v. Kingston*, 43 Hun. 367; *Texarkana v. Talbot*, 7 Tex. Civ. App. 202, 26 S. W. 451; *Champion v. Crandon*, 84 Wis. 405, 19 L.R.A. 856, 54 N. W. 775,—holding no liability on part of municipal corporation where in the making of public improvements in streets surface water was cast onto land of plaintiff; *Jordan v. Benwood*, 42 W. Va. 312, 57 A. S. R. 859, 36 L.R.A. 519, 26 S. E. 266; *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811,—holding same where flow of surface water obstructed by the grading of a street; *Weis v. Madison*, 75 Ind. 241, 30 A. R. 135; *Hitchins Bros. v. Frostburg*, 68 Md. 100, 6 A. S. R. 422, 11 Atl. 826; *Paine v. Delhi*, 116 N. Y. 224, 5 L.R.A. 797, 22 N. E. 405; *Anchor Brewing Co. v. Dobbs Ferry*, 84 Hun. 274, 32 N. Y. Supp. 371; *Carll v. Northport*, 11 App. Div. 120, 42 N. Y. Supp. 576; *Coyle v. Davidson*, 92 App. Div. 322, 86 N. Y. Supp. 1039; *Miles v. Brooklyn*, 98 App. Div. 195, 90 N. Y. Supp. 702,—on liability of municipality for damage caused by casting surface water onto lands of property owner; *Punsky v. New York City*, 129 App. Div. 558, 114 N. Y. Supp. 66, holding city not liable for damages caused solely by flooding cellar from natural flow of water over street during excessive rainfall; *Adams v. Oklahoma City*, 20 Okla. 519, 95 Pac. 975; *Prime v. Yonkers*, 192 N. Y. 105, 84 N. E. 571,—holding city not liable for injury by surface water which is result of grading streets.

Cited in reference notes in 33 A. R. 304, on liability of city for increasing flow of surface water from street; 33 A. R. 470, on liability of municipal corporation for injury caused by surface water diverted in improving street; 34 A. R. 598, on liability of municipality for surface water escaping to adjacent land.

Cited in notes in 43 A. D. 723, on municipal liability for injury by grading or regarding street; 66 A. D. 441, on municipal liability as to surface water and drainage; 35 A. S. R. 543, on municipal liability for flowing private lands; 38 A. R. 144, on liability of one using his own land so as to obstruct surface water from draining over it; 30 A. S. R. 391, on municipal liability for interference with surface waters by grading streets; 21 L.R.A. 605, on duty to care

for surface water where it falls; 65 L.R.A. 254, on duty of municipality to care for surface water on raising grade of street.

Distinguished in *Clark v. Rochester*, 43 Hun, 271; *Bedell v. Sea Cliff*, 18 App. Div. 261, 46 N. Y. Supp. 226,—holding municipality liable for damages on the discharge of surface water onto land on improvement of streets, it being conducted and discharged through an artificial channel.

Discretion vested in municipality in the making of public improvements.

Cited in *Burford v. Grand Rapids*, 53 Mich. 98, 51 A. R. 105, 18 N. W. 571; *Ebbets v. New York*, 111 App. Div. 364, 97 N. Y. Supp. 833; *Platt v. New York*, 8 Misc. 409, 28 N. Y. Supp. 672,—on discretion vested in municipality in care of streets and highways; *Morgan v. Binghamton*, 32 Hun, 602, on discretion vested in city in the construction of sewers; *Bell v. Rochester*, 61 N. Y. S. R. 721, 30 N. Y. Supp. 365, holding a municipal corporation will not be enjoined from exercising its discretionary powers in making public improvements within the scope of its charter.

Actionable diversion of surface water.

Cited in *Conner v. Woodfill*, 126 Ind. 85, 22 A. S. R. 568, 25 N. E. 876, holding one who sheds the water from his building by means of spouts upon the lot of adjoining owner is guilty of a trespass.

Right to obstruct flow of surface water.

Cited in *Phillips v. Waterhouse*, 69 Iowa, 199, 58 A. R. 220, 28 N. W. 539, holding owner of city lot might so improve it as to cast surface water upon adjacent alley or street at the established grade; *Drake v. Chicago*, R. I. & P. R. Co. 63 Iowa, 302, 50 A. R. 746, 19 N. W. 215, on right of party to obstruct the natural flow of surface water; *Barkley v. Wilcox*, 86 N. Y. 140, 40 A. R. 519, on right of land owner to prevent surface water from flooding lot.

32 AM. REP. 274, PEOPLE v. BAKER, 76 N. Y. 78.

Jurisdiction over suit against nonresident.

Cited in *Robinson v. National Bank*, 81 N. Y. 385, 37 A. R. 508, 59 How. Pr. 218, upholding attachment in action by citizen of New York against out of state National bank.

— For divorce.

Cited in *Hull v. Hull*, 8 Pa. Dist. R. 420, 23 Pa. Co. Ct. 73, 30 Pittab. L. J. N. S. 208, upholding jurisdiction of court dissolving marriage of citizen of Pennsylvania on constructive service on nonresident defendant.

Cited in notes in 16 L.R.A. 498, on domicil of wife for purpose of divorce suit; 5 E. R. C. 724, 725, on jurisdiction to dissolve marriage as dependent on domicil.

Distinguished in *Blackinton v. Blackinton*, 141 Mass. 432, 55 A. R. 484, 5 N. E. 830, entertaining petition for separate maintenance by wife, married in Massachusetts, against husband residing and served in New York whose property was not attached; *Scragg v. Scragg*, 44 N. Y. S. R. 845, 18 N. Y. Supp. 487, holding that court can dissolve New York marriage for adultery committed while plaintiff was resident thereof, although nonresident defendant served by publication.

Effect of judgment generally.

Cited in *United States v. Hills*, 124 Fed. 831, holding a deposition decrees

rendered by United States commissioner relevant evidence of status, so as to justify indictment for unlawfully bringing into United States the person so reported.

—Of divorce.

Cited in note in 2 L.R.A.(N.S.) 326, on effect in third state of decree upholding foreign decree.

Distinguished in *Campbell v. Campbell*, 90 Hun, 233, 35 N. Y. Supp. 280, holding valid, Pennsylvania divorce against defendant not appearing who was served by publication, where both parties were deemed residents of that state.

Validity, effect, and conclusiveness of foreign judgment generally.

Cited in *Van Matre v. Sankey*, 148 Ill. 536, 39 A. S. R. 196, 23 L.R.A. 665, 36 N. E. 628, holding valid Pennsylvania decree of adoption binding in Illinois; *Cumington v. Belchertown*, 149 Mass. 223, 4 L.R.A. 131, 21 N. E. 435, holding settlement of insane wife domiciled in Massachusetts not affected by New York decree annulling marriage for fraud on grounds insufficient in Massachusetts.

Cited in note in 16 L.R.A. 234, on validity of personal judgment for alimony or costs rendered upon constructive service of process.

Recognition given divorce granted in another state generally.

Cited in *Percival v. Percival*, 106 App. Div. 111, 94 N. Y. Supp. 909; *Dean v. Dean*, 48 Misc. 149, 96 N. Y. Supp. 472; *Ransom v. Ransom*, 125 App. Div. 915, 100 N. Y. Supp. 1143,—on refusal of courts to recognize a decree of divorce granted in another state.

Cited in reference note in 2 A. S. R. 454, on validity of divorce rendered without personal service on defendant.

Cited in notes in 53 A. S. R. 184, on validity of divorce where one party is a nonresident; 83 A. S. R. 624, on extraterritorial effect of divorce decree; 11 L.R.A. 445, on conclusiveness of judgment of divorce under conflict of laws; 12 L.R.A. 863, on extraterritorial effect of decrees of divorce in state court; 59 L.R.A. 167, on validity and effect on status in state where rendered of decree of divorce rendered on constructive service against nonresident; 59 L.R.A. 169, on validity and effect on status in other states of decree of divorce rendered against nonresident on constructive service.

Cited as overruled in *Williams v. Williams*, 3 Silv. Sup. Ct. 385, 17 N. Y. Civ. Proc. Rep. 297, 6 N. Y. Supp. 645, on recognition to be given decree of divorce obtained in foreign state.

Validity, effect, and conclusiveness of foreign decree of divorce against nonresident not appearing.

Cited in *Collins v. Collins*, 80 N. Y. 1, holding void, California divorce obtained against resident of New York, without service of process, or notice; *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 333, holding void, out of state divorce obtained without service or appearance of defendant; *Ransom v. Ransom*, 54 Misc. 410, 104 N. Y. Supp. 198, holding in action for divorce it was no defense that defendant had been granted a divorce in another state without personal service upon plaintiff of summons and complaint, or his appearance in action, he being domiciled in this state; *Rigney v. Rigney*, 127 N. Y. 408, 24 A. S. R. 462, 28 N. E. 405, refusing to enforce out of state decree as to alimony and costs against defendant residing in New York who did not appear in divorce action; *Re Brunor*, 21 App. Div. 259, 47 N. Y. Supp. 681, holding void New

Jersey divorce against woman residing in foreign land and not appearing; *Re Kimball*, 155 N. Y. 62, 49 N. E. 331, affirming 18 App. Div. 320, 46 N. Y. Supp. 177, holding void, Dakota divorce against nonresident not personally served there, and not appearing; *Winston v. Winston*, 165 N. Y. 553, 59 N. E. 273, 31 N. Y. Civ. Proc. Rep. 283, holding invalid, Oklahoma divorce against resident of New York, obtained without personal service of process or appearance of defendant; *Degarama v. Johnson*, 86 Hun, 390, 33 N. Y. Supp. 502, holding invalid, Ohio divorce against defendant residing in New York not personally served and not appearing; *Davis v. Davis*, 2 Misc. 549, 22 N. Y. Supp. 191, holding void, Massachusetts divorce for desertion against non-appearing nonresident defendant, served by publication; *Com. v. Steiger*, 12 Pa. Co. Ct. 334, 2 Pa. Dist. R. 494, 10 Lanc. L. Rev. 11, holding Ohio divorce procured by husband in constructive service, invalid as to wife residing in Pennsylvania not appearing; *Mellen v. Mellen*, 10 Abb. N. C. 329, holding a divorce granted in another state dissolving a marriage contracted in this state, in favor of husband temporarily residing there upon substituted service upon wife resident of this state and for a cause not existing in fact is invalid as against wife; *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 A. & E. Ann. Cas. 1, holding same where husband went to another state acquired a domicile and obtained a divorce upon constructive service upon the wife who remained domiciled in this state; *Williams v. Williams*, 130 N. Y. 193, 27 A. S. R. 517, 14 L.R.A. 220, 29 N. E. 98 (affirming 25 N. Y. S. R. 183), holding invalid, Minnesota divorce against resident of New York not appearing, on service outside former state; *Gebhard v. Gebhard*, 25 Misc. 1, 54 N. Y. Supp. 406, holding invalid, Connecticut divorce against one not served in that state, not a resident thereof and not appearing. *People v. Karlsioe*, 1 App. Div. 571, 37 N. Y. Supp. 481, holding out of state divorce without notice to defendant no defense to prosecution for nonsupport.

Cited in note in 19 L.R.A. 814, on validity of decree of divorce obtained on publication on service out of state where defendant did not appear.

Distinguished in *Re Swales*, 60 App. Div. 599, 70 N. Y. Supp. 220, denying right of woman invoking jurisdiction of courts of another state for divorce to impeach decree afterwards so as to obtain administration on divorced husband's estate; *Re Morrison*, 52 Hun, 102, 5 N. Y. Supp. 90, upholding Ohio divorce from Ohio marriage for adultery while parties were residents of Ohio, although defendant was served by publication while a resident of New York.

Disapproved in *Dunham v. Dunham*, 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841, holding that out of state divorce obtained for good cause and in good faith against resident of Illinois not appearing is valid; *Felt v. Felt*, 57 N. J. Eq. 101, 40 Atl. 436, holding valid, Utah divorce for desertion against woman domiciled in New Jersey, personally served there but not appearing.

— On right to divorce or separation.

Cited in *De Meli v. De Meli*, 120 N. Y. 485, 17 A. S. R. 652, 24 N. E. 996, holding record of divorce obtained in Germany without personal service or appearance of nonresident defendant inadmissible in separation action between same parties; *Munson v. Munson*, 60 Hun, 189, 14 N. Y. Supp. 692, holding California divorce against woman, residing in New York served by publication and mail, no bar to divorce action by her in New York; *Cook v. Cook*, 56 Wis. 195, 43 A. R. 706, 14 N. W. 33, holding Michigan divorce against wife domiciled in Wisconsin, not personally served or appearing, no bar to action

by her in Wisconsin for divorce; *Bell v. Bell*, 4 App. Div. 527, 40 N. Y. Supp. 443, holding Pennsylvania divorce against nonresident defendant, not personally served and not appearing no bar to subsequent divorce action by such defendant in New York; *Felt v. Felt*, 59 N. J. Eq. 606, 88 A. S. R. 612, 47 L.R.A. 546, 49 Atl. 1071 (dissenting opinion), majority holding Utah divorce against wife domiciled and served with process in New Jersey bar to later action for divorce by wife in New Jersey; *Hamilton v. Hamilton*, 29 App. Div. 331, 51 N. Y. Supp. 365, majority holding that default decree of divorce should be opened to allow defendant to litigate validity of out of state divorce obtained by her.

Distinguished in *Lacey v. Lacey*, 38 Misc. 196, 77 N. Y. Supp. 235, denying right of woman invoking jurisdiction of courts of another state for divorce to impeach decree imposed as defense to action by her for divorce in New York; *Atherton v. Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544 (reversing 155 N. Y. 129, 83 A. S. R. 650, 40 L.R.A. 291, 49 N. E. 933, which affirmed 32 Hun, 179, 31 N. Y. Supp. 997), holding Kentucky divorce obtained against woman residing in New York without personal service or appearance bar to action by her for limited divorce in New York.

— On right to dower.

Cited in *Starbuck v. Starbuck*, 62 App. Div. 437, 71 N. Y. Supp. 104, holding wife obtaining out of state divorce for cruelty entitled to dower in land subsequently acquired by her divorced husband; *Rundle v. Van Inwegan*, 9 N. Y. Civ. Proc. Rep. 328, holding woman marrying another man after her husband had procured out of state divorce, against her void for lack of service or appearance, entitled to dower in latter's estate; *McCreery v. Davis*, 44 S. C. 195, 51 A. S. R. 794, 28 L.R.A. 655, 22 S. E. 178, holding wife procuring Illinois divorce not barred from dower in South Carolina land acquired before or after divorce.

— On remarriage and legitimacy of offspring.

Cited in *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110, holding void, remarriage of woman in New York after Ohio divorce against her for desertion, obtained without her appearance while a resident of Canada; *Simonds v. Allen*, 33 Ill. App. 512, holding void, marriage of woman in New York after husband had obtained out of state divorce from her, upon mere service by publication; *Re Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406, holding legitimate, child born in Dakota to resident thereof after marriage following Dakota divorce from first husband, a nonresident; *Adams v. Adams*, 154 Mass. 290, 13 L.R.A. 275, 28 N. E. 260, holding illegitimate son not legitimated by California marriage after void California divorce against wife residing in Massachusetts; *Wilcox v. Wilcox*, 46 Hun, 32, holding record of Ohio divorce against nonresident husband, not served or appearing, inadmissible against wife in proceeding involving validity of her remarriage; *Osterhoudt v. Osterhoudt*, 48 App. Div. 74, 62 N. Y. Supp. 529 (dissenting opinion), as to invalidity of second marriage after Dakota divorce obtained without appearance of defendant domiciled in New York; *People v. Chase*, 27 Hun, 256, holding Michigan divorce obtained without service or appearance of defendant therein a resident of New York, inadmissible as evidence in prosecution for bigamy.

Effect and conclusiveness of divorce against nonresident who appears.

Cited in *Pohlman v. Pohlman*, 60 N. J. Eq. 28, 46 Atl. 658, upholding divorce for desertion against nonresident wife, assumed to have permitted service in New Jersey and to have appeared for purpose of validating decree as to her.

Distinguished in *Jones v. Jones*, 108 N. Y. 415, 2 A. S. R. 447, 15 N. E. 707, affirming 36 Hun, 414, upholding validity of Texas divorce obtained on invalid service of process, where defendant appeared and answered; *Lynde v. Lynde*, 162 N. Y. 405, 76 A. S. R. 332, 48 L.R.A. 679, 56 N. E. 979 (affirming 41 App. Div. 280, 58 N. Y. Supp. 567), holding enforceable, New Jersey amended decree of divorce awarding alimony against nonresident defendant contesting amendment, although served by publication and not appearing in original action.

Invalidity of remarriage while former spouse is living.

Cited in *Safford v. Safford*, 31 Abb. N. C. 73, 27 N. Y. Supp. 640, on a remarriage while other spouse living as being absolutely void.

32 AM. REP. 282, CAMP v. WOOD, 76 N. Y. 92.

Duty resting on landlord to keep premises in safe condition.

Cited in *O'Sullivan v. Norwood*, 14 Daly, 286, holding lessor of building let to several tenants, the stairway in which is the common passage-way to street for tenants, is bound to keep stairway lighted, light being necessary to make it reasonably safe; *Cole v. McKey*, 66 Wis. 500, 57 A. R. 293, 29 N. W. 279, holding landlord owed no duty to sublessee to keep premises in safe condition where premises are sublet contrary to terms of lease; *Whitcomb v. Mason*, 102 Md. 275, 4 L.R.A.(N.S.) 565, 62 Atl. 749; *Gillvon v. Reilly*, 50 N. J. L. 26, 11 Atl. 481; *Eckman v. Atlantic Lodge*, No. 276, B. P. O. E. 68 N. J. L. 10, 52 Atl. 293, *Akerley v. White*, 58 Hun, 382, 12 N. Y. Supp. 149; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788; *Barrett v. Lake Ontario Beach Improv. Co.* 68 App. Div. 601, 74 N. Y. Supp. 301 (dissenting opinion),—on duty resting on landlord to keep premises in safe condition.

Cited in note in 110 A. S. R. 533, on care required of proprietor or manager of theater and like shows.

Liability of landlord for damages sustained by defective condition of premises.

Cited in *La Plant v. La Zear*, 31 Ind. App. 433, 68 N. E. 312, holding tenant might recover for injury by reason of defective steps leading to house, landlord keeping possession and exercising dominion over the step as a common passage-way for all the tenants; *Foren v. Rodick*, 90 Me. 276, 38 Atl. 175, holding landlord liable where the approach to entrance of building was so misleading and dangerous that plaintiff was injured while trying to locate such entrance; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620; *Stenberg v. Willcox*, 96 Tenn. 163, 34 L.R.A. 615, 33 S. W. 917,—holding landlord leasing premises in unsafe condition liable for injury received by guest of lessee without any fault on his part.

Cited in reference notes in 34 A. R. 230, on liability for injury through dangerous premises; 1 A. S. R. 432, on landlord's liability to third person for defective condition or construction of premises; 1 A. S. R. 490, on liability of landowner for injuries to persons coming on premises.

Cited in notes in 50 A. D. 783, on liability of tenant or occupant to third person for nuisances or injuries from failure to repair; 59 A. D. 734, on liability of landlord and tenant respectively for nuisances or failure to repair; 23 L.R.A. 155, on liability of landlord as to condition of common entrance, pass way, and yard, and access.

Distinguished in *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 A. R. 659 (affirming 25 Hun, 634), holding landlord leasing building not liable for injury to persons rightfully there by reason of its defective condition where he

had no knowledge of its defects or that it would be used in such a way as to render it unsecure; *Jucht v. Behrens*, 26 N. Y. S. R. 690, 7 N. Y. Supp. 195, holding landlord not liable where visitor of tenant injured by falling into open cellar way, the hall being unlighted and the cellar door left open; *Hilsenbeck v. Guhring*, 39 N. Y. S. R. 460, 15 N. Y. Supp. 162, on liability of landlord for injury to person rightfully on premises.

Liability of owner of property for injury to persons rightfully there.

Cited in *Dunn v. Durant*, 9 Daly, 389, holding defendant liable to plaintiff who was rightfully in building for injuries received by falling through unguarded opening in the floor; *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 668, 46 S. W. 63, holding owner of building liable for the death of a person who walked through a door on second floor which opened out into space, the decedent being guilty of negligence; *Dunning v. Jacobs*, 15 Misc. 85, 36 N. Y. Supp. 453; *Shobert v. May*, 40 Or. 68, 91 A. S. R. 453, 55 L.R.A. 810, 66 Pac. 466,—on duty owed by owner to person rightfully on premises; *Donaldson v. Wilson*, 60 Mich. 86, 1 A. S. R. 487, 26 N. W. 842; *Kappes v. Brown Shoe Co.* 116 Mo. App. 154, 90 S. W. 1158; *Hilsenbeck v. Guhring*, 36 N. Y. S. R. 452, 12 N. Y. Supp. 792; *Anderson v. Seattle-Tacoma Interurban R. Co.* 36 Wash. 387, 104 A. S. R. 962, 78 Pac. 1013,—on owner of property as liable for injury to person rightfully there.

Cited in notes in 26 A. R. 564, on liability of owner of dangerous premises for injury to one lawfully thereon; 92 A. S. R. 515, on liability to licensees, guests, etc., of tenant, of lessor negligently leasing defective premises; 34 L.R.A. 615, on liability of landlord for injury to tenant's guests, and servants, from defects in structures for use of public; 46 L.R.A. 85, on liability of lessor for injuries to servants of another because of defects in parts of leased building which he keeps under his own control.

Distinguished in *Baddeley v. Shea*, 114 Cal. 1, 55 A. S. R. 56, 33 L.R.A. 747, 45 Pac. 990, holding owner of premises not liable for injury through defect in where defect was of a latent nature and defendant was guilty of no negligence in not discovering it; *Converse v. Walker*, 30 Hun, 596, holding owner of hotel under liability for injury to stranger coming into hotel piazza during a sudden storm it giving away because of the crowd coming upon it against warnings of defendant; *Donohue v. Braaf*, 122 App. Div. 552, 107 N. Y. Supp. 377, holding owner not liable where party walked into elevator shaft and was killed, he being warned as he opened the door of the shaft which was lighted and which he would have seen in the exercise of due care.

Contributory negligence as question for jury.

Cited in *Rhodus v. Johnson*, 24 Ind. App. 401, 56 N. E. 942, on question of contributory negligence as being one for jury.

32 AM. REP. 286, ST. VINCENT ORPHAN ASYLUM v. TROY, 76 N. Y. 108.

Municipal control of public streets and highways.

Cited in *Rose v. Hawley*, 10 N. Y. S. R. 360; *Walter v. Macfarland*, 27 App. D. C. 182,—on control of municipalities over public streets and highways.

Cited in note in 1 L.R.A. 169, on power and authority of municipal corporations.

— **Grant to private use.**

Cited in *Smith v. McDowell*, 148 Ill. 51, 22 L.R.A. 393, 35 N. E. 141; *Field*

v. Barling, 149 Ill. 556, 41 A. S. R. 311, 24 L.R.A. 406, 37 N. E. 850,—holding municipality had no power to devote public property to private use; State v. Berdetta, 73 Ind. 185, 38 A. R. 117, on same point.

Disability to acquire interest in public street or highway as against the public.

Cited in *People ex rel. Wooster v. Maher*, 141 N. Y. 330, 36 N. E. 396, holding long continued user of obstruction to public streets no obstacle to proceeding to have it removed; *Knickerbocker Ice Co. v. Forty-second Street & G. Street Ferry R. Co.* 85 App. Div. 530, 83 N. Y. Supp. 469; *Knickerbocker Ice Co. v. Forty-second Street & G. Street Ferry R. Co.* 39 Misc. 27, 78 N. Y. Supp. 838,—holding plaintiff could not acquire title by adverse possession in public piers belonging to city; *Delaware, L. & W. R. Co. v. Buffalo*, 4 App. Div. 562, 38 N. Y. Supp. 510; *Buffalo v. Delaware, L. & W. R. Co.* 68 App. Div. 488, 74 N. Y. Supp. 343 (affirming in part 39 N. Y. Supp. 4); *New York v. De Peyster*, 120 App. Div. 762, 105 N. Y. Supp. 612; *Slaterry v. McCaw*, 44 Misc. 426, 90 N. Y. Supp. 52,—holding abutting owner could not acquire an interest in street as against public by adverse possession; *American Ice Co. v. New York*, 51 Misc. 114, 100 N. Y. Supp. 748, holding the granting of a qualified use of property to plaintiff did not prevent the city from appropriating the property at any time to its use as a public street; *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830, holding right of public in street dedicated to public could not be affected by subsequent possession of private party; *McClellan v. Weston*, 49 W. Va. 669, 55 L.R.A. 898, 39 S. E. 670, holding persons appropriating and inclosing part of public street to their own use held such possession subject to demands of the town; *Charlotte v. Pembroke Iron Works*, 82 Me. 391, 8 L.R.A. 828, 19 Atl. 902; *Woodruff v. Paddock*, 56 Hun. 288, 9 N. Y. Supp. 381,—on doctrine of adverse possession as having no application to public highways; *Lighton v. Syracuse*, 48 Misc. 134, 96 N. Y. Supp. 692, on abutting owner as acquiring no right in street by prescription.

Cited in notes in 48 A. R. 38, on adverse possession of street; 14 A. S. R. 279, on extinguishment of highway and other easement through nonuser or by operation of statute of limitations; 76 A. S. R. 494, on adverse possession of highways, streets, parks, etc.; 18 L.R.A. 149, on rights acquired against municipality by adverse possession of city street; 53 L.R.A. 901, on prescriptive right to maintain fences, buildings, and other structures in highways and places held for public use so as to cause a nuisance.

Abandonment of highway.

Cited in notes in 26 L.R.A. 449, 450, on abandonment of highway by nonuser or otherwise than by act of public authorities; 26 L.R.A. 466, on effect of encroachments, obstructions, etc., on highway as abandonment.

Legislative control of highways.

Cited in note in 26 L.R.A. 822, on legislative power to discontinue or vacate highway.

Title by adverse possession.

Cited in *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 A. R. 479, holding plaintiff did not by long continued use obtain a prescriptive right to easement, the possession being with defendant's consent; *Doherty v. Matsell*, 119 N. Y. 646, 2 Silv. Ct. App. 550, 23 N. E. 994 (affirming 24 Jones & S. 76, 1 N. Y. Supp. 426, which affirmed 16 N. Y. S. R. 593); *Lewis v. New York & H. R. Co.* 162 N. Y. 202, 56 N. E. 540,—on the acquirement of title by adverse possession.

Cited in notes in 35 A. D. 640, on ripening of privilege of licensee into right by lapse of time; 12 L.R.A.(N.S.) 1144, on right of one in permissive possession to acquire title by adverse possession.

Power of municipality to pass ordinances.

Cited in 34 A. D. 628, on general limitations on power of municipality to pass ordinances.

32 AM. REP. 290, ROHRSCHEIDER v. KNICKERBOCKER L. INS. CO. 76 N. Y. 216.

Right to avoid assessment for insurance on grounds of fraud.

Cited in *Corey v. Sherman*, 32 L.R.A. 490, on right of insured to defeat a suit for an assessment on the ground that he was induced by fraud to contract.

Acts of corporation amounting to fraud.

Cited in *Benedict v. Guardian Trust Co.* 58 App. Div. 302, 68 N. Y. Supp. 1082, holding action for deceit lies against a corporation for false representations contained in a prospectus issued by it, whereby plaintiff was induced to subscribe for stock; *Colton v. Stanford*, 82 Cal. 351, 16 A. S. R. 137, 23 Pac. 16, on fraudulent misrepresentations avoiding contract; *Dresser v. Hartford L. Ins. Co.* 80 Conn. 681, 70 Atl. 39, on action of insurance company amounting to fraud on policy holder.

Cited in notes in 85 A. S. R. 391, on liability for misrepresentations as to condition of corporations indirectly made to complaining party; 6 E. R. C. 816, on acts of corporation amounting to fraud.

Waiver of fraud by insurer.

Cited in note in 67 L.R.A. 738, on retention of policy as waiver of fraud by insurer or his agent as to matters outside of the policy and application.

Equitable suits against directors.

Cited in note in 4 L.R.A. 745, on equitable suits against directors.

32 AM. REP. 293, LAMBERT v. PEOPLE, 76 N. Y. 220, 6 ABB. N. C. 181.

What constitutes perjury.

Cited in *People ex rel. Hegeman v. Corrigan*, 129 App. Div. 62, 113 N. Y. Supp. 504, holding that to establish charge of perjury on affidavit made on information and belief, it must appear affidavit contained false statement and that person knew it was false; *Davenport v. Prentice*, 126 App. Div. 451, 110 N. Y. Supp. 1056, to point that knowledge is information and information knowledge and it is not confined to what has been personally observed.

Cited in notes in 85 A. D. 489, on intent as to falsity in perjury; 25 L.R.A. (N.S.) 659, on perjury in statements involving matters of opinion or belief.

— Perjury before usurping or de facto officer.

Cited in *Staight v. State*, 39 Ohio St. 496, holding a prosecution for perjury could not be maintained against a party taking a false oath against a de facto official.

Cited in note in 27 L. ed. U. S. 535, on necessity of lawful administration of oath by competent authority to convict of perjury.

Distinguished in *State v. Williams*, 61 Kan. 739, 60 Pac. 1050, holding a witness who swears falsely about a relevant matter before a de facto judge whose judgment is binding is guilty of perjury and liable to punishment for.

Requisites of indictment for perjury.

Cited in *People v. Gillette*, 126 App. Div. 665, 111 N. Y. Supp. 133, holding that indictment for perjury before grand jury must state specifically subject which was being investigated.

Cited in notes in 85 A. D. 498, on negating false matter in indictment for perjury; 59 A. D. 471; 124 A. S. R. 676,—on requisites of indictment for perjury in averments on information and belief.

Who is a de facto officer.

Cited in *Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265, holding party holding judicial office under a certificate of election from secretary of state is entitled to the compensation incident to the office, notwithstanding that a contest of the election is pending; *Buck v. Hawley*, 129 Iowa, 406, 105 N. W. 688, on what necessary to constitute party an officer de facto.

Validity of acts of de facto officials.

Cited in *Schiff v. Leipziger Bank*, 65 App. Div. 33, 72 N. Y. Supp. 513, holding an affidavit taken before a de facto notary is not a nullity; *People v. Ellenbogen*, 114 App. Div. 182, 99 N. Y. Supp. 897, holding proof showing officials administering were officers de facto, placed burden on defendants of showing they had not qualified; *Stillman v. Associated Lace Makers' Co.* 14 Misc. 503, 35 N. Y. Supp. 1071, holding service of summons on president de facto of a defendant corporation gives court jurisdiction of such corporation; *Terhune v. New York*, 88 N. Y. 247, 42 A. R. 248, holding the payment of the salary of an office to a de facto officer while he is holding the office and discharging its duties is a defense to action by de jure officer to recover the same salary.

Distinguished in *People v. Petrea*, 30 Hun, 98, 1 N. Y. Crim. Rep. 198, 64 How. Pr. 139, holding it not allowable to adduce evidence to impeach the enactment of a statute under which grand jury was drawn by alleged improper officer.

Proof of agency or office by act of claimant.

Cited in *People v. Dye*, 75 Cal. 108, 16 Pac. 537, holding mere declaration of a party not proof that he is the agent of another.

Liability for fraudulent representations by third person.

Cited in *Ashner v. Abenheim*, 19 Misc. 282, 43 N. Y. Supp. 69, holding a party to a contract referring the other to a third person for information concerning a matter connected with the contract is liable for any false representation made by such person; *Lehman v. Frank*, 19 App. Div. 442, 46 N. Y. Supp. 761, on right to hold one party responsible for the declarations of another.

32 AM. REP. 302, PEOPLE v. CRAPO, 76 N. Y. 288.**Competency of cross-examination of defendant as to other arrests or accusations.**

Cited in *Thompson v. United States*, 30 App. D. C. 352, 12 A. & E. Ann. Cas. 1004, holding it not proper on cross-examination of defendant to elicit information that defendant had been convicted of a crime where a new trial was granted; *People v. Gotshall*, 123 Mich. 474, 82 N. W. 274, holding on indictment for arson it was error to allow prosecution to ask defendant on cross-examination if he had not set numerous other fires; *People v. Bradt*, 46 Hun, 445, 7 N. Y. Crim. Rep. 444, 10 N. Y. Supp. 157, holding court erred in allowing evidence that defendant had been arrested for keeping a disorderly house, in prosecution for selling liquor without a license; *People v. Schewe*, 29 Hun, 122, 1 N. Y.

Crim. Rep. 360, holding defendant might be asked on cross-examination whether his license had been previously revoked for a violation of the excise law; *Bates v. State*, 60 Ark. 450, 30 S. W. 890; *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287,—holding cross-examination of defendant as to previous indictment and trial improper, it not appearing that he was convicted; *People v. Dorthy*, 20 App. Div. 308, 13 N. Y. Crim. Rep. 173, 46 N. Y. Supp. 970, holding it improper to require defendant on cross-examination to testify that he had been a member of a certain church and had been expelled; *State v. Shockley*, 20 Utah, 25, 110 A. S. R. 639, 80 Pac. 865, holding on prosecution for murder it was error to permit the state over defendant's objections to question him on cross-examination, respecting the commission of other crimes in no wise connected with the crime for which he was on trial; *Fossdahl v. State*, 89 Wis. 482, 62 N. W. 185, holding on prosecution for selling liquor without a license, one distinct offense being charged, the commission of similar offenses could not be shown even on the cross-examination of the defendant; *State v. Kent (State v. Pancoast)*, 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *State v. Kuhn*, 117 Iowa, 216, 90 N. W. 733 (dissenting opinion); *People v. Stephenson*, 11 N. Y. Crim. Rep. 80, 36 N. Y. Supp. 595; *People v. Courtney*, 31 Hun, 199, 1 N. Y. Crim. Rep. 557; *People ex rel Phelps v. Oyer & Terminal Ct.* 83 N. Y. 436; *People v. Stephenson*, 92 Hun, 613, 36 N. Y. Supp. 595; *State v. Bacon*, 13 Or. 143, 57 A. R. 8, 9 Pac. 393,—considering what may constitute proper cross-examination; *People v. Patrick*, 182 N. Y. 131, 19 N. Y. Crim. Rep. 136, 74 N. E. 843 (dissenting opinion), on the propriety of cross-examination of defendant as to previous arrest for crime.

Cited in notes in 38 A. S. R. 897, on cross-examination of accused as witness; 15 L.R.A. 674, on cross-examination of defendant in criminal cases.

Distinguished in *People v. Irving*, 95 N. Y. 541, 2 N. Y. Crim. Rep. 171 (affirming 31 Hun, 614, 2 N. Y. Crim. Rep. 47), holding upon trial of indictment for assault, defendant might be asked on cross-examination if he had made an assault upon another person; *People v. Noelke*, 94 N. Y. 137, 1 N. Y. Crim. Rep. 495, 46 A. R. 128 (affirming 29 Hun, 461, 1 N. Y. Crim. Rep. 252), holding same where on indictment for selling lottery tickets, party might be cross-examined as to whether or not he had been formerly arrested and convicted for sending lottery circulars through mail; *People v. McGrath*, 6 N. Y. Crim. Rep. 151, holding defendant might on cross-examination be interrogated as to distinct acts of criminality or misconduct tending to throw discredit on his testimony.

Explained in *Hanoff v. State*, 37 Ohio St. 178, 41 A. R. 496, holding on trial for murder that defendant might be properly asked on cross-examination if he had not once been arrested for an assault with intent to kill.

Disapproved in *Oxier v. United States*, 1 Ind. Terr. 85, 38 S. W. 331, holding witness might be asked on cross-examination if he had been arrested for larceny.

Evidence of res inter alios acta.

Cited in *People v. Betsinger*, 34 N. Y. S. R. 818, 11 N. Y. Supp. 916, holding on prosecution for rape where physician found the hymen absent in prosecutrix, evidence admissible on part of defendant that she had had sexual intercourse with others.

Admissibility of evidence of commission of other crimes by defendant.

Cited in *People v. Flanigan*, 42 App. Div. 318, 14 N. Y. Crim. Rep. 396, 59 N. Y. Supp. 101, holding evidence of previous assaults not admissible for pur-

pose of showing motive and intent on trial of husband for assaulting wife with deadly weapon; *People v. Sekeson*, 111 App. Div. 490, 97 N. Y. Supp. 917, holding in a prosecution for larceny of certain jewelry a confession by defendant that some months before he had stolen another piece of jewelry from another person was inadmissible; *People v. Goodman*, 43 Misc. 508, 89 N. Y. Supp. 522, holding a commission to take testimony of nonresident witnesses in a criminal case cannot be had to secure testimony that the complaining witness had been indicted and tried for murder; *People v. O'Sullivan*, 5 N. Y. S. R. 132, holding on indictment for rape it was incompetent to prove a previous attempt of defendant to commit rape; *Carnecross v. People*, 1 N. Y. Crim. Rep. 518, holding evidence of a proposal to witness to commit arson of a different building was error; *People v. Weber*, 130 App. Div. 593, 115 N. Y. Supp. 453 (dissenting opinion), on inadmissibility of evidence of other crimes for purpose of showing guilt of defendant.

Cited in note in 50 A. R. 99, on admissibility of evidence of commission of felonies to rebut evidence of truthfulness of prisoner.

Distinguished in *Pontius v. People*, 82 N. Y. 339, holding evidence properly received as showing motive although it tended to prove the commission of another crime.

Admissibility of evidence to impeach or discredit witness.

Cited in *Smith v. Mulford*, 42 Hun, 347, holding witness could not be asked on what charge he had formerly been arrested; *Kober v. Miller*, 38 Hun, 184, holding same where witness asked if he ever was indicted; *Lindsley v. Miller*, 3 App. Div. 127, 39 N. Y. Supp. 393, holding witness could not be asked whether he had not been charged with "crooked driving;" *Spiegel v. Hays*, 118 N. Y. 660, 22 N. E. 1105, 2 Silv. Ct. App. 428; *Ryan v. People*, 79 N. Y. 593; *Van Bokkelen v. Berdell*, 130 N. Y. 141, 29 N. E. 254,—holding it not competent to discredit a witness by showing simply that he had been indicted; *Hirschman v. Cohn*, 38 App. Div. 351, 56 N. Y. Supp. 602, holding witness cannot be impeached by compelling him to answer that he is the defendant named in an indictment which counsel declares he holds in his hands; *Wright v. People*, 1 N. Y. Crim. Rep. 462, holding witness cannot be asked if he has been arrested; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26; *Wallace v. State*, 41 Fla. 547, 26 So. 713,—on evidence admissible to impeach or discredit witness; *Eads v. State*, 17 Wyo. 490, 101 Pac. 946; *People v. Morrison*, 194 N. Y. 175, 128 Am. St. Rep. 552, 86 N. E. 1120; *People v. Morrison*, 195 N. Y. 116, 133 A. S. R. 780, 88 N. E. 21, 16 A. & E. Ann. Cas. 871,—holding evidence that witness was indicted inadmissible to impeach or discredit him.

Cited in reference note in 34 A. R. 263, on impeachment of prisoner who testifies.

Cited in notes in 88 A. D. 323, on inquiry on collateral and irrelevant matter for purpose of discrediting witness; 57 A. R. 19, on right of prosecuting attorney to ask witness whether he has ever been arrested; 82 A. S. R. 38, 39, on impeachment of witness by proof of character; 11 E. R. C. 157, on method of impeaching witness.

Discretion vested in trial court as to the admission or rejection of evidence.

Cited in *Penny v. Rochester R. Co.* 7 App. Div. 595, 40 N. Y. Supp. 172, on discretion vested in trial court on whether inquiries tending to disgrace a witness shall be excluded or admitted.

Privilege of witness.

Cited in note in 75 A. S. R. 334, 336, on privilege of witness as to incriminating testimony.

32 AM. REP. 306, CLARK v. BARNES, 76 N. Y. 301.**Validity of lease of agricultural lands for more than statutory time.**

Cited in *Waldo v. Jacobs*, 152 Mich. 425, 116 N. W. 371, holding lease of lands for twenty years placed in escrow is void where delivered more than twelve years prior to the date of expiration of the lease; *Massachusetts Nat. Bank v. Shinn*, 163 N. Y. 360, 57 N. E. 611, holding lease for twenty years of all the iron ore contained in, on or under a farm not invalid; *Parish v. Rogers*, 20 App. Div. 279 (affirming 40 N. Y. Supp. 1014), holding lease of agricultural lands for life of lessor and wife not void; *Wegner v. Lubenow*, 12 N. D. 95, 95 N. W. 442, on validity of leases of agricultural land.

Disapproved in *Robertson v. Hayes*, 83 Ala. 290, 3 So. 674, holding lease of land for a longer period than allowed by statute only void as to excess above the designated period.

Contracts exceeding statutory limit.

Cited in *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702, holding contract which provides for single improvement which exceeds in cost the amount allowed by statute, is void as to the excess only.

Leases construed as single term.

Cited in *Carling v. Purcell*, 46 N. Y. S. R. 287, 19 N. Y. Supp. 183, holding oral leases for a month and a year of the same premises would be construed as one transaction or one lease.

Evasion of constitutional provisions.

Cited in note in 32 A. R. 437, on evasion of constitutional provisions.

32 AM. REP. 309, RODERIGAS v. EAST RIVER SAV. INST. 76 N. Y. 316.**Effect of appointment of administrator upon estate of a living man.**

Cited in *Springer v. Shavender*, 116 N. C. 12, 47 A. S. R. 701, 33 L.R.A. 772, 21 S. E. 397, holding the appointment of an administrator upon the estate of a living man is void for all purposes.

Cited in reference notes in 40 A. R. 12, on validity of administration on estate of living person; 60 A. D. 530, as to when letters of administration may be granted on estate of living persons; 15 A. S. R. 497, on sufficiency of payment of debt to administrator of creditor.

Cited in notes in 73 A. D. 126, 127, on administration on estate of living person; 18 L.R.A. 243, on validity of administration of estate of living person; 21 L.R.A. 150, on validity of acts done by executor or administrator under letters testamentary or of administration where testator or intestate subsequently proved to be alive.

Disapproved in *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, holding order of court appointing an administrator for person in fact alive and acts administrator under same void.

Cited as overruled in *Re Killan*, 172 N. Y. 547, 63 L.R.A. 95, 65 N. E. 561, 33 N. Y. Civ. Proc. Rep. 241, holding judicial settlement of administrator's accounts void as against interested parties not cited or appearing therein.

Void judgments as protection to strangers.

Cited in *Levy v. Melody*, 50 Misc. 509, 99 N. Y. Supp. 153, on judgments void as to parties being valid as to protect ministerial officers.

Collateral attack on judgments.

Cited in *Chauncey v. Wass*, 35 Minn. 1, 30 N. W. 826 (dissenting opinion on rehearing), on judgment of courts as when not subject to attack; *Murad v. Thomas*, 66 How. Pr. 100, on right to question validity of order of court; *Re Bergmann*, 110 App. Div. 588, 97 N. Y. Supp. 346, holding a fraudulent adjudication of insanity by foreign court of resident of this state not binding here.

Cited in note in 80 A. S. R. 482, on collateral attack upon forged or altered entries.

— Probate and administration decrees.

Cited in *Schulter v. Bowery Sav. Bank*, 117 N. Y. 125, 15 A. S. R. 494, 5 L.R.A. 541, 22 N. E. 572, holding persons dealing with administrator protected the court having jurisdiction to grant letters of administration; *Bolton v. Schriever*, 135 N. Y. 65, 18 L.R.A. 242, 29 Abb. N. C. 300, 31 N. E. 1001; *Bolton v. Schriever*, 26 Abb. N. C. 234, 19 N. Y. Civ. Proc. 398, 26 Jones & S. (N. Y.) 520, 12 N. Y. Supp. 918,—holding determination by surrogate of inhabitancy of deceased is conclusive; *Murzynowski v. Delaware, L. & W. R. Co.* 39 N. Y. S. R. 299, 15 N. Y. Supp. 841, holding decision of surrogate's court cannot be attacked collaterally when court has jurisdiction; *Brown v. Landon*, 30 Hun, 57, holding the court having jurisdiction the granting of ancillary letters of administration, was not subject to collateral attack.

Cited in note in 81 A. S. R. 544, 545, on collateral attack on right of acting administrator where testator or intestate is not dead.

Validity and effect of letters of administration.

Cited in *Brown v. Landon*, 4 N. Y. Civ. Proc. Rep. 11, on letters of administration as conclusive of rights of administrator under them.

Cited in note in 79 A. D. 65, on validity of grant of administration.

Letters of administration as evidence of death of intestate.

Cited in *Ruoff v. Greenpoint Sav. Bank*, 40 Misc. 549, 82 N. Y. Supp. 881, holding letters of administration are in and of themselves prima facie evidence of the death of the person on whose estate they are granted; *Re Brewster*, 5 Dem. 259, on sufficiency of proof of decedent's intestacy.

Proof of death.

Cited in note in 91 A. D. 529, on proof of death.

Jurisdiction of surrogate court.

Cited in *O'Connor v. Higgins*, 16 N. Y. S. R. 130, 1 N. Y. Supp. 377; *People ex rel. James v. Surrogates Ct.* 36 Hun, 218, 16 Abb. N. C. 241,—on the jurisdiction of a surrogate's court; *Westervelt v. Westervelt*, 14 Jones & S. 298, on party relying on surrogate's order as having the burden of proving jurisdictional facts.

Distinguished in *Knox v. Nobel*, 77 Hun, 230, 23 N. Y. Civ. Proc. Rep. 429, 28 N. Y. Supp. 355, holding the jurisdiction of a surrogate to appoint an administrator does not in any way depend upon any inquiry as to the age of the proposed administrator.

Jurisdiction dependent on finding of facts.

Cited in *Re Buffalo*, 78 N. Y. 362, on jurisdiction of court as depending on finding of jurisdictional facts.

— **In administration proceedings.**

Cited in *Czech v. Bean*, 35 Misc. 729, 72 N. Y. Supp. 402, on jurisdictional facts necessary to the appointment of administrator; *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61, on jurisdiction of court as regards administration of estates how acquired.

Want of jurisdiction as grounds for appeal.

Cited in *Wright v. Hayden*, 31 Misc. 116, 63 N. Y. Supp. 796, on want of jurisdiction as ground for appeal in settlement of estate of decedent.

Validity of decree without authority of court.

Cited in *Dorrance v. Henderson*, 27 Hun, 206 (dissenting opinion), on stay of judgment without authority of court as being void.

Justification of officers by process.

Cited in note in 21 A. D. 190, on justification of officers by their process.

Effect of affidavit on information and belief as to facts required to be proved.

Cited in *Thompson's Estate*, 1 N. Y. Civ. Proc. Rep. 264, holding petition for letters of administration based upon information and belief insufficient; *Roosevelt v. Edson*, 19 Jones & S. 227; *Martin v. Gross*, 24 Jones & S. 512, 16 N. Y. Civ. Proc. 235, 4 N. Y. Supp. 337; *People v. Snaith*, 57 Hun, 332, 10 N. Y. Supp. 589; *Re Parrish*, 28 App. Div. 22, 50 N. Y. Supp. 735; *Re Leslie*, 19 Misc. 667, 44 N. Y. Supp. 1103,—holding affidavit made solely on information and belief which does not state the sources of such information is insufficient; *Re Hopkins*, 110 App. Div. 907, 96 N. Y. Supp. 941 (dissenting opinion), on affidavit stating facts as upon information and belief as being insufficient.

32 AM. REP. 315, CUSHMAN v. THAYER MFG. JEWELRY CO. 76 N. Y. 365.

Specific enforcement of rights in chattels.

Cited in *Morgenstern v. Burkhardt*, 9 Misc. 417, 30 N. Y. Supp. 215, holding complete remedy at law precluded action to compel execution of agreement, evidencing right to share in profits; *Earle v. Gorham Mfg. Co.* 2 App. Div. 460, 37 N. Y. Supp. 1037, holding want of like remedy allowed action to enforce possessory rights under a chattel mortgage; *Ridenbaugh v. Thayer*, 10 Idaho, 662, 80 Pac. 229, holding inadequacy of legal remedy may permit action to enforce contract for sale of chattels.

Cited in note in 6 E. R. C. 646, on specific performance of contracts concerning chattels.

Specific enforcement of rights in corporate shares.

Cited in *Scruggs v. Cotterill*, 67 App. Div. 583, 73 N. Y. Supp. 882, holding agreement between shareholders, giving each the first option in case of a sale or death, may be enforced.

Cited in reference note in 30 A. S. R. 668, on rights of holders of certificates of stock.

Cited in notes in 12 L.R.A. 776, on specific performance of contracts to sell corporate stock; 50 L.R.A. 503, on jurisdiction over specific performance of contract for sale of stock in corporation.

— **Compelling transfer on books and issuance of new certificate.**

Cited in *Ernst v. Elmira Municipal Improv. Co.* 24 Misc. 583, 54 N. Y.

Supp. 116, holding transferee may maintain action to compel company to transfer stock on its books; *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632, on right to relief in grantee in a deed, which reversed life estate in shares granted; *Gilkinson v. Third Ave. R. Co.* 47 App. Div. 472, 63 N. Y. Supp. 792, holding a donee may be given like relief against both the corporation and executor of donor; *Evins v. Cawthon*, 132 Ala. 184, 31 So. 441, holding an owner may sue for like relief after a sale; *Rice v. Rockefeller*, 134 N. Y. 174, 30 A. S. R. 658, 17 L.R.A. 237, 29 Abb. N. C. 120, 31 N. E. 907, holding transferee of shares in a trust agreement may bring action against association to compel entry on books; *Keller v. Eureka Brick Mach. Mfg. Co.* 43 Mo. App. 84, 11 L.R.A. 472, holding owner of lost certificate may bring action against corporation to compel issuance of a duplicate; *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582, on right of owner of corporate stock to maintain action to compel officer to sign a certificate; *Iron R. Co. v. Fink*, 41 Ohio St. 321, 52 A. R. 84; *Freon v. Carriage Co.* 42 Ohio St. 30, 51 A. R. 794,—on power of equity to furnish relief on refusal to transfer stock; *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504, on extent of like power; *Snyder v. Charleston & S. Bridge Co.* 65 W. Va. 1, 131 A. S. R. 947, 63 S. E. 616, holding that equity has jurisdiction in suit against corporation to compel it to issue certificate of stock to owner; *Sherman v. Herr*, 220 Pa. 420, 69 Atl. 899, holding that if stock purchased is not procurable in market and is of peculiar value to purchaser, action lies to compel specific performance; *Smith v. Walkerville Malleable Iron Co.* 23 Ont. App. 95, to the point that holder of shares of stock may maintain action for refusal to transfer same on company's books.

Cited in reference notes in 57 A. D. 521, on compelling transfer of stock on books; 36 A. R. 675, on right of assignee of stock to compel transfer on books of corporation.

Cited in note in 133 Am. St. Rep. 726, 730, on compelling issue of stock; 136 Am. St. Rep. 1030, 1040, on duty of corporations to transfer stock on their books.

Equitable remedy as to corporate stocks when legal remedy is inadequate.

Cited with special approval in *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084, holding absence of market value of stock, purchased for investment, and inability to purchase other shares allows enforcement of return against pledgee.

Cited in *Moses v. Scott*, 84 Ala. 608, 4 So. 742, on absence of legal remedy as a ground for enforcing a contract; *Walker v. Detroit Transit R. Co.* 47 Mich. 338, 11 N. W. 187, holding want of adequate remedy at law allows action to compel cancellation of unlawful transfer of stock and issuance of new certificates; *Eckstein v. Downing*, 64 N. H. 248, 10 A. S. R. 404, 9 Atl. 626, holding an adequate remedy at law was a bar to enforcement of contract to sell stock; *Everett v. DeFontaine*, 78 App. Div. 219, 79 N. Y. Supp. 692, holding specific performance of contract to deliver stock and money dependent on inadequacy of remedy at law; *Johnson v. Brooks*, 93 N. Y. 337, holding same as to contract to purchase and deliver stocks and bonds; *Jahn v. Reynolds*, 115 App. Div. 647, 101 N. Y. Supp. 293, holding inadequacy of remedy at law may permit action to cancel an exchange of stock; *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931, holding same may permit action to rescind trust agreement as to stock; *New England Trust Co. v. Abbott*, 162 Mass. 148, 27

L.R.A. 271, 38 N. E. 432, holding same as to action by corporation to enforce contract for option in case of death of owner of certificates; Kennedy v. Thompson, 97 App. Div. 296, 89 N. Y. Supp. 963, holding same must be alleged in action for enforcement of contract by corporation to issue stock; Toronto General Trust Co. v. Chicago, B. & Q. R. Co. 32 Hun, 190, holding action for transfer of stock at local office of foreign corporation arose within state and was maintainable; Sherwood v. Wallin, 1 Cal. App. 532, 82 Pac. 566, holding possible loss of control and inability to purchase other stock allowed enforcement of trust agreement as to shares; Bedford v. American Aluminum & Specialty Co. 51 App. Div. 537, 64 N. Y. Supp. 856, holding possible loss of control allowed action against fraudulent director to compel reissue of stock, surrendered for that purpose; Baker v. Wasson, 59 Tex. 140, on right to maintain action to compel corporation to issue new certificate for stock, unlawfully cancelled.

Distinguished in Ringler v. Jetter, 35 Misc. 750, 72 N. Y. Supp. 362, where right to specific performance of sale of stock was lost by laches.

— **Alternative prayer for damages or specific relief.**

Cited in Jones v. Missouri Edison Electric Co. 75 C. C. A. 631, 144 Fed. 705, holding prayer may be in the alternative for restoration of specific stock or its value.

Transfers of securities without registration on books of corporation.

Cited in Thompson v. Hudgins, 116 Ala. 93, 22 So. 632, holding execution of a deed, with reservation of life estate to owner of stock, vested at least a beneficial ownership; Weller v. J. B. Pace Tobacco Co. 2 N. Y. Supp. 292, holding delivery of certificates, with assignment and power indorsed, passed title as against attaching creditors; Cherry v. Frost, 7 Lea, 1, holding like transferee under a pledge may pass a better title to an innocent sub-assignee as against owner; Nicolle Nat. Bank v. City Bank, 38 Minn. 85, 8 A. S. R. 643, 35 N. W. 577, holding assignment and delivery of certificates effective against all parties, not showing a superior right; Fitchburg Sav. Bank v. Torrey, 134 Mass. 239, holding like assignment passes entire interest as between the parties; Williams v. Western U. Teleg. Co. 16 Jones & S. 349, on same point; Brissell v. Knapp, 155 Fed. 809, holding an assignment of certificates, in hands of trustee under pooling agreement, passed equitable but not legal title to shares; People ex rel. Krohn v. Miller, 39 Hun, 557, 9 N. Y. Civ. Proc. Rep. 149, holding membership certificate in a cotton exchange transferable between parties without registration, though contra as to corporation and other members.

Distinguished in Allen-West Commission Co. v. Grumbles, 63 C. C. A. 401, 129 Fed. 287, holding written assignment of stock ineffective while donor retained certificates; Molson's Bank v. Boardman, 47 Hun, 135, denying that beneficiary of registered title holder could be held as a stockholder.

Disapproved in Baltimore Retort & Fire Brick Co. v. Mali, 65 Md. 93, 57 A. R. 304, 3 Atl. 286, holding actual transfer on books of corporation essential to assignment of stock.

Right to mandamus.

Cited in note in 3 L.R.A. 265, on rule that mandamus is issued only for public purposes.

— **To compel transfer of stock on corporate books.**

Cited in Tobey v. Hakes, 54 Conn. 274, 1 A. S. R. 114, 7 Atl. 551, holding

it unavailable; *People ex rel. Rottenberg v. Utah Gold & C. Mines Co.* 135 App. Div. 418, 119 N. Y. Supp. 852, holding that mandamus does not lie against corporation to compel transfer of stock, holder's remedy being by action.

Specific performance.

Cited in *Herrick v. Throop*, 24 Fed. 532, on its character as a matter of equitable cognizance.

Pleading adequacy of remedy at law.

Cited in *Everett v. De Fontaine*, 78 App. Div. 219, 79 N. Y. Supp. 692, holding it unnecessary where want of such remedy is an essential part of plaintiff's case.

32 AM. REP. 321, RATHBURN v. CITIZENS' S. S. CO. 76 N. Y. 376.

Right of agent to accept check for a collection.

Cited in *Industrial Trust, Title & Sav. Co. v. Weakley*, 103 Ala. 458, 49 A. S. R. 45, 15 So. 854, denying right to accept such a payment.

Ratification of improper collections by agents.

Cited in *Union Nat. Bank v. Citizens' Bank*, 153 Ind. 44, 54 N. E. 97, holding acceptance of sight draft from bank, collecting a note, was evidence of ratification.

Distinguished in *Shepard v. Davis*, 42 App. Div. 462, 59 N. Y. Supp. 456, where payment of commission to insurance broker was held no bar to action for negligence.

32 AM. REP. 325, THORPE v. NEW YORK C. & H. R. R. CO. 76 N. Y. 402.

Duties of carriers as to accommodations for passengers.

Cited in *Jenkins v. Brooklyn Heights R. Co.* 29 App. Div. 8, 51 N. Y. Supp. 216, holding street railway bound to furnish a safe place and comfortable accommodations; *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 17 A. S. R. 611, 8 L. R. A. 224, 24 N. E. 319, holding railroad must provide usual accommodations and protect from injuries.

Cited in reference note in 4 A. S. R. 780, on carrier's duty to furnish passenger with seat.

Cited in notes in 28 A. R. 202, on liability for ejecting passenger from drawing-room car upon refusal to pay extra when he cannot find seat in ordinary car; 22 L.R.A. 259, on right of passenger to seat.

Sleeping cars as part of train.

Cited in *Cleveland, C. C. & I. R. Co. v. Walrath*, 38 Ohio St. 461, 43 A. R. 433; *De Long v. Delaware, L. & W. R. Co.* 37 Hun, 282,—holding railroad was liable for falling of upper berth in sleeping car.

Cited in notes in 21 L.R.A. 297, on liability of railroad company to passengers on sleeping cars; 23 L.R.A.(N.S.) 1057, on liability of railroad for acts of employee of sleeping or Pullman car company toward passengers.

Liabilities of sleeping car companies.

Cited in reference notes in 32 A. R. 57, on sleeping car company's liability for breach of contract for through transportation in same car; 21 A. S. R. 647, on rights, duties, and liabilities of sleeping car companies.

Cited in notes in 5 A. S. R. 38, on sleeping car company's liability for injury

to passenger; 26 A. S. R. 334, on liability of sleeping car company for negligence; 26 A. S. R. 340, as to when passenger is not trespasser in sleeping car. **Negligence in riding in baggage car.**

Cited in *Lane v. Choctaw, O. & G. R. Co.* 19 Okla. 324, 91 Pac. 883, holding person occupying seat in baggage car on mixed train, not guilty of negligence per se.

Persons regarded as servants of carrier.

Cited in *Penfield v. Cleveland, C. C. & St. L. R. Co.* 26 App. Div. 413, 50 N. Y. Supp. 79, holding officer at station operated by a distinct corporation was carrier's servant.

Distinguished in *Cain v. Syracuse, B. & N. Y. R. Co.* 20 Misc. 459, 45 N. Y. Supp. 538, holding conductor of lessee of trackage was not servant of lessor as to conduct at grade crossing; *Patton v. McDonald*, 204 Pa. 517, 54 Atl. 356, 33 Pittsb. L. J. N. S. 16, where assignor of a government contract was held not liable for injuries to servant, employed by him for corporate assignee.

— Sleeping and parlor car employees.

Cited in *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 17 A. S. R. 611, 8 L.R.A. 224, 24 N. E. 319 (reversing 45 Hun, 139); *Williams v. Pullman Palace Car Co.* 40 La. Ann. 417, 8 A. S. R. 538, 4 So. 85; *Nashville, C. & St. L. R. Co. v. Lillie*, 112 Tenn. 331, 105 A. S. R. 947, 78 S. W. 1055,—holding porter of sleeping car was a servant; *Evansville & T. H. R. Co. v. Athon*, 6 Ind. App. 295, 51 A. S. R. 303, 33 N. E. 469, holding same as to conductor of sleeping car; *Louisville & N. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554, holding same as to both conductor and porter of a sleeping car; *Weeks v. Auburn & S. E. R. Co.* 60 Misc. 400, 113 N. Y. Supp. 636, to the point that railroad was liable for assault committed on passenger by porter of drawing-room car.

Distinguished in *Ulrich v. New York C. & H. R. R. Co.* 108 N. Y. 80, 2 A. S. R. 369, 15 N. E. 60 (reversing 13 Daly, 129), holding act of conductor of drawing-room car could not affect special contract with gratuitous passenger; *Jones v. St. Louis S. W. R. Co.* 125 Mo. 666, 46 A. S. R. 514, 26 L.R.A. 718, 28 S. W. 883, holding porter of sleeping car was not a co-servant of engineer and conductor on same train; *Blake v. Kansas City S. R. Co.* 38 Tex. Civ. App. 337, 85 S. W. 430, holding sleeping car conductor was not an employee as respects conduct towards a trespasser.

Liability for acts of another.

Cited in *Deming v. Terminal R. Co.* 49 App. Div. 493, 63 N. Y. Supp. 615, holding existence of a public duty obviates necessity of relationship of master and servant.

Cited in notes in 55 A. D. 317, on liability of master or principal for negligence or misconduct of servant or agent; 55 A. D. 321, on liability of employer for acts or negligence of contractor; 66 L.R.A. 141, on liability of railway company for acts of independent contractor where injuries result from employer's nonperformance of absolute duties in respect to operation of completed plant.

— Applicability of doctrine of respondeat superior.

Cited in *Flinn v. World's Dispensary Medical Asso.* 64 App. Div. 490, 72 N. Y. Supp. 243; *Wyllie v. Palmer*, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381,—holding relation of master and servant must be shown to exist at the time and in respect to the very transaction.

Cited in note in 37 L.R.A. 82, on which of two or more persons is master of another conceded to be the servant of one of them.

32 AM. REP. 330, WHITED v. GERMANIA F. INS. CO. 76 N. Y. 415.

Agents as representatives of insurers or insured under stipulations of policy.

Cited in *Smith v. Home Ins. Co.* 47 Hun, 30, holding provision in fire policy making procurer the agent of insured in all matters ineffective in case of voluntary communications by insured; *Bell v. Lycoming F. Ins. Co.* 19 Hun, 238, on unsettled condition of law as to effect of like provision; *Allen v. German-American Ins. Co.* 123 N. Y. 6, 25 N. E. 309, on effectiveness of like provision to change character of company's agent; *Putnam v. Commonwealth Ins. Co.* 18 Blatchf. 368, 4 Fed. 753, holding like provision could not alter character of company's agent; *Von Wein v. Scottish Union & Nat. Ins. Co.* 20 Jones & S. 490, holding provision did not authorize procuring broker to receive notice of cancelation; *O'Farrell v. Metropolitan L. Ins. Co.* 22 App. Div. 495, 48 N. Y. Supp. 199, holding stipulation in life application that it was made by insured or his agent was waived in case of preparation by company's agent; *Sternaman v. Metropolitan L. Ins. Co.* 170 N. Y. 13, 88 A. S. R. 625, 57 L.R.A. 318, 62 N. E. 763, holding life application could not make medical examiner the agent of insured; *Supreme Lodge, K. P. v. Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611; *Brown v. Supreme Court, I. O. F.* 66 App. Div. 259, 72 N. Y. Supp. 806 (affirming 34 Misc. 556, 70 N. Y. Supp. 397),—holding laws of fraternal society could not make local secretary the agent of members; *Murphy v. Independent Order, S. & D. of J. A.* 77 Miss. 830, 50 L.R.A. 111, 27 So. 624, holding same in case of an attempt to create like agency on part of subordinate lodge; *Bushaw v. Woman's Mut. Ins. & Acci. Co.* 3 Silv. Sup. Ct. 591, 28 N. Y. S. R. 524, 8 N. Y. Supp. 423, holding laws of an accident association could not alter character of own agents.

Cited in notes in 77 A. D. 726, on effect of stipulations seeking to make agent of insurer agent of assured; 20 L.R.A. 285, as to when insurance agent is agent of assured as to waiver of conditions in policy.

Explained in *Bernard v. United Life Ins. Asso.* 12 Misc. 10, 33 N. Y. Supp. 22; *Bernard v. United Life Ins. Asso.* 17 Misc. 115, 39 N. Y. Supp. 356,—holding provision in life application making procurer the agent of insured inapplicable to persons acting within authority.

Criticised in *Dimick v. Metropolitan L. Ins. Co.* 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291, holding provision in life application that one filling in answers was agent of insured was at least effective as a limitation on powers.

Agency implied from countersignature to bind insurer.

Cited in *Mowry v. Agricultural Ins. Co.* 64 Hun, 137, 18 N. Y. Supp. 834, holding finding of agency justified by indorsement on policy that certain person was agent; *Farnum v. Phoenix Ins. Co.* 83 Cal. 246, 17 A. S. R. 233, 23 Pac. 869, holding authority to countersign by terms of policy is evidence of agency; *Getchell & M. Lumber & Mfg. Co. v. Peterson*, 124 Iowa, 599, 100 N. W. 550, on power to countersign and issue policies as evidence of an agency.

Knowledge of agent as affecting insurer.

Cited in *Berry v. American Cent. Ins. Co.*, 5 Silv. Sup. Ct. 242, 8 N. Y. Supp.

762; *McNierney v. Agricultural Ins. Co.* 48 Hun, 230,—holding authority of fire agent was such as to impute to insurer any knowledge acquired.

Cited in notes in 11 L.R.A. 343, on knowledge of insurance agent as knowledge of company; 9 A. S. R. 234, on applications for insurance made out by agents.

Estoppel of insurer by agent's acts.

Cited in reference note in 78 A. S. R. 420, on estoppel of insurance company by agent's acts.

Cited in note in 13 L.R.A. (N.S.) 850, on estoppel in pais by acts of agent where policy contains non-waiver agreement.

Waiver of conditions in insurance policies.

Cited in *Stewart v. Union Mut. L. Ins. Co.* 155 N. Y. 257, 42 L.R.A. 147, 49 N. E. 876, holding provision in life policy requiring immediate payment of premium was waived by agent's delivery of policy on credit; *Pomeroy v. Rocky Mountain Ins. & Sav. Inst.* 9 Colo. 295, 59 A. R. 144, 12 Pac. 153, holding renewal of policy was waiver of known ground of forfeiture for intemperance.

Cited in note in 27 A. R. 598, on waiver of condition in insurance policy.

—As to conditions in fire policies.

Cited in *New York Mut. Sav. & L. Asso. v. Westchester F. Ins. Co.* 110 App. Div. 760, 97 N. Y. Supp. 436, holding vacancy clause was waived by agent's issuance of policy with knowledge of violation; *Putnam v. Commonwealth Ins. Co.* 18 Blatchf. 368, 4 Fed. 753; *London & L. F. Ins. Co. v. Fischer*, 34 C. C. A. 503, 92 Fed. 500,—holding same as to clause relating to additional insurance; *Couch v. Rochester German F. Ins. Co.* 25 Hun, 409, holding same as to clause relating to use of head-light oil and running of factory at night; *Farnum v. Phoenix Ins. Co.* 83 Cal. 246, 17 A. S. R. 233, 23 Pac. 869, holding issuance of policy was a waiver of clause, requiring immediate payment of premium, though policy required waiver in writing.

—As to misstatements of title or interest.

Cited in *Forward v. Continental Ins. Co.* 142 N. Y. 382, 25 L.R.A. 637, 37 N. E. 615; *Miaghan v. Hartford F. Ins. Co.* 24 Hun, 58; *Berry v. American Cent. Ins. Co.* 5 Silv. Sup. Ct. 242, 30 N. Y. S. R. 53; *Wood v. American F. Ins. Co.* 78 Hun, 109, 29 N. Y. Supp. 250,—holding clause as to nature of title waived by issuance with knowledge of breach.

—Where policy requires written or indorsed waiver.

Cited in *German-American Ins. Co. v. Yeagley*, 163 Ind. 651, 71 N. E. 897, 2 A. & E. Ann. Cas. 275; *Robbins v. Springfield F. & M. Ins. Co.* 149 N. Y. 477, 44 N. E. 159,—holding clause as to condition of title was waived by agents' issuance of policy with knowledge of violation, though policy required waiver in writing; *American Cent. Ins. Co. v. McCrea*, 8 Lea, 513, 41 A. R. 647, on renewal of policy with notice of like violation as a waiver under like circumstances; *Manchester v. Guardian Assur. Co.* 151 N. Y. 88, 56 A. S. R. 600, 45 N. E. 381, upholding parol agreement to indorse consent to change of title on policy in possession of insurer; *Lamberton v. Connecticut F. Ins. Co.* 39 Minn. 129, 1 L.R.A. 222, 39 N. W. 76, holding clause requiring waiver in writing did not preclude parol consent to vacancy after issuance of policy.

Cited in note in 107 A. S. R. 133, on failure to indorse waivers of conditions and forfeitures as expressly required by policy.

Distinguished in *Tompkins v. Hartford F. Ins. Co.* 22 App. Div. 380, 49 N.

Y. Supp. 184, holding parol agreement, after issuance of policy, could not waive provision requiring indorsement of consent to mortgage; *Gray v. Germania F. Ins. Co.* 155 N. Y. 180, 49 N. E. 675, holding mere notice of future intention could not waive similar requirement in case of additional insurance.

Forfeiture of insurance policy.

Cited in note in 35 A. R. 126, on forfeiture of policy for nonpayment of premium.

Applicability of provision requiring waiver to be indorsed on policy.

Cited in *Dibrell v. Georgia Home Ins. Co.* 110 N. C. 193, 28 A. S. R. 678, 14 S. E. 783; *Okey v. State Ins. Co.* 29 Mo. App. 105,—holding it inapplicable to acts to be performed after loss.

Authority of insurance agent to waive conditions.

Cited in *O'Brien v. Prescott Ins. Co.* 134 N. Y. 28, 31 N. E. 265, holding general agent could consent that property might remain vacant in absence of restriction; *Home Ins. Co. v. Duke*, 84 Ind. 253, holding agent with authority to issue policies could waive condition as to statement that building was on leased land; *Farnum v. Phenix Ins. Co.* 83 Cal. 246, 17 A. S. R. 233, 23 Pac. 869, holding like agent may waive conditions precedent to liability, including clause requiring waiver in writing.

Cited in notes in 42 A. R. 624, on authority of agent as to conditions in insurance policy; 10 L.R.A.(N.S.) 1075, on power of agents to bind insurer by oral waiver or estoppel in pais as to forfeitures occurring after issuance of policy and before loss, under policies requiring consent and waiver to be in writing.

32 AM. REP. 335, NEWTON v. MUTUAL BEN. L. INS. CO. 76 N. Y. 426.

Construction of exemptions in insurance policies against death by suicide.

Cited in *Blackstone v. Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L.R.A. 486, 42 N. W. 156, holding self destruction by uncontrollable impulse from insanity was not death by suicide; *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 61 A. S. R. 123, 48 N. E. 59, holding self destruction not suicide where there was uncontrollable impulse from insanity or inability to understand character and consequences of act; *Meacham v. New York State Mut. Ben. Asso.* 120 N. Y. 237, 24 N. E. 283 (affirming 46 Hun, 363), holding self destruction is suicide unless there was accident, mistake, insanity or insane impulse, preventing control of actions; *Penfold v. Universal L. Ins. Co.* 85 N. Y. 317, 39 A. R. 660, holding "death by his own hand or act, voluntary or otherwise" did not include accidental death through taking of poison, while sane; *Koch v. Fox*, 71 App. Div. 288, 75 N. Y. Supp. 913, on ineffectiveness of exemption if insured should "die by his own hand" where there was an uncontrollable insane impulse, though accompanied by knowledge of consequences; *Knights Templars' & M. Life Indemnity Co. v. Jarman*, 44 C. C. A. 93, 104 Fed. 638 (dissenting opinion), on ineffectiveness of exemption as to "death by one's own hand" or "suicide," where there was insanity to such an extent that nature or consequences of act were not understood.

Cited in reference note in 8 A. S. R. 885, on effect of provision in insurance policy against liability for death by own hand.

Cited in notes in 59 A. D. 494, on effect of insanity on condition in life insur-

ance policy against suicide; 84 A. S. R. 548, on insanity of insured as affecting defense of suicide; 3 L.R.A. 487, on effect of suicide clause in life policy.

Distinguished in *Scherar v. Prudential Ins. Co.* 63 Neb. 530, 56 L.R.A. 611, 88 N. W. 637, holding mental condition immaterial where policy provided for exemption in case of suicide "whether sane or insane;" *Scarth v. Security Mut. L. Soc.* 75 Iowa, 346, 39 N. W. 658, holding same where there was like exemption in case of suicide "felonious or otherwise, sane or insane;" *Tritschler v. Keystone Mut. Ben. Asso.* 180 Pa. 205, 36 Atl. 734, on same point.

— Evidence of insane impulse.

Cited in *Meacham v. New York State Mut. Ben. Asso.* 46 Hun, 363, holding certain evidence was sufficient to sustain finding.

Cited in note in 35 L.R.A. 262, on capacity to understand the moral character of act as test in determining liability on policy on life of one committing suicide.

32 AM. REP. 337, PEOPLE EX REL. BRISBANE v. BUFFALO, 76 N. Y. 558.

Municipal power over nuisances.

Cited in note in 38 L.R.A. 171, on municipal power over wooden and frame buildings as nuisances.

Municipal liability for acts of officers and servants.

Cited in note in 32 A. R. 620, on municipal liability for acts of officers and servants.

32 AM. REP. 342, DEVEREUX v. BUCKLEY, 34 OHIO ST. 16.

Measure of damages for carrier's delay in delivery.

Cited in note in 11 A. S. R. 366, on measure of damages for injury to goods by delay in transportation.

32 AM. REP. 345, WORK v. CORRINGTON, 34 OHIO ST. 64.

Obligation of states to honor requisition for fugitive criminal.

Cited in *Wilcox v. Nolze*, 34 Ohio St. 520, holding both governor and courts limited to inquiry as to whether act is punishable as crime in other state.

Cited in notes in 57 A. D. 393, on executive's discretion in causing arrest and delivery of fugitives from justice in another state; 68 A. S. R. 131, on nature of duty or obligation of one state to surrender person demanded by authorities of another; 68 A. S. R. 132, 133, as to when refusal by one state to surrender persons demanded by authorities of another is proper.

Sufficiency of papers and warrant for extradition.

Cited in reference note in 8 A. S. R. 443, on sufficiency of papers and warrant for extradition.

Cited in note in 28 L.R.A. 801, on papers necessary to obtain surrender of fugitive in another state.

Review on habeas corpus of extradition proceedings.

Cited in *Ex parte Devine*, 74 Miss. 715, 22 So. 3, holding inquiry as to guilt or innocence not permitted in a habeas corpus proceeding; *Ex parte Larney*, 4 Ohio N. P. 304, holding on habeas corpus the alleged fugitive may prove that he was not in the demanding state and not fugitive, but he may not prove an alibi to the charge.

Cited in reference note in 65 A. S. R. 556, on review by habeas corpus of extradition warrant.

Cited in note in 21 L.R.A.(N.S.) 940, on right, in reviewing extradition proceedings, to be heard upon merits of charge.

Revocation of warrants of extradition.

Cited in *State ex rel. Nisbett v. Toole*, 69 Minn. 104, 65 A. S. R. 553, 38 L.R.A. 224, 72 N. W. 53, holding governor may revoke his warrant at any time before prisoner is taken from state.

Cited in reference note in 66 A. S. R. 556, on revocation of extradition warrant.

Cited in note in 112 A. S. R. 142, on right of executive to revoke extradition warrant.

Constitutional limitations as to interstate extradition.

Cited in *Re Mohr*, 73 Ala. 503, 49 A. R. 63, holding auxiliary but not repugnant legislation permitted to states.

Cited in note in 41 L. ed. U. S. 1048, on international and interstate extradition.

Executive practice as criterion of statutory construction.

Distinguished in *State v. Vanderbilt*, 37 Ohio St. 590, where there had been no uniform interpretation by executive officers.

Validity of pardons obtained by fraud.

Explained in *Knapp v. Thomas*, 39 Ohio St. 377, 45 A. R. 462, holding an absolute pardon could not be impeached for fraud in a habeas corpus proceeding.

32 AM. REP. 359, WHIPP v. STATE, 34 OHIO ST. 87.

Right of one spouse to testify against the other.

Cited in *Ohio v. Smith*, 7 Ohio N. P. 72, holding wife can testify against husband in prosecution for robbery committed on her; *State v. Willis*, 119 Mo. 485, 24 S. W. 1008, holding wife cannot testify against husband on trial for forgery of her signature to note; *State v. Evans*, 138 Mo. 116, 60 A. S. R. 549, 39 S. W. 462, holding wife could not testify against husband in prosecution for rape on her prior to marriage; *State v. Orth*, 79 Ohio St. 130, 22 L.R.A.(N.S.) 240, 86 N. E. 476, holding wife not competent witness against husband on trial of latter for violation of statute requiring him to provide for children; *State v. Woodrow*, 58 W. Va. 527, 112 A. S. R. 1001, 2 L.R.A.(N.S.) 862, 52 S. E. 545, 6 A. & E. Ann. Cas. 180 (dissenting opinion), on exceptions to rule that one spouse cannot testify against the other.

Cited in notes in 106 A. S. R. 766, on right of either husband or wife to testify as to personal injury inflicted by the other; 2 L.R.A.(N.S.) 863, on husband or wife as witness against the other in case of crime against third persons.

32 AM. REP. 362, DUTTENHOFFER v. STATE, 34 OHIO ST. 91.

Privileged communications.

Cited in note in 36 A. R. 632, on communications by client to attorney as privileged.

Power of client in regard to privileged communications.

Cited in *Passmore v. Passmore*, 50 Mich. 626, 45 A. R. 62, 16 N. W. 170, holding client can waive privilege; *Burgess v. Sims Drug Co.* 114 Iowa, 275, 80 A. S. R. 359, 54 L.R.A. 364, 86 N. W. 307, on right of client to claim privilege in cross-examination; *Herman v. Schlesinger*, 114 Wis. 382, 91 A. S. R. 922, 90 N. W. 460, on power of client to control the privilege.

Cited in note in 66 A. S. R. 242, on waiver of privilege as to confidential communications to an attorney.

— **Effect of accused becoming a witness in own behalf.**

Cited in *People v. Mullings*, 83 Cal. 138, 17 A. S. R. 223, 23 Pac. 229, on its ineffectiveness as a waiver of the privilege.

Cited in notes in 38 A. S. R. 897; 15 L.R.A. 674,—on cross-examination of defendant in criminal cases.

Distinguished in *Jones v. State*, 65 Miss. 179, 3 So. 379, holding the turning of states evidence was a waiver of the privilege.

32 AM. REP. 364, BANK OF CADIZ v. SLEMMONS, 34 OHIO ST. 142.

Effect of taking new notes and surrendering those of earlier date.

Cited in *Beals v. Lewis*, 43 Ohio St. 220, 1 N. E. 641, holding certain notes were prima facie in renewal as well as evidence of additional loans.

— **Questions of fact.**

Cited in *Widdifield v. Aetna Live Stock Ins. Co.* 2 Ohio N. P. 167, holding the facts and not what the payee called the transaction are to be regarded.

Validity of excessive loan by banks.

Cited in *Benton County Sav. Bank v. Boddicker*, 105 Iowa, 548, 67 A. S. R. 310, 45 L.R.A. 321, 75 N. W. 632, holding loan by savings bank in excess of liabilities allowed to be taken by statute was not void in absence of express provision.

Usury by national banks.

Cited in *Citizens Nat. Bank v. Forman*, 111 Ky. 206, 56 L.R.A. 673, 63 S. W. 454, holding instrument is invalid as to entire interest but not as to principal.

Cited in reference note in 68 A. S. R. 598, on effect of national banking act as to usury.

Cited in notes in 56 L.R.A. 678, on extent of invalidity generally from charging or taking of usury by national bank; 56 L.R.A. 681, on waiver of, or estoppel to claim, penalty for charging or taking of usury by national bank; 56 L.R.A. 683, on extent of forfeiture of interest in case of renewals where usury is charged by, but not paid to, national bank; 23 L. ed. U. S. 197, on usury by national banks.

Application of payments on usurious note.

Cited in *Moniteau Nat. Bank v. Miller*, 73 Mo. 187, holding payments, made generally, will be applied on principal.

Cited in note in 56 L.R.A. 701, on application of payments where illegal interest is actually paid to national bank.

Limits of cross-examination as to matters not relevant to issue.

Cited in *Hill v. State*, 42 Neb. 503, 60 N. W. 916, holding limit is discretionary in case of witness other than accused; *Hanoff v. State*, 37 Ohio St. 178, 41 A. R. 496, holding same in case of an accused who became a witness; *Shelby v. Clagett*, 46 Ohio St. 549, 5 L.R.A. 606, 22 N. E. 407, holding same in case of a plaintiff in a personal injury action.

Liability for costs on modification of judgments.

Cited in *Chapman v. J. W. Beltz & Sons Co.* 48 W. Va. 1, 35 S. E. 1013, holding an appellee, entering a remittitur, was liable for costs.

Am. Rep. Vol. XVII.—32.

Estoppel of party requesting second trial in court of common pleas.

Cited in *Jones v. Booth*, 38 Ohio St. 405, holding he is estopped from denying that action was in pursuance of statute.

Vacation of judgments to let in defense.

Cited in *Follett v. Alexander*, 58 Ohio St. 202, 50 N. E. 720, holding judgment should not be vacated before adjudication as to validity of defense.

Cited in reference note in 59 A. D. 623, on opening judgment rendered upon warrants of attorney to admit defense.

Practice on sustaining petition for a new trial.

Cited in *Moore v. Coates*, 35 Ohio St. 177, on well settled condition of the practice.

32 AM. REP. 367, AKRON v. CHAMBERLAIN CO. 34 OHIO ST. 328.**Municipal liability for change of grade of streets.**

Cited with special approval in *Akron v. Huber*, 78 Ohio St. 372, 85 N. E. 583, holding no liability exists in case of a reasonable grade established subsequent to improvement.

Cited in *Columbus v. Bidlingmeier*, 3 Ohio C. Dec. 698, 7 Ohio C. C. 136, holding recovery in case buildings were erected before establishment of grade dependent on proof of its unreasonableness; *Wabash R. Co. v. Defiance*, 10 Ohio C. C. 27, on same point; *McGee v. Avondale*, 1 Ohio Dec. 379, 31 Ohio L. J. 163, holding same, though property owner exercised care and foresight; *Cincinnati v. Whetstone*, 9 Ohio Dec. Reprint, 368, 12 Ohio L. J. 247, holding substantial injury from change in an established grade gives right to compensation.

Cited in reference note in 52 A. R. 420, on city's liability to adjacent property owner for injury by changing street grade.

Cited in notes in 66 A. D. 438, on municipal liability for consequential damages resulting from act done under authority of valid statute or character; 14 L.R.A. 372, on injury to abutter's easements by changing grade of street; 23 L.R.A. 661, on damages to abutting owner as to building erected after establishment of grade of street; 12 L.R.A.(N.S.) 699, on municipal liability for injury to lateral support in making street improvements.

Distinguished in *Grant v. Hyde Park*, 67 Ohio St. 166, 65 N. E. 891, holding owner of lots upon a contemplated street takes all risk of a future grade.

Explained in *Neubert v. Toledo*, 6 Ohio C. Dec. 66, 9 Ohio C. C. 462, holding evidence in action for change of grade must show that grade, which was anticipated, was established by affirmative act.

Method of proving establishment of grade of street.

Cited in *Smith v. Wayne County*, 50 Ohio St. 628, 40 A. S. R. 699, 35 N. E. 796, holding line may be practically established.

Explained in *Kepple v. Keokuk*, 61 Iowa, 653, 17 N. W. 140, holding passage of ordinance or other legislative act essential.

Power of cities as to grades of streets.

Cited in *Wabash R. Co. v. Defiance*, 52 Ohio St. 262, 40 N. E. 89, holding statutes conferred power on all municipal corporations.

32 AM. REP. 372, WHEELER v. STATE, 34 OHIO ST. 394.**Inquisition of lunacy as evidence.**

Cited in *Kerr v. Lunsford*, 31 W. Va. 659, 2 L.R.A. 668, 8 S. E. 493, holding record proper of inquisition in lunacy was competent on an issue devisavit vel

non; *State v. Champoux*, 33 Wash. 339, 74 Pac. 557, holding verdict of sanity by special jury and record in proceeding was competent in a murder trial.

Criticized in *Dewey v. Allgire*, 37 Neb. 6, 40 A. S. R. 468, 55 N. W. 276, holding record, adjudging fitness for treatment in hospital, incompetent in an action to avoid a conveyance; *Pfueger v. State*, 46 Neb. 493, 64 N. W. 1094, holding admission of like record in murder case was a nonprejudicial error.

Weight of evidence of prior insanity.

Cited in *State v. Austin*, 71 Ohio St. 317, 104 A. S. R. 778, 73 N. E. 218, holding proof of prior insanity does not defeat presumption of sanity in a murder case; *Goodwin v. State*, 96 Ind. 550, holding commitment to hospital was not even prima facie evidence of insanity in like case.

Inquests in lunacy as a proceeding in rem.

Cited in *Heckman v. Adams*, 50 Ohio St. 305, 34 N. E. 155, holding guardianship for an insane wife cannot be collaterally impeached by husband.

Presumption of continuance of sanity.

Cited in note in 76 A. S. R. 85, on presumption of continuance of sanity or insanity.

Necessity for notice of lunacy proceedings.

Cited in note in 23 L.R.A. 742, on necessity of notice of lunacy proceedings to alleged lunatic.

32 AM. REP. 376, TIMMONS v. STATE, 34 OHIO ST. 426.

What constitutes a burglarious breaking.

Cited in *State v. Moon*, 62 Kan. 801, 64 Pac. 609, on sufficiency of opening of a shut outer door with felonious intent.

Cited in reference notes in 54 A. R. 529, on what constitutes burglarious entry; 4 A. S. R. 113, on what constitutes burglary.

Cited in note in 2 A. S. R. 384, 385, on what constitutes "breaking" in burglary.

32 AM. REP. 380, UNITED STATE ROLLING STOCK CO. v. ATLANTIC & G. W. R. CO. 34 OHIO ST. 450.

Lapse of time as bar to avoidance of transaction.

Cited in *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa, 737, 98 N. W. 606, holding rescission must be made within a reasonable time after discovery of fraud.

Cited in note in 8 L.R.A. 248, on equitable rule of laches as depending on circumstances.

— As to transactions between corporations with common directors.

Cited in *Hart v. Ogdensburg & L. C. R. Co.* 89 Hun, 316, 35 N. Y. Supp. 566, holding lapse of time precluded action, by bondholders and shareholders, to set aside lease on ground that they were common directors.

Distinguished in *Sweeney v. Wheeling Grape Sugar & Ref. Co.* 30 W. Va. 443, 8 A. S. R. 88, 4 S. E. 431, where there was no unreasonable delay involved.

Ratification of dealings between corporations with common directors.

Cited in *O'Connor Min. & Mfg. Co. v. Coosa Furnace Co.* 95 Ala. 614, 36 A. S. R. 251, 10 So. 290, holding corporation or shareholders may render dealings binding by acquiescence.

Cited in note in 33 L.R.A. 791, on ratification of contracts between corporations having common directors or officers.

Effect of director's interest in contracts with corporation.

Cited in *Tenison v. Patton*, 95 Tex. 284, 67 S. W. 92, holding known interest of a director did not avoid a purchase of corporate property as a matter of law.

Cited in note in 33 L.R.A. 789, on validity of contracts between corporations having common directors or officers.

Criticized in *Miner v. Belle Isle Ice Co.* 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218, holding a contract between president of corporation and dummy directors was void.

— Effect of majority being interested.

Cited in *Fitzgerald v. Fitzgerald & M. Constr. Co.* 44 Neb. 463, 62 N. W. 899, holding fraudulent character not dependent on proof of bad motive.

— Effect of majority being disinterested.

Cited in *Jesup v. Illinois C. R. Co.* 43 Fed. 483, holding fact that minority of directors used position for personal interest does not avoid contract but merely subjects it to close scrutiny; *Booth v. Robinson*, 55 Md. 419, holding like fact does not raise a presumption against fairness of transaction; *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621 (dissenting opinion), on same point; *Bill v. Western U. Teleg. Co.* 16 Fed. 14, on effect of presence of majority of disinterested directors under like circumstances; *Budd v. Walla Walla Printing & Pub. Co.* 2 Wash. Terr. 347, 7 Pac. 896; *Leavitt v. Oxford & G. Silver Min. Co.* 3 Utah, 265, 1 Pac. 356,—holding presence and vote of director, who owned claim acted upon, did not nullify act of majority in absence of bad faith; *Henry v. Pittsburgh, C. C. & St. L. R. Co.* 2 Ohio N. P. 118, holding transaction between corporations with minority of common directors will not be interfered with in absence of proof of fraud.

Distinguished in *Metropolitan Teleph. & Teleg. Co. v. Domestic Teleg. & Teleph. Co.* 44 N. J. Eq. 568, 14 Atl. 907, holding a common director unavailable as one of quorum of committee settling terms of contract; *Browne v. United States Road & Paper Co.* 6 Ohio N. P. 254, holding executory contract between corporation and one of its directors may be avoided at suit of corporation.

Explained in *Pearson v. Concord R. Corp.* 62 N. H. 537, 13 A. S. R. 590, holding a stockholder could maintain action to prevent execution of contract because of common directors' acting; *Metropolitan Elev. R. Co. v. Manhattan Elev. R. Co.* 14 Abb. N. C. 103, 11 Daly, 373, holding fact that majority of directors were disinterested will not save a like contract.

Power of directors to transact business for corporation.

Explained in *Henry v. Pittsburgh, C. C. & St. L. R. Co.* 2 Ohio N. P. 118, holding power is made subject to imposed restrictions.

Right to act as a dual agent.

Cited in *Michigan State Co. v. Iron Range & H. B. R. Co.* 101 Mich. 14, 59 N. W. 646, holding circumstances may allow dual agency in sale of goods; *Bell v. McConnell*, 37 Ohio St. 396, 41 A. R. 528, holding full knowledge and consent of principals allows double agency by real estate broker; *Findlay v. Partz*, 29 L.R.A. 188, 13 C. C. A. 559, 31 U. S. App. 340, 66 Fed. 427, holding like facts essential to a dual agency by a municipal employee.

Liability on transactions effected by dual agency.

Cited in *Alger v. Anderson*, 78 Fed. 729, holding bribery is ground for repudiation of contract without proof of actual effect; *Findlay v. Partz*, 29 L.R.A.

188, 13 C. C. A. 559, 31 U. S. App. 340, 66 Fed. 427, holding same as to proof that agent was acting for both parties to contract; *Retzsch v. Retzsch Printing Co.* 19 Ohio C. C. 631, holding mortgagee, whose agent conspired with mortgagor, could not be charged with constructive notice; *Smith v. Farrell*, 66 Mo. App. 8, on right to avoid contracts on ground of a dual agency.

Cited in notes in 93 A. D. 173, on ratification of double agency; 45 L.R.A. 49, on effect of principal's knowledge of or consent to dealings by real-estate broker with other party as affecting right to commissions.

Ratification by acceptance of benefits.

Cited in *Tryon v. White & C. Co.* 62 Conn. 161, 20 L.R.A. 291, 25 Atl. 712, holding acceptance of benefits ratified a director's employment of contractor without authority..

Allegations and denials of legal conclusions.

Cited in *Fox v. Keister*, 6 Ohio N. P. 327; *Hamilton County v. Noyes*, 35 Ohio St. 201,—holding averment of legal conclusion ineffective as a pleading; *Baltimore & O. R. Co. v. Walker*, 45 Ohio St. 577, 16 N. E. 475, holding same as to denial in like form.

32 AM. REP. 390, STATE EX REL. ATTY. GEN. v. COLUMBUS GAS-LIGHT & COKE CO. 34 OHIO ST. 572.

Franchises giving company right to fix rates.

Cited in *Danville v. Danville Water Co.* 178 Ill. 299, 69 A. S. R. 304, 53 N. W. 118, holding silence of water franchise did not give right to fix prices.

Public control of rates for public service.

Cited in *Danville v. Danville Water Co.* 178 Ill. 299, 69 A. S. R. 304, 53 N. E. 118, holding water company subject to control as to prices in absence of charter protection; *Rateliff v. Wichita Union Stock-Yards Co.* 74 Kan. 1, 118 A. S. R. 298, 6 L.R.A.(N.S.) 834, 86 Pac. 150, 10 A. & E. Ann. Cas. 1016, holding stock yards at a commercial center subject to control as to prices; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, holding like control must be reasonable; *State ex rel. Stoesser v. Brass*, 2 N. D. 482, 52 N. W. 408; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 12 Sup. Ct. Rep. 468, 4 Inters. Com. Rep. 45,—holding warehousemen, engaged in storing grain, subject to control as to prices; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000 (dissenting opinion), on devotion to public use as a test of right to control.

Cited in notes in 25 A. S. R. 889, on application of 14th Amendment to fixing of rates to be charged for services; 62 A. S. R. 290, 295, on state regulation of rates of charges; 6 L.R.A.(N.S.) 835, on kinds of business affected with a public interest subjecting them to regulation and control in respect to rates or prices.

—Control of gas companies.

Cited in *Zanesville v. Zanesville Gaslight Co.* 47 Ohio St. 1, 23 N. E. 55, holding gas company liable to control as to prices in absence of charter protection.

Cited in note in 33 L.R.A. 181, on legislative power to fix tolls, rates, or prices for gas.

—Control of meter charges.

Cited in *Buffalo v. Buffalo Gas Co.* 81 App. Div. 505, 80 N. Y. Supp. 1093, upholding a statute prohibiting direct or indirect charges for meters.

Rights of public in respect to franchise holders.

Cited in *Fisher v. Baltimore & O. R. Co.* 3 Ohio N. P. 283, holding railroad company cannot by leasing its line absolve itself from positive duties.

Public nature of business of supplying gas.

Cited in *Indiana Natural & Illuminating Gas Co. v. State*, 158 Ind. 516, 57 L.R.A. 761, 63 N. E. 220, holding public must be served without discrimination; *Portland Natural Gas & Oil Co. v. State*, 135 Ind. 54, 21 L.R.A. 639, 34 N. E. 818, holding performance of duty may be enforced by mandamus.

Public contracts with public service corporations.

Cited in *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624, holding town cannot grant exclusive right to a gas company in absence of express power.

Distinguished in *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526, holding town cannot grant exclusive rights to water company in absence of express or necessarily implied power; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493 (dissenting opinion), on right of city to agree on rates for water for a certain period under express power.

Implied restrictions on use of property.

Cited in *State v. Somerville*, 1 Ohio N. P. 422, holding all property subject to restriction that use shall not be injurious to community.

32 AM. REP. 395, DILLE v. STATE, 34 OHIO ST. 617.**Power of court to limit time for argument.**

Cited in *Wingo v. State*, 62 Miss. 311, holding reasonable limits may be imposed in either criminal or civil cases; *People v. Green*, 99 Cal. 564, 34 Pac. 231, holding limitation in a criminal case is within discretionary power; *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, 7 A. & E. Ann. Cas. 881; *Wingo v. State*, 62 Miss. 311,—holding any limitation, depriving accused of full and fair hearing, is ground for reversal.

Cited in reference notes in 32 A. R. 12, on power of court to limit arguments of counsel in criminal case; 46 A. S. R. 27, on limitations upon argument of counsel.

Cited in note in 27 A. R. 413, on limiting time of prisoner's counsel in addressing jury.

— Illustrations.

Cited in *Reagan v. St. Louis Transit Co.* 180 Mo. 117, 79 S. W. 435, holding a limitation of fifteen minutes in a simple personal injury action did not justify a reversal; *Jones v. Com.* 87 Va. 63, 12 S. E. 226, holding it error to limit time to thirty minutes in trial for felony on circumstantial evidence; *People v. Green*, 99 Cal. 564, 34 Pac. 231, holding same as to limitation of one hour in trial for felony which had lasted five days.

32 AM. REP. 397, WESTLAKE v. WESTLAKE, 34 OHIO ST. 621.**Action for alienation of affections.**

Cited in notes in 6 L.R.A. 554, on right of action for alienation of affections and loss of conjugal society; 9 L.R.A.(N.S.) 324, on liability of parent for causing separation of husband and wife.

— By wife for alienation of husband's affections.

Cited in *Kuhn v. Hemmann*, 43 App. Div. 108, 59 N. Y. Supp. 341, sustaining the right; *Gerner v. Gerner*, 185 Pa. 233, 64 A. S. R. 646, 40 L.R.A. 549, 39

Atl. 884, 42 W. N. C. 49; *Seaver v. Adams*, 66 N. H. 142, 49 A. S. R. 597, 19 Atl. 776; *Smith v. Smith*, 98 Tenn. 101, 60 A. S. R. 838, 38 S. W. 439,—holding right is dependent on existence of statute enabling wife to sue; *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17, holding right exists under statute allowing wife to sue “alone or joined with other parties, as if she were single;” *Wolf v. Frank*, 92 Md. 138, 52 L.R.A. 102, 48 Atl. 132, holding right exists under statute allowing wives to sue for torts “as fully as if they were unmarried;” *Deitzman v. Mullin*, 108 Ky. 610, 94 A. S. R. 390, 50 L.R.A. 808, 57 S. W. 247, holding right exists under statute allowing wife to “sue and be sued as a single woman;” *Mehrhoff v. Mehrhoff*, 26 Fed. 13, holding right exists under statute, allowing wife to sue “alone or joined with other parties, as if she were single;” 91 Iowa, 693, 51 A. S. R. 360, 29 L.R.A. 150, 60 N. W. 202, holding right exists under statute allowing wife to sue for “protection of her rights and property as if unmarried;” *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847, holding right existed under statute giving right to sue, notwithstanding possibility of community of interest in damages; *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932, holding right could be based on departure from unity of person doctrine, even in absence of statute, giving right to sue; *Duffies v. Duffies*, 76 Wis. 374, 20 A. S. R. 79, 8 L.R.A. 420, 45 N. W. 522; *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961,—holding right does not exist under statute allowing wife to sue for “injuries to her person or character;” *Baker v. Baker*, 16 Abb. N. C. 293, holding right exists under a similar statute; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Bassett v. Bassett*, 20 Ill. App. 543; *Haynes v. Nowlin*, 129 Ind. 581, 28 A. S. R. 213, 14 L.R.A. 787, 29 N. E. 389; *Clow v. Chapman*, 125 Mo. 101, 46 A. S. R. 468, 26 L.R.A. 412, 28 S. W. 328; *Warren v. Warren*, 89 Mich. 123, 14 L.R.A. 545, 50 N. W. 842; *Beach v. Brown*, 20 Wash. 266, 72 A. S. R. 98, 43 L.R.A. 114, 55 Pac. 46; *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085,—holding right existed under various statutes enlarging rights of married women; *Nolin v. Pearson*, 191 Mass. 283, 114 A. S. R. 605, 4 L.R.A. (N.S.) 643, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, holding same and denying any distinction in case of a criminal conversation action; *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. 99, holding right in a divorced woman may be based either on common law or statutes; *Brown v. Brown*, 121 N. C. 8, 38 L.R.A. 242, 27 S. E. 998 (dissenting opinion), on nonexistence of the right at common law; *Quick v. Church*, 23 Ont. Rep. 262, holding action lies in favor of wife against woman who induces husband to leave her; *Lellis v. Lambert*, 24 Ont. App. 653, holding no action lies by married woman against another for alienation of husband’s affections.

Cited in reference notes in 17 A. S. R. 500, on wife’s right to recover damages for enticement of husband; 20 A. S. R. 88, on wife’s right of action for loss of husband’s society.

Cited in notes in 94 A. D. 593, on recovery by wife for enticement of husband; 28 A. S. R. 218; 46 A. S. R. 473, 474,—on wife’s action for alienation for husband’s affections; 94 A. D. 592, on remedies for injuries to person and reputation of married women.

Distinguished in *Kroessin v. Keller*, 60 Minn. 372, 51 A. S. R. 533, 27 L.R.A. 685, 62 N. W. 438, where right to maintain action of criminal conversation against another woman was denied.

Declarations of husband as evidence in action for alienating husband’s affections.

Cited in *Whitman v. Egbert*, 27 App. Div. 374, 50 N. Y. Supp. 3, holding

husband's letter, narrating facts and opinions, incompetent; *Leavell v. Leavell*, 122 Mo. App. 654, 99 S. W. 460, holding admission of statements of husband, made out of presence of defendants, was reversible error; *Humphrey v. Pope*, 1 Cal. App. 374, 82 Pac. 223, holding wife cannot testify to narrations by husband, in absence of defendant, of declarations made by defendant.

Cited in note in 48 A. S. R. 475, 476, on evidence in action for alienating husband's affections.

Distinguished in *Hardwick v. Hardwick*, 130 Iowa, 230, 106 N. W. 639, holding husband's declarations to wife as to his affection, made at time of communication of defendant's desires, were competent.

Malice as basis of liability for alienating affections of husband or wife.

Cited in *Brown v. Brown*, 124 N. C. 19, 70 A. S. R. 574, 32 S. E. 320, holding liability of father causing son to leave wife dependent on proof of legal malice; *Multer v. Knibbs*, 193 Mass. 556, 9 L.R.A. (N.S.) 322, 79 N. E. 762, 9 A. & E. Ann. Cas. 958, holding husband, charging wife's father with like action must prove malice; *Reed v. Reed*, 6 Ind. App. 317, 51 A. S. R. 310, 33 N. E. 638, holding complaint making like charge against husband's mother must allege malice; *Sickler v. Mannix*, 68 Neb. 21, 93 N. W. 1018, holding petition against another woman sufficiently charged act to be malicious.

Gist of action for alienating husband's affections.

Cited in *Daley v. Gates*, 65 Vt. 591, 27 Atl. 193, holding cause of action is loss of consortium.

Definition of malice as applied to torts.

Cited in *Lake Shore & M. S. R. Co. v. Scofield*, 2 Ohio C. C. 305, holding malice does not mean spitefulness but conduct proceeding from ill-regulated mind, not sufficiently cautious.

One spouse as witness against other.

Cited in reference note in 2 A. S. R. 668, on admissibility of testimony of one spouse for or against the other.

Charging woman with unchastity.

Cited in note in 24 L.R.A. (N.S.) 594, on slander and libel in charging woman with unchastity.

32 AM. REP. 408, TIFFIN v. McCORMACK, 34 OHIO ST. 638.

Duties between owners of adjacent lands.

Cited in *Cork v. Blossom*, 162 Mass. 330, 44 A. S. R. 362, 26 L.R.A. 256, 38 N. E. 495, holding proper care must be used in erection and maintenance of chimneys near neighbors.

Cited in note in 1 E. R. C. 273, on liability for injury due to escape of anything likely to do harm.

Distinguished in *Langabaugh v. Anderson*, 68 Ohio St. 131, 62 L.R.A. 948, 67 N. E. 286, holding a certain instruction was improper in action for burning of buildings from escaping oil.

— Absolute duties regardless of care.

Cited in *Western Paper Co. v. Pope*, 155 Ind. 394, 56 L.R.A. 899, 57 N. E. 719, holding absence of malice or negligence does not relieve manufacturer from liability for depositing refuse in stream; *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.* 60 Ohio St. 560, 71 A. S. R. 740, 45 L.R.A. 658, 54 N. E. 528,

holding liability for injuries from explosion of nitro-glycerine magazine not dependent on proof of negligence; *Colton v. Onderdonk*, 69 Cal. 155, 58 A. R. 556, 10 Pac. 395; *Frost v. Berkeley Phosphate Co.* 42 S. C. 402, 46 A. S. R. 736, 26 L.R.A. 693, 20 S. E. 280,—holding exercise of care does not permit a phosphate company to commit injury with gases.

What constitutes negligence.

Cited in reference notes in 19 A. S. R. 39, on gunpowder as a nuisance; 34 A. S. R. 713, on pollution of soil by escaping oil as a nuisance.

Cited in note in 36 A. R. 658, on the keeping of gunpowder on private premises as a nuisance.

Liability for injurious blasting.

Cited in *Carbo v. State*, 4 Ga. App. 583, 62 S. E. 140, to the point that person is liable for injury to adjacent building caused by blasting, though he uses ordinary care; *Blackford v. Heman Constr. Co.* 132 Mo. App. 157, 112 S. W. 287, holding that even in absence of negligence throwing stone upon property of another as result of blasting is trespass; *Longtin v. Persell*, 30 Mont. 306, 104 A. S. R. 723, 65 L.R.A. 655, 76 Pac. 699, 2 A. & E. Ann. Cas. 198, holding same as to liability for either direct or consequential injuries from blasting on a city lot; *Gossett v. Southern R. Co.* 115 Tenn. 376, 112 A. S. R. 846, 1 L.R.A. (N.S.) 97, 89 S. W. 737, holding railroad and its contractors liable for injuries from vibrations of air caused by skilful blasting; *Hoffman v. Walsh*, 117 Mo. App. 278, 93 S. W. 853, holding liability for blasting in construction work dependent on proof of negligence except in case of a direct injury; *Fitz Simons & C. Co. v. Braun*, 94 Ill. App. 533, holding liability for direct injuries from like work not dependent on proof of negligence.

Cited in notes in 76 A. S. R. 422, on liability for negligence of independent contractors in blasting; 17 L.R.A. 221, on liability for injuries to buildings and land from blasting.

Distinguished in *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 37 A. S. R. 552, 24 L.R.A. 105, 35 N. E. 592, holding temporary blasting to improve property did not necessarily create liability for injuries; *Thurmond v. Ash Grove White Lime Asso.* 125 Mo. App. 73, 102 S. W. 617, holding liability for noncontinuous blasting dependent on proof of negligence where injury did not amount to trespass.

Right to enjoin blasting.

Cited in *Frazier v. Pennypack Trap Rock Co.* 17 Montg. Co. L. Rep. 105, holding that court will restrain blasting in quarry which throws stones on highway and adjoining premises.

Liability for acts of independent contractor.

Cited in reference note in 24 A. S. R. 378, on master's liability for acts of independent contractor.

Cited in notes in 51 A. D. 204, on employer's liability for contractor's acts if acts authorized necessarily work harm; 76 A. S. R. 39, 40, 403, on employer's liability for negligence and other torts of independent contractor where work causes a nuisance.

Relation of master and servant or independent contractor.

Cited in *McCafferty v. Dock Co.* 11 Ohio C. C. 457, holding fact that work was done by contract instead of by day not necessarily conclusive; *Toledo Stove Co. v. Reep*, 18 Ohio C. C. 58, holding work must be undertaken as a job without control in order to constitute an independent contractor.

Cited in notes in 22 A. S. R. 461, on when relation of master and servant exists; 65 L.R.A. 498, on effect of employment being general to negative independence of contractor.

Exceptions to nonliability for acts of independent contractors.

Cited in *Omaha v. Jensen*, 35 Neb. 68, 37 A. S. R. 432, 52 N. W. 833; *Circleville v. Neuding*, 41 Ohio St. 465,—holding necessarily dangerous character of work or obligation as to safety renders the rule inapplicable; *Chicago v. Norton Mill. Co.* 97 Ill. App. 651, holding rule inapplicable in case of acts necessarily resulting from contract in question.

Distinguished in *Omaha Bridge & Terminal R. Co. v. Hargadine*, 5 Neb. (Unof.) 418, 98 N. W. 1071, holding mere fact of liability to third persons for act of independent contractor does not create liability towards employees.

Liability of municipal corporation for maintenance of nuisance.

Cited in *Mansfield v. Hunt*, 19 Ohio C. C. 488, holding liability is same as that of an individual.

32 AM. REP. 413, NAGLE v. ALLEGHENY VALLEY R. CO. 88 PA. 35.

Capacity of minor as to negligence.

Cited in *Erie R. Co. v. Weinstein*, 92 C. C. A. 189, 166 Fed. 271, to the point that boy fourteen years of age is bound to same care as may be exacted from adult; *E. S. Higgins Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; *Devert v. Lehigh Valley Coal Co.* 12 Luzerne Leg. Reg. 122; *Central R. Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952; *Sanborn v. Atchison, T. & S. F. R. Co.* 35 Kan. 292, 10 Pac. 860; *Hunt v. Graham*, 15 Pa. Super. Ct. 42,—holding that minor over fourteen years of age is presumed to have sufficient capacity to appreciate and avoid danger; *Phillips v. Duquesne Traction Co.* 42 W. N. C. 528, 29 Pittsb. L. J. N. S. 60, 8 Pa. Super. Ct. 210; *Fick v. Jackson*, 3 Pa. Super. Ct. 378, 39 W. N. C. 534,—on the same point; *Kirchner v. Oil City Street R. Co.* 210 Pa. 45, 59 Atl. 270, holding the same but that such presumption may be overcome by positive proof of want of capacity; *Allen v. Western Electric Co.* 131 Ill. App. 118, holding that responsibility of minor 19 years of age for contributory negligence is the same as that of an adult; *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308, 21 A. S. R. 670, 26 N. E. 916, holding that infant twelve years of age is *sui juris* and chargeable with the same degree of caution as an adult; *Doggett v. Chicago, B. & Q. R. Co.* 134 Iowa, 690, 13 L.R.A. (N.S.) 364, 112 N. W. 171, 13 A. & E. Ann. Cas. 588, holding that fact that person injured was only seventeen years of age is not to be considered upon question of contributory negligence in absence of evidence showing incapacity; *Durgin v. Minneapolis & St. L. R. Co.* 86 Minn. 224, holding minor sixteen years of age, travelling alone, guilty of contributory negligence as matter of law in leaning out of car and being injured by striking against post; *Lenahan v. Pittston Coal Min. Co.* 13 Luzerne Leg. Reg. 239, holding minor over fourteen years of age guilty of contributory negligence so as to prevent recovery for personal injury; *Heimann v. Kinnare*, 190 Ill. 156, 83 A. S. R. 173, 52 L.R.A. 652, 60 N. E. 215, holding minor thirteen years old guilty of contributory negligence in rushing into known and obvious danger; *Graney v. St. Louis, I. M. & S. R. Co.* 157 Mo. 666, 50 L.R.A. 153, 57 S. W. 276, holding minor twelve years of age guilty of contributory negligence in failing to avoid a danger apparent to him; *Malsky v. Schumacher & Ettlinger*, 7 Misc. 8, 27 N. Y. Supp. 331, holding that intelligent

boy nearly fourteen years of age is guilty of negligence if he fails to avoid obvious danger; *South Covington & C. Street R. Co. v. Herrklotz*, 104 Ky. 400, 47 S. W. 265, holding that minor less than four years of age cannot be guilty of contributory negligence; *Lake Erie & W. R. Co. v. Mackey*, 53 Ohio St. 370, 53 A. S. R. 640, 29 L.R.A. 757, 41 N. E. 980; *Parker v. Washington Electric Street R. Co.* 207 Pa. 438, 56 Atl. 1001,—holding that minor under fourteen is presumed to be incapable of negligence; *Baldwin v. Urner*, 18 Montg. Co. L. Rep. 211, to the point that boy fifteen years of age is presumed to have capacity sufficient to be sensible of danger; *Baker v. Seaboard Air Line R. Co.* 150 N. C. 562, 29 L.R.A.(N.S.) 846, 64 S. E. 506, 17 A. & E. Ann. Cas. 351, holding that boy fifteen years of age cannot recover for injury received by jumping from train moving at rate of thirty miles per hour; *Tucker v. Buffalo Cotton Mills*, 76 S. C. 539, 121 A. S. R. 957, 57 S. E. 626, holding that infant under fourteen years of age is prima facie incapable of contributory negligence; *Moore v. J. D. Moore Co.* 4 Ont. L. Rep. 167; *Wilkinson v. Kanawha & H. Coal & Coke Co.* 64 W. Va. 93, 20 L.R.A.(N.S.) 331, 61 S. E. 875; *Walling v. Trinity & B. V. R. Co.* 48 Tex. Civ. App. 35, 106 S. W. 417,—holding law presumes that minor fifteen years of age has sufficient intelligence and discretion to be sensible of danger of riding on car platform; *Turner v. Norfolk & W. R. Co.* 40 W. Va. 675, 22 S. E. 83 (dissenting opinion), on responsibility for negligence of infant sixteen years of age; *Ewing v. Lanark Fuel Co.* 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 200, holding boy under fourteen years of age presumed not to possess sufficient mental capacity to comprehend and avoid danger.

Cited in reference note in 32 A. R. 472, on driver's duty to anticipate that child will suddenly try to board moving horse-car.

Cited in notes in 55 A. D. 676, on capacity of child for negligence preventing recovery for injury; 14 A. S. R. 594, on negligence of infant as bar to recovery for personal injuries; 49 A. S. R. 411, on when infant will be presumed to have capacity to see and avoid danger; 116 A. S. R. 115, on application of rule of presumption of due care to children and minors; 29 L.R.A.(N.S.) 488, 489, 490, on presumption and burden of proof as to capacity of minor servant to comprehend and avoid danger; 21 L. ed. U. S. 745, on degree of care required from infants to avoid injury.

Criticized and doubted in *Dubiver v. City & Suburban R. Co.* 44 Or. 227, 74 Pac. 915, 1 A. & E. Ann. Cas. 889, holding that a minor fifteen years of age, should not be held to the same care, foresight and responsibility as to avoiding danger as an adult.

— When question for the jury.

Cited in *Kehler v. Schwenk*, 144 Pa. 348, 27 A. S. R. 633, 13 L.R.A. 374, 22 Atl. 910, 48 Phila. Leg. Int. 539, holding that measure of minor's responsibility is his capacity to notice and appreciate danger and is for the jury though minor is over fourteen years of age; *West Philadelphia Pass. R. Co. v. Gallagher*, 108 Pa. 524, 16 W. N. C. 413, 42 Phila. Leg. Int. 153; *Elwood v. Addison*, 26 Ind. App. 28, 39 N. E. 47; *Strawbridge v. Bradford*, 128 Pa. 200, 15 A. S. R. 670, 18 Atl. 346, 24 W. N. C. 536, 47 Phila. Leg. Int. 203, 20 Pittsb. L. J. N. S. 143; *Kelly v. Pittsburg & B. Traction Co.* 204 Pa. 623, 54 Atl. 482; *Holtzinger v. Pennsylvania R. Co.* 6 Pa. Dist. R. 430; *Bracken v. Pennsylvania R. Co.* 32 Pa. Super. Ct. 22; *Davis v. Pennsylvania R. Co.* 34 Pa. Super. Ct. 388,—holding that where infant is under fourteen years of age, the question of capacity to be guilty of contributory negligence is for the jury; *Pueblo Electric Street R. Co. v. Sher-*

man, 25 Colo. 114, 71 A. S. R. 116, 53 Pac. 322; *Cook v. Houston Direct Nav. Co.* 76 Tex. 353, 18 A. S. R. 52, 13 S. W. 475,—holding that in case of infant between thirteen and fourteen years of age question of capacity and discretion are for the jury; *Elze v. Baumann*, 2 Misc. 72, 21 N. Y. Supp. 782, on question of age at which minor's responsibility is presumed being for the court; *Eisenberg v. Fraim*, 22 Lanc. L. Rev. 356, holding that time when infant's responsibility for negligence is presumed to commence is for court.

Disapproved in *Daniels v. Johnson*, 39 Colo. 177, 89 Pac. 811; *Texas & P. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511,—holding that question whether minor had discretion enough to understand the danger of his employment is for the jury though minor is over fourteen years of age.

Care required in crossing railroad.

Cited in *Aiken v. Pennsylvania R. Co.* 130 Pa. 380, 17 A. S. R. 775, 18 Atl. 619, 25 W. N. C. 13, 47 Phila. Leg. Int. 84, 20 Pittsb. L. J. N. S. 182, holding that person must stop, look and listen before crossing railroad track whether he is walking or riding; *St. Louis & S. W. R. Co. v. Johnson*, 69 Ark. 122, 26 S. W. 593, holding that failure to stop, look and listen before crossing railroad is negligence; *Pennsylvania R. Co. v. White*, 88 Pa. 327, the same point.

Cited in note in 50 A. R. 279, on liability of railway company for injury to passenger in alighting, due to the position of the train at the station.

32 AM. REP. 417, CRAIG v. FIRST PRESBY. CHURCH, 88 PA. 42.

Power to regulate cemeteries.

Cited in *Went v. Methodist Protestant Church*, 80 Hun, 266, 30 N. Y. Supp. 157, sustaining validity of act providing for removal of bodies and abandonment of cemetery where there was danger of its becoming a danger to public health; *Carpenter v. Yeadon*, 151 Fed. 879; *Pfleger v. Groth*, 103 Wis. 104, 79 N. W. 19,—holding, that regulation of the location of cemeteries is within the police power of the state.

Cited in notes in 75 A. S. R. 429, on right to remove dead bodies; 87 A. S. R. 683, on power of municipalities to abolish or discontinue cemeteries; 38 L.R.A. 329, on municipal power over nuisances relating to burial of the dead; 42 L.R.A. 730, on disinterment of dead bodies by the authorities or for public purposes; 27 L.R.A. (N.S.) 261, 269, on regulations of burials and cemeteries.

Right of individual in burying ground.

Cited in *Gowen v. Beasey*, 94 Me. 114, 46 Atl. 792, holding that holder of burial lot in public cemetery has exclusive privilege of burial therein which is not revocable as long as cemetery is used as burial place; *Page v. Symonds*, 63 N. H. 17, 56 A. R. 481, holding that right of burial in a public cemetery is merely a privilege or license revocable whenever public necessity requires it; *Congregation Shaarai Shomayim v. Moss*, 20 Lanc. L. Rev. 177, 22 Pa. Super. Ct. 356, holding that individual member of congregation having title to cemetery acquires no right to burial therein except under such regulation as the congregation may adopt.

Cited in reference note in 55 A. S. R. 319, on injunction against unauthorized interference with graves.

Cited in note in 21 L.R.A. 219, on rights of owner of burial lot where property is taken by eminent domain.

Rights and duties as to bodies of dead.

Cited in note in 82 A. D. 511, 515, on rights and duties of relatives and others respecting bodies of dead.

Effect of deed to cemetery lot.

Cited in *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903; *Anderson v. Acheson*, 132 Iowa, 744, 9 L.R.A. (N.S.) 217, 110 N. W. 335,—holding that deed to cemetery lot conveys only exclusive privilege of burial therein; *Hancock v. McAvoy*, 151 Pa. 460, 31 A. S. R. 774, 18 L.R.A. 781, 25 Atl. 47, 31 W. N. C. 257, holding that grant of exclusive right of interment in certain burial lots in cemetery, conveys no such interest in the land as will sustain action of ejectment; *Bessemer Land & Improv. Co. v. Jenkins*, 111 Ala. 135, 56 A. S. R. 26, 18 So. 565, on interest of owner of burial privilege in cemetery.

Cited in reference notes in 31 A. S. R. 776; 56 A. S. R. 37,—on title of cemetery-lot owners.

Cited in note in 67 L.R.A. 120, on estate or property of owner in burial lot as a license.

Right of trustees of cemetery to sell land.

Cited in *Re Sprogeil Burying-Ground*, 122 Montg. Co. L. Rep. 63, holding that trustees of burying-ground may, if not restricted by nature of trust, sell land for purpose of buying new burial place.

Taxation of cemeteries.

Cited in *Oak Hill Cemetery Co. v. Wells*, 38 Ind. App. 479, 78 N. E. 350, holding that family burying-grounds and church cemeteries are exempt from taxation.

Sufficiency of title of act.

Cited in *Wilson v. Downing*, 4 Pa. Super. Ct. 487, 40 W. N. C. 342; *Weeks v. Franklin*, 29 Pa. Co. Ct. 47, 13 Pa. Dist. R. 286; *Com. v. Leibrich*, 33 Pa. Co. Ct. 289,—holding that where act is entitled as amending prior act, its subject is sufficiently set forth in the title if it is included in title of original act; *Second Nat. Bank v. Caldwell*, 13 Fed. 429; *Com. v. Sharon Coal Co.* 164 Pa. 284, 30 Atl. 127, 35 W. N. C. 213; *Millvale's Appeal*, 20 Pittsb. L. J. N. S. 413, 18 Atl. 993, 47 Phila. Leg. Int. 445; *Sanderson v. Comrs.* 1 Pa. Co. Ct. 342; *Millvale v. Evergreen R. Co.* 131 Pa. 1, 7 L.R.A. 369, 18 Atl. 993, 25 W. N. C. 142; *Com. ex rel. Cummings v. Atty. Gen.* 30 Pa. Co. Ct. 53, 13 Pa. Dist. R. 521,—holding the same as to act entitled as supplementing prior act; *Philadelphia v. Ridge Ave. R. Co.* 142 Pa. 484, 24 A. S. R. 512, 21 Atl. 982, 28 W. N. C. 106, 48 Phila. Leg. Int. 362; *Luzerne Water Co. v. Toby's Creek Water Co.* 148 Pa. 568, 24 Atl. 117 (affirming 6 Kulp, 237); *Com. v. Lloyd*, 2 Pa. Super. Ct. 6, 38 W. N. C. 290,—on the same point; *Taggart v. Com.* 102 Pa. 354, 12 W. N. C. 465, 40 Phila. Leg. Int. 78, holding that a summary of a section of the Constitution is sufficient as title to an act under that section; *Com. v. Morningstar*, 144 Pa. 103, 22 Atl. 867, 22 Pittsb. L. J. N. S. 161, 48 Phila. Leg. Int. 486, 28 W. N. C. 442; *Philadelphia v. Pepper*, 2 Pa. Co. Ct. 287, 19 W. N. C. 108,—holding that title to bill need not be complete index to its contents, but the legislation therein must be germane to the title; *York Teleph. Co. v. Keesey*, 5 Pa. Dist. R. 366, holding that "telegraph company" used in title is sufficient though the body of the act includes telephone companies; *Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132, 24 W. N. C. 273, on unconstitutionality of act where title does not clearly indicate its subject matter; *Carothers v. Philadelphia Co.* 118 Pa. 468, 12 Atl. 314, 20 W. N. C. 434, 18 Pittsb. L. J. N. S. 367, 45 Phila. Leg. Int. 257, holding title "to incorporate" a certain company "and define the powers thereof" sufficient

where act authorizes company to engage in the production, distribution and supply of natural gas for fuel; Commonwealth's Appeal, 46 Phila. Leg. Int. 342, holding that if title of act does not indicate subject-matter it is unconstitutional; Second Nat. Bank v. Caldwell, 13 Pittsb. L. J. N. S. 74, 1 Chester Co. Rep. 497, holding that statute entitled supplemental to former named act, is not invalid because subject is not expressed in title; O'Donnell v. Pittsburgh, 227 Pa. 14, 75 Atl. 959, holding that act in relation to opening of streets is not unconstitutional because of insufficient title.

Distinguished in *Com. v. Bender*, 7 Pa. Co. Ct. 620, holding that where act entitled as supplemental to prior act also specifies nature of changes made, its provisions are limited to those specified in the title; *Re Road*, 20 Lanc. L. Rev. 308, 13 Pa. Dist. R. 88, holding act invalid for defective title where act purported to be amended was not designated by title and date and the act itself was at variance with title.

Presumptions as to constitutionality of acts.

Cited in *Re Judicial Salaries Act*, 13 Pa. Dist. R. 91; *Com. v. Samuels*, 14 Pa. Co. Ct. 423; *Re Proctor Alley*, 57 Pittsb. L. J. 262; *Pittsburgh & A. Teleph. Co. v. Braddock*, 39 Pittsb. L. J. N. S. 372; *Haas v. Pittsburgh*, 39 Pittsb. L. J. N. S. 361; *Re Delaware River Road*, 6 North. Co. Rep. 213; *Re Nutt's Ave.* 2 Chester Co. Rep. 49; *Evans v. Witmer*, 2 Pa. Co. Ct. 612,—holding that all presumptions are in favor of the constitutionality of an act; *Luzerne Water Co. v. Toby Creek Water Co.* 148 Pa. 568, 24 Atl. 117 (affirming 6 Kulp, 237); *Com. ex rel. Garman v. McDonnell*, 7 Kulp, 357, 3 Pa. Dist. R. 767; *Com. v. Watson*, 10 Lanc. L. Rev. 141, 2 Pa. Dist. R. 526,—on the same point; *Com. ex rel. Atty. Gen. v. Mathus*, 210 Pa. 372, 59 Atl. 961; *Com. ex rel. Atty. Gen. v. State Treasurer*, 29 Pa. Co. Ct. 545, 13 Pa. Dist. R. 231,—holding that every possible presumption and intentment must be considered in favor of the constitutionality of an act; *Com. v. Hazen*, 20 Pa. Super. Ct. 487; *Mink v. Mink*, 16 Pa. Co. Ct. 189,—applying the same rule where the sufficiency of the title to a statute is questioned under constitutional provision; *Com. v. Leibrich*, 16 Pa. Dist. R. 468; *Cassell's Appeal*, 8 Lanc. L. Rev. 260,—to the point that statute is presumed to be constitutional.

What constitutes quorum.

Cited in note in 21 L.R.A. 174, on what constitutes a quorum for a meeting of stockholders where number is indefinite.

Meaning of majority vote.

Cited in *State ex rel. Granvold v. Porter*, 11 N. D. 309, 91 N. W. 944, holding that a majority of those voting at a convention control though only a minority of those present actually voted; *Morrill v. Little Falls Mfg. Co.* 53 Minn. 371, 21 L.R.A. 174, 55 N. W. 547, holding that where charter and by-laws of corporation are silent, the stockholders present at annual meeting constitute a quorum and the acts of a majority binds the corporation though only a minority was present; *Schlichter v. Keiter*, 156 Pa. 119, 22 L.R.A. 161, 27 Atl. 45, 32 W. N. C. 441, holding that under constitution of church society requiring a two-thirds vote of society, a majority of two-thirds of those voting is sufficient; *Russie v. Brazzell*, 128 Mo. 93, 49 A. S. R. 542, 30 S. W. 526, holding the same and especially where church conference had accepted the same interpretation; *Re Lemoyne*, 15 Pa. Dist. R. 241, holding that where seven councilmen were provided for by law, but only five were elected, a quorum required four, and action by three all voting favorably was void where only the three were present; *Com. v. Overholt*, 23 Pa. Super. Ct. 199, holding that majority of quorum of members of corporation may

elect officers; *York's Case*, 3 Pa. Co. Ct. 514, holding that constitutional provision requiring majority of electors of a town requires only majority of those voting, although they may not be a majority of whole number of voters; *Com. ex rel. Torrey v. Chittenden*, 13 Pa. Co. Ct. 362, 10 *Lanc. L. Rev.* 276, 2 Pa. Dist. R. 804, holding that majority of joint convention of select and common councils; means a majority of all the members of both, not a majority of each separately; *St. Aemilianus Orphan Asylum v. Milwaukee County*, 107 Wis. 80, 82 N. W. 704, construing "majority vote of board of supervisors" to mean majority of quorum present.

Cited in note in 6 L.R.A. 310, on what constitutes a majority vote when number of voters is indefinite.

Distinguished in *State, Schermerhorn, Prosecutor, v. Jersey City*, 53 N. J. L. 112, 20 *Atl.* 829, holding that act requiring favorable vote of three-fourths of all the members of a legislative body, means three-fourths of all the members, not three-fourths of those voting.

Right to vote by proxy.

Cited in *Com. ex rel. Verree v. Bringham*, 103 Pa. 134, 49 A. R. 119, 13 W. N. C. 483, 40 *Phila. Leg. Int.* 326, holding that members of corporation have no right to vote by proxy unless such right is expressly given by the charter or by valid by-law; *Wilson v. American Academy of Music*, 18 *Phila.* 352, 43 *Phila. Leg. Int.* 86, 2 Pa. Co. Ct. 280, holding that right to vote by proxy is not a general right but is valid under by-law of corporation where charter granted such privilege.

Cited in note in 4 L.R.A. 521, on right of shareholders to vote by proxy.

Nature of pew holder's title.

Cited in notes in 80 A. D. 664, on nature of pew-holder's title; 22 L.R.A. 211, on nature of right and title of pew-holders.

Regularity of religious meeting.

Cited in *Phillips v. Westminster Church*, 225 Pa. 62, 73 *Atl.* 1062, holding that meetings of religious society when notice thereof is read from pulpit are regularly called.

32 AM. REP. 429, WALTER v. COM. 88 PA. 137.

Evasion of statutes.

Cited in reference notes in 32 A. R. 306, on right to evade limitation as to agricultural leases by simultaneously executing leases for successive periods; 39 A. R. 419, on dispensing beer at social club as sale; 73 A. S. R. 150, on indirect sales of intoxicating liquors.

32 AM. REP. 438, STEPMENS v. MONONGAHELA NAT. BANK, 88 PA. 157.

Liability of accommodation endorser of note.

Cited in *McCamant v. Miners' Trust Co. Bank*, 15 W. N. C. 122, 41 *Phila. Leg. Int.* 368, holding that upon protest of note an accommodation endorser is liable as principal; *Yardley Nat. Bank v. Vansant*, 14 Pa. Dist. R. 145, holding accommodation maker of note liable to bank thereon, though he offered to show that bank had knowledge that note was given for accommodation of corporation to conceal actual amount loaned to it; *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 915, on liability of makers and endorsers of promissory note as to each other; *Delaware County Trust, S. D. & Title Ins. Co. v. Haser*, 8 Del.

Co. Rep. 125, holding maker of note given to payee as security for debt of third person not discharged by extension of time to principal debtor.

Cited in reference notes in 22 A. S. R. 870, on liability of accommodation maker after indorsement; 36 A. R. 310, on liability of maker of accommodation note.

Cited in note in 31 A. S. R. 745, on rights and liability of makers and indorsers of accommodation paper.

Liability of surety or endorser on note.

Cited in *Henry v. Bigley*, 5 Pa. Super. Ct. 503; *Kerr's Estate*, 4 Pa. Dist. R. 696, 17 Pa. Co. Ct. 193 (dissenting opinion),—on distinction between endorser and mere surety.

—Release of security discharging surety.

Cited in *Clausen v. Bellevue Bldg. & L. Asso.* 7 Pa. Super Ct. 217, holding that judgment creditor who has levied upon and sold personal property of debtor can not thereafter release the proceeds and have his judgment in force against the land of the debtor; *Griesmere v. Thorn*, 32 Pa. Super. Ct. 13, on distinction between the lien of an execution and the lien of a levy thereunder as affecting release of surety by failure to enforce it; *Francisco v. Shelton*, 85 Va. 779, 8 S. E. 789, on effect of release by creditor of property levied upon, as to liability of surety.

Usury by national bank.

Cited in notes in 56 L.R.A. 678, on extent of invalidity generally from charging or taking of usury by national bank; 56 L.R.A. 691, on jurisdiction of action by state courts against national bank for taking of usury where interest is actually paid.

—Set-off or counterclaim of.

Cited in notes in 56 L.R.A. 697, on set-off or counterclaim of illegal interest paid to national bank; 56 L.R.A. 700, on set-off or counterclaim of illegal interest paid to national bank where right to recover penalty barred by limitations.

—Who may set up defense of.

Cited in note in 56 L.R.A. 697, on set-off or counterclaim of illegal interest paid to national bank.

—Recovery of penalty for.

Cited in *Lealos v. Union Nat. Bank*, 9 N. D. 60, 81 N. W. 56, holding that personal representative of maker of note can not recover penalty for usury where such usury was not actually paid by intestate; *First Nat. Bank v. Smith*, 36 Neb. 199, 54 N. W. 254; *Lynch v. Merchant's Nat. Bank*, 22 W. Va. 554, 46 A. R. 520,—holding that right of action for penalty for usury accrues the instant it is paid and statute of limitations runs from that time; *Bright v. Mountain City Bkg. Co.* 3 Penny, 478, on same point.

Cited in note in 56 L.R.A. 706, on prerequisites to suit against national bank for twice amount of illegal interest paid to it

Disapproved in *First Nat. Bank v. Childs*, 133 Mass. 248, 43 A. R. 509, holding that in suit by national bank upon promissory note, interest paid above the legal rate is not available as a set-off.

Liability of bank director.

Cited in *Warren v. Robinson*, 19 Utah, 289, 75 A. S. R. 734, 57 Pac. 287, holding bank directors bound to use ordinary care and prudence in managing affairs of a bank and liable to stockholders for failure to do so.

Who may maintain suit for violation of national bank act.

Cited in *McCartney v. Kipp*, 171 Pa. 644, 33 Atl. 233, on suit for violation of statute governing national bank being maintainable only at instance of comptroller of the currency.

Parol evidence to vary written instrument.

Cited in note in 11 E. R. C. 231, on admissibility of parol evidence to vary terms of negotiable instruments.

32 AM. REP. 445, LYNCH v. COM. 88 PA. 189.

Voluntary absence from trial of one accused of crime.

Cited in *State ex rel. Poul v. McLain*, 13 N. D. 368, 102 N. W. 407, holding that where accused who is out on bail voluntarily fails to appear at preliminary examination but is represented by counsel, he waives his right to be present; *Grant v. Com.* 16 Pa. Dist. R. 826, 10 Del. Co. Rep. 207, holding that prosecution for malicious trespass may proceed in voluntary absence of defendant; *Com. v. McAndrews*, 3 Lack. Leg. News, 339, holding that presence of defendant upon return of verdict in prosecution for misdemeanor valid.

Cited in notes in 28 A. D. 630, as to when trial may be had in absence of accused; 14 L.R.A.(N.S.) 604, on right of accused to waive his presence at time of receiving verdict on trial for felony.

Verdict or sentence in absence of accused.

Cited in *Falk v. United States*, 15 App. D. C. 446, holding that in cases not involving capital punishment trial may proceed and verdict be rendered in the absence of defendant, where he was present at opening of trial but escaped and fled during the trial; *State v. Hope*, 100 Mo. 347, 8 L.R.A. 608, 13 S. W. 490, sustaining validity of statute permitting rendering of verdict in criminal case in absence of defendant who voluntarily or wilfully fails to appear; *Frey v. Calhoun Circuit Judge*, 107 Mich. 130, 64 N. W. 1047; *Peterson v. State*, 64 Neb. 875, 90 N. W. 964,—holding that voluntary absence of defendant out on bail, is a waiver of right to be present at rendition of verdict; *State v. McCullough*, 1 Penn. (Del.) 274, 40 Atl. 237, on same point; *Com. v. McCarthy*, 163 Mass. 458, 40 N. E. 766; *Jackson v. State*, 49 N. J. L. 252, 9 Atl. 740,—holding that in all criminal cases where defendant is out on bail, verdict may be rendered in his voluntary absence; *Grant v. Com.* 33 Pa. Co. Ct. 43, 37 Phila. Leg. Int. 281, sustaining money penalty imposed upon conviction in justice court where defendant had notice of time of trial but voluntarily failed to appear; *Com. v. Craig*, 19 Pa. Super. Ct. 81, holding that record of trial for larceny need not necessarily show the presence of defendant at time verdict is rendered.

Cited in notes in 68 A. D. 224, on necessity for accused's presence at rendition of verdict in case of felony; 68 A. D. 225, on necessity for accused's presence at rendition of verdict in cases of bail or escape; 5 L.R.A. 834, on right of person accused of felony to be present during trial.

Distinguished in *Davis v. Com.* 13 Pa. Co. Ct. 545, 3 Pa. Dist. R. 668, holding that justice of the peace has no power to convict and sentence a defendant for cruelty to animals, where defendant is ill and unable to be present; *Com. v. House*, 6 Pa. Super. Ct. 92, 28 Pittsb. L. J. N. S. 210, 41 W. N. C. 246, holding it to be reversible error to give additional instructions to the jury in absence of defendant in criminal case, and without notice to him or his counsel.

Meaning of "felony" at common law.

Cited in *Ex parte Biggs*, 52 Or. 433, 97 Pac. 713, holding that a common law "felony" was offense which occasioned total forfeiture of goods or lands, and misdemeanor was offense less than felony.

32 AM. REP. 451, *ERIE & P. R. CO. v. DOUTHET*, 88 PA. 243.

Validity of agreement for free passage on railway.

Cited in *Oklahoma City v. Oklahoma R. Co.* 20 Okla. 1, 16 L.R.A.(N.S.) 651, 93 Pac. 48, holding agreement by street railway to carry certain persons free on condition of getting franchise in city, valid.

Remedy and damages for breach of contract to give pass on railroad.

Cited in *Ruddick v. St. Louis, K. & N. W. R. Co.* 116 Mo. 25, 38 A. S. R. 570, 22 S. W. 499, holding that suit for damages is an available remedy for breach of covenant to furnish annual pass over railroad; *Brown v. St. Paul, M. & M. R. Co.* 36 Minn. 236, 31 A. R. 941, on measure of damages for breach of contract to give annual pass; *World's Columbian Exposition v. Pasteur Chamberland Filter Co.* 82 Ill. App. 94, on measure of damages for breach of contract as to matter having no commercial value.

Recovery of damages for continuing breach of contract.

Cited in *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 422, 5 So. 138, holding that in case of a continuing breach, plaintiff may declare for total breach and recover in one action damages running through many years; *Hays v. Wilksburg & E. P. Street R. Co.* 32 Pittsb. L. J. N. S. 216, holding that measure of damages was cost of paving and grading, where street railway acquired right of way upon agreement to do grading and paving but abandoned enterprise.

Cited in note in 57 L.R.A. 196, on measure of damages for breach by vendor of contract for sale of article in case of total absence of market.

32 AM. REP. 453, *LOGAN v. CASSELL*, 88 PA. 288.

Rights of action on negotiable instrument.

Cited in *Toby v. Oregon P. R. Co.* 98 Cal. 490, 33 Pac. 550, holding that assignee of note and mortgage for collection may maintain action thereon in his own name subject to defenses available against his assignor; *First Nat. Bank v. Mann*, 94 Tenn. 17, 27 L.R.A. 565, 27 S. W. 1015, holding that holder of note as collateral security may maintain action thereon though the debt secured thereby has been paid, but it is subject to defenses available against payee; *Greene v. McAuley*, 70 Kan. 601, 68 L.R.A. 308, 79 Pac. 133, on same point.

Cited in reference note in 40 A. S. R. 339, on actions on negotiable instruments by indorsee.

Cited in note in 79 A. D. 504, on pledgee's remedy upon pledge of commercial paper.

32 AM. REP. 455, *FAIR v. PHILADELPHIA*, 88 PA. 309.

Liability of municipal corporation for damages from inadequacy of sewer system.

Cited in *Costello v. Conshohocken*, 8 Pa. Co. Ct. 639; *Sullivan v. Pittsburgh*, 40 W. N. C. 542, 28 Pittsb. L. J. N. S. 36, 5 Pa. Super. Ct. 357; *Collins v. Philadelphia*, 93 Pa. 270; *Fairlawn Coal Co. v. Seranton*, 148 Pa. 231, 23 Atl. 1069; *Bealafeld v. Verona*, 188 Pa. 627, 41 Atl. 651, holding municipality not

liable for damages arising from inadequacy of sewer or drain; *Pressman v. Dickson*, 13 Pa. Super. Ct. 236; *Cooper v. Scranton City*, 21 Pa. Super. Ct. 17; *Siegfried v. South Bethlehem*, 27 Pa. Super. Ct. 456,—on same point; *Knostman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887; *Schwermer v. Philadelphia*, 35 Pa. Super. Ct. 128; *Springfield v. Spence*, 39 Ohio St. 665,—holding city not liable for damages resulting from failure to provide drains sufficient to carry off surface water; *Kennedy v. Pittsburgh*, 14 Pittsb. L. J. N. S. 230, holding city not liable for error in judgment in not providing means to carry off surface water though natural drainage in obstructed; *A. L. Lakey Co. v. Kalamazoo*, 138 Mich. 644, 110 A. S. R. 338, 67 L.R.A. 931, 101 N. W. 841, holding city not liable for damage from overflow of natural creek caused by the washing into it of matter from streets and adjacent property.

Cited in reference notes in 40 A. R. 1, on equitable jurisdiction to compel city to construct sewer or to award damages for improper construction; 1 A. S. R. 673, on municipal liability for defective sewers.

Cited in notes in 66 A. D. 441, on municipal liability as to surface water and drainage; 54 A. R. 672, on municipal liability for insufficiency of sewers; 29 A. S. R. 738, on municipal liability for defect in plan for sewers; 21 L. R.A. 604, on duty to care for surface water where it falls; 61 L.R.A. 685, on liability of municipality for failure to drain; 65 L.R.A. 251, on duty of municipality to care for surface water; 1 L.R.A. 298, on municipality's discretionary powers to construct sewers; 41 L. ed. U. S. 840, on drainage of surface water.

Distinguished in *Seifert v. Brooklyn*, 15 Abb. N. C. 97, holding city liable for damage from overflow of sewer on to private property resulting from sewer's incapacity to carry off the water gathered into it from other places; *Gift v. Reading*, 40 W. N. C. 164, 3 Pa. Super. Ct. 359, holding city liable for damage resulting from diversion of surface water on to plaintiff's land resulting from construction of sewer and obstruction of natural flow; *Butchers' Ice & Coal Co. v. Philadelphia*, 156 Pa. 54, 27 Atl. 376, 32 W. N. C. 526, holding city liable for damages resulting to property from deposit of filth at sewer's mouth, which could have been avoided by extending it a little farther; *Metzgar v. Lycoming Twp.* 39 Pa. Super. Ct. 602, holding that city is liable for damages resulting from negligent obstruction of natural stream; *Gable v. Lancaster*, 20 Lanc. L. Rev. 301, holding city liable for diverting flow of surface water and increase natural flowage on street to damage of adjacent property.

—From grading and improving streets.

Cited in *Strauss v. Allentown*, 215 Pa. 96, 63 Atl. 1073, 7 A. & E. Ann. Cas. 686, holding city not liable for damage from increased flow of surface water caused by opening of streets and grading of lots in the development of the city; *Fleming v. Connellsville*, 36 Pa. Co. Ct. 298, to the point that city is not liable to lot owners for injury arising from grading of street.

Distinguished in *Torrey v. Scranton*, 133 Pa. 173, 19 Atl. 351, holding city liable for damages resulting from diversion of flow of surface water by grading road, thereby throwing such water upon plaintiff's property where it otherwise would not have gone.

—From other public works.

Cited in *Long v. Elberton*, 109 Ga. 28, 75 A. S. R. 363, 46 L.R.A. 428, 34 S. E. 333, holding city not liable for damage to property owner resulting from erection of prison in vicinity of his property; *Watters v. Omaha*, 76 Neb. 855,

110 N. W. 981, 14 A. & E. Ann. Cas. 750, holding city not liable for damage resulting from adoption of defective plan for construction of a public work.

Cited in note in 30 A. S. R. 380, on municipal liability for errors of officers and agents in plan of work.

—From use of street.

Cited in *Burford v. Grand Rapids*, 53 Mich. 98, 51 A. R. 105, 18 N. W. 571, holding city not liable for injury from coasting in street, though permitted under city ordinance.

32 AM. REP. 457, DALY v. MITLAND, 88 PA. 384.

Nature and validity of stipulations for attorney's fees.

Cited in *Re Penney*, 2 Fed. 765, sustaining validity of stipulation in bond for payment of attorney's commission; *Re Wendel*, 152 Fed. 672, holding that where mortgage stipulates for a fixed per cent as attorney's commission, the court should allow a reasonable compensation for services rendered; *Salsburg v. Mack*, 11 Pa. Co. Ct. 408, 6 Kulp, 413; *Eichelberger's Estate*, 15 Pa. Dist. R. 420; *Wilson v. Ott*, 173 Pa. 253, 51 A. S. R. 767, 34 Atl. 23, 37 W. N. C. 557,—holding that stipulated attorney's commission for collection of debt is in nature of a penalty and its enforcement as to amount is within equity discretion of the court; *Scott v. Carl*, 24 Pa. Super. Ct. 460; *Commonwealth Bldg. & L. Asso. v. Stroh*, 12 Pa. Dist. R. 509, 20 Lanc. L. Rev. 123; *Johnston v. Speer*, 92 Pa. 227, 37 A. R. 675, 37 Phila. Leg. Int. 435,—on same point; *Kuhn v. Ogilvie*, 6 Pa. Dist. R. 102, allowing attorney's fees under stipulation for payment of costs and charges; *Leshner v. Brown*, 3 Del. Co. Rep. 69; *Underhill v. Miller*, 6 North. Co. Rep. 289,—holding stipulations for attorneys' fees in judgment note are regarded in nature of penalty and not stipulated damages.

Cited in note in 55 A. S. R. 445, on validity of stipulation for attorneys' fees.

—Reasonableness of amount.

Cited in *Burns v. Scoggin*, 9 Sawy. 73, 16 Fed. 734, allowing \$500 as reasonable fee for collection of \$30,000 mortgage debt which contained stipulation for a fee of 10%; *Imler v. Imler*, 94 Pa. 372, sustaining commission of \$103 for collection of \$2600, debt though most of it was paid voluntarily, a small part only being litigated; *Warwick Iron Co. v. Morton*, 148 Pa. 72, 23 Atl. 1065, allowing 2% for attorneys commission on mortgage for \$1,500 stipulating for 5%; *Cunningham v. McCready*, 219 Pa. 594, 69 Atl. 82, holding that \$50, was sufficient attorney's fee where tendered immediately where action is brought though mortgage stipulated for 5% as attorney's fee; *Weigley v. Charlier*, 8 Del. Co. Rep. 71, 9 Pa. Dist. Rep. 670, allowing \$200 on a mortgage foreclosure for \$14,000 the stipulated fee being three per cent.

Disapproved in *Balfour v. Davis*, 14 Or. 47, 12 Pac. 89, holding stipulation for 20% as attorney's fee for collection void, and refusing to allow any fee under such stipulation.

—Necessity of demand before suit.

Cited in *Eisenhower v. Shank*, 31 Pa. Super. Ct. 23, allowing attorney's fees on a confessed judgment though no execution was had under it and no demand made, where it appeared that the attorney had rendered substantial services; *Tressler v. Stephens*, 34 Pa. Co. Ct. 264, sustaining right to stipulated fee of 5% upon collection of a judgment though no demand was made, where collected from administrator of deceased debtor; *Lindley v. Ross*, 137 Pa.

629, 20 Atl. 944, allowing no attorney's commission where no demand of payment was made prior to obtaining judgment though mortgage contained stipulation for commission; *Lewis v. Germania Sav. Bank*, 96 Pa. 86, enforcing payment of attorney's fee though no demand was made for payment prior to action where mortgagor did not pay or tender payment thereafter but defended against the debt.

— **Stipulated fee as costs.**

Cited in *Bronson v. Brown*, 8 Pa. Dist. R. 365, holding that attorney's commission stipulated in mortgage cannot be recovered as costs but must be included in the judgment; *Allison's Estate*, 4 Pa. Co. Ct. 550, on same point.

Propriety of amount of attorney's fees as court question.

Cited in *Streng's Case*, 22 Pa. Co. Ct. 570; *Zentmyer's Appeal*, 3 Pennyp. 224,—holding that it is duty of court to fix attorney's compensation for collection of debt, though a rate may have been stipulated; *Johnson v. Blanks*, 68 Tex. 495, 4 S. W. 557; *McKelvy's Appeal*, 108 Pa. 615, 15 W. N. C. 564, 42 Phila. Leg. Int. 181, 16 Pittsb. L. J. N. S. 150,—holding that court has power to fix compensation of attorney for services without hearing evidence as to their value; *Kent v. West*, 33 App. Div. 112, 53 N. Y. Supp. 244, on same point; *Guthrie v. Reid*, 107 Pa. 251, 42 Phila. Leg. Int. 363, holding that it is error for court to submit question of amount of attorney's fee to the jury; *People's Mut. F. Ins. Co. v. Groff*, 154 Pa. 200, 26 Atl. 63, on reasonableness of attorney's fee in mortgage foreclosure being for the court; *Anderson v. March*, 6 Pa. Dist. R. 49, on power of court to decide whether commission agreed upon is reasonable; *Leshner v. Brown*, 2 Lehigh Valley L. Rep. 272, holding amount to be allowed as attorney fees under clause in mortgage in discretion of court; *Guthrie v. Reid*, 16 Pittsb. L. J. N. S. 596, holding that amount of attorney's fees in judgment note should not be submitted to jury; *Re Plains Twp.* 12 Luzerne Leg. Reg. 291, to the point that amount of attorneys' fees under stipulation in mortgage is in court's discretion.

Penalty or liquidated damages.

Cited in reference note in 57 A. R. 783, on distinction between penalty and liquidated damages.

Cited in note in 6 E. R. C. 561, on distinction between a penalty and liquidated damages mentioned as payable in event of nonperformance of contract.

32 AM. REP. 462, HASS v. PHILADELPHIA & S. MAIL S. S. CO. 88 PA. 269.

Existence of relation of fellow servants as question for the jury.

Cited in *Braegger v. Oregon Short Line R. Co.* 24 Utah, 391, 68 Pac. 140, holding that it is question of fact for jury whether under certain facts and circumstances in evidence the relation of fellow servants does or does not exist. *Dealey v. Philadelphia & R. R. Co.* 2 Sadler (Pa.) 224, 4 Atl. 170, 16 Phila. 122, 40 Phila. Leg. Int. 124, on the same point; *Norfolk Beet-Sugar Co. v. Koch*, 52 Neb. 197, 71 N. W. 1015, holding general verdict for plaintiff not sustained where jury in answer to special interrogatory whether the plaintiff and the servant whose negligence caused the injury, were fellow servants, answered "We do not know."

Cited in notes in 36 A. D. 289, on who are fellow servants; 25 L. ed. U. S. 613, on who are coservants within rule that the master is not responsible for injuries to servant occasioned by negligence of coservant.

Who are independent contractors.

Cited in reference notes in 36 A. R. 320, as to who is independent contractor for whose acts employer is not liable; 4 A. S. R. 264, on test as to whether relation of master and servant or contractor and contractee exists.

Cited in notes in 76 A. S. R. 384, on who are independent contractors; 65 L.R.A. 470, on inference of independence of contracts by stevedores.

Liability for negligence of independent contractor.

Cited in reference notes in 32 A. R. 632, on railroad's liability for negligent handling of train by independent contractor; 54 A. R. 874, on shipowner's liability for injury to servant by stevedore; 9 L.R.A. 604, on railroad's liability for independent contractor's negligence.

32 AM. REP. 469, MOORE'S APPEAL, 88 PA. 450.**Liability of grantee of property "under and subject" to lien.**

Cited in *Taylor v. Mayer*, 93 Pa. 42, holding that the words "under and subject to" an incumbrance, used in conveyance of land creates only a covenant of indemnity from grantee to grantor; *Farmers' Loan & T. Co. v. Penn Plate-Glass Co.* 186 U. S. 434, 46 L. ed. 1234, 22 Sup. Ct. Rep. 842 (affirming 103 Fed. 132, 43 C. C. A. 114, 56 L.R.A. 710), holding that grantee taking deed subject to lien of mortgage is simply an indemnitor of his grantor against payment of the mortgagee, under laws of Pennsylvania; *McConaghy's Estate*, 13 Phila. 399, 37 Phila. Leg. Int. 486; *Peter's Estate*, 16 Pa. Super. Ct. 462,—on same point; *Erwin's Estate*, 7 Pa. Dist. R. 486, 21 Pa. Co. Ct. 281, holding that where husband and wife convey to trustees who reconveys to wife both being under and subject to a mortgage, the husband's personal estate is not liable for such mortgage debt; *Samuel v. Peyton*, 88 Pa. 465, holding that where mortgagee agreed with a grantee that he was not to be personally liable on mortgage debt, a subsequent grantee does not become liable by reason of a "under and subject to" clause; *Hirst's Appeal*, 92 Pa. 491, holding personal estate of decedent not liable for mortgage debt on realty purchased by him "under and subject to" said mortgage; *May's Estate*, 218 Pa. 64, 67 Atl. 120, on liability of purchaser of property "under and subject to" a mortgage.

Cited in notes in 78 A. D. 83, on effect of mortgage debt forming part of consideration on personal liability of grantee; 26 A. R. 661, 662, on effect of conveyance of land subject to mortgage.

Distinguished in *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501, holding that where lessor of premises executes a subsequent lease with clause "this lease to be taken subject to former lease" he does not thereby declare a forfeiture of such former lease.

Assumption of mortgage by grantee.

Cited in *Michigan Sav. & L. Asso. v. Attebery*, 16 Tex. Civ. App. 222, 42 S. W. 569, holding that purchaser of property subject to lien who does not assume the payment of the lien debt, does not become personally liable therefor; *Jager v. Vollinger*, 174 Mass. 521, 55 N. E. 458, holding that where "payment of a mortgage" is expressed as part of the consideration, the grantee assumes its payment; *Kirker v. Wylie*, 207 Pa. 511, 56 Atl. 1074, holding grantee, of land who assumes to pay mortgages thereon as part of consideration, liable to grantor where the latter is compelled to pay part of such incumbrance; *Stanhope's Estate*, 184 Pa. 414, 39 Atl. 217, 6 Pa. Dist. R. 179, 19 Pa. Co. Ct. 411, 4 Lack. Leg. News, 272, on the same point; *Orrick v. Durham*, 79 Mo. 174, holding

that where grantee assumes payment of mortgage debt, and vendor is compelled to pay it, vendor is subrogated to rights of mortgagee; *Fletcher v. Chamberlin*, 61 N. H. 438, on liability of grantee who assumes payment of an incumbrance.

Cited in notes in 78 A. D. 76, on enforcement by mortgagee of grantee's obligation; 78 A. D. 82, on form of contract by grantee to pay mortgage.

Distinguished in *Thomas v. Fourth Street M. E. Church*, 17 Montg. Co. L. Rep. 68, 24 Pa. Co. Ct. 642, holding grantee personally liable for mortgage debt on premises, where it was part of consideration and circumstances indicated that such liability was intended at time of conveyance.

Evidence as to assumption of payment of mortgage debt by grantee.

Cited in *Merriman v. Moore*, 90 Pa. 78, holding evidence that vendee of land "under and subject to" mortgage, agreed to assume payment of the debt as part of consideration, admissible in suit against him by mortgagee.

Liability of decedent's personal estate for debt secured by mortgage on realty.

Cited in *Stuard's Estate*, 17 Phila. 498, 42 Phila. Leg. Int. 445, 17 W. N. C. 14, holding that where realty devised or inherited is subject to mortgage given by decedent, such mortgage debt is payable out of his personal estate; *Burton's Estate*, 3 Pa. Dist. R. 755, 15 Pa. Co. Ct. 367, holding that debt secured by mortgage upon real estate of intestate is payable out of his personal estate.

32 AM. REP. 472, HESTONVILLE PASS. R. CO. v. CONNELL, 88 PA. 520.

Liability for injury to children in street.

Cited in *Summers v. Bergner Brewing Co.* 143 Pa. 114, 24 A. S. R. 518, 22 Atl. 707, 28 W. N. C. 431, 48 Phila. Leg. Int. 442, holding that where child was injured by being run over by wagon, the driver being asleep, question of negligence is for the jury; *McCloskey v. Chautauqua Lake Ice Co.* 174 Pa. 34, 34 Atl. 287, 38 W. N. C. 30, 26 Pittsb. L. J. N. S. 347 (dissenting opinion), on liability for injury to child in street from being struck by ice wagon; *Calumet Electric Street R. Co. v. Van Pelt*, 68 Ill. App. 582 (dissenting opinion), on liability for injury to child from failure to guard against it.

Liability towards trespassing children.

Cited in *Emerson v. Peteler*, 35 Minn. 481, 59 A. R. 337, 29 N. W. 311, holding one grading street not liable for injury to child trespassing upon cars used in the work and injured; *Feehan v. Dobson*, 44 W. N. C. 65, 10 Pa. Super. Ct. 6, holding owner of lot surrounded by low wall who habitually places hot coal and ashes there, not liable for injury to child trespassing thereon and injured by contact with the hot coals; *Rodgers v. Lees*, 140 Pa. 475, 23 A. S. R. 250, 12 L.R.A. 216, 21 Atl. 399, 27 W. N. C. 441, 22 Pittsb. L. J. N. S. 34, 48 Phila. Leg. Int. 329, holding that a child of tender years may be a trespasser and as such be precluded from recovery for an injury.

Liability for injury to children by street railways.

Cited in *Hearn v. St. Charles Street R. Co.* 34 La. Ann. 160, holding street railway not liable where child was injured on track, where he was in such position ahead of the mule that driver did not see him; *Funk v. Electric Traction Co.* 175 Pa. 559, 34 Atl. 861, holding street car company not liable where 13-year-old boy ran diagonally across street and against moving car and was injured.

Cited in reference note in 33 A. S. R. 208, on right of child running in front of cable car, to recover for injuries.

— Children trespassing on cars.

Cited in *Jefferson v. Birmingham, R. & Electric Co.* 116 Ala. 294, 67 A. S. R. 116, 38 L.R.A. 458, 22 So. 546, holding street railway not liable for injury to child trespassing upon its cars and injured while jumping off; *Mullen v. Springfield Street R. Co.* 164 Mass. 450, 41 N. E. 664, holding street railway not liable for injury to child who was stealing a ride on a wagon and jumped off just ahead of the car and was run over; *Feingold v. Philadelphia Traction Co.* 21 Pa. Co. Ct. 183, 4 Lack. Legal News, 290, 7 Pa. Dist. R. 445, holding street railway not liable for injury to boy trespassing on moving car who is told to get off and is injured in jumping off while car is moving; *Hestonville, M. & F. Pass. R. Co. v. Kelley*, 102 Pa. 115, 13 W. N. C. 158, 13 Pittsb. L. J. N. S. 494, 40 Phila. Leg. Int. 221 (reversing 37 Phila. Leg. Int. 168), holding street railway not liable for injury to child who climbed onto platform of car without knowledge of the driver and soon after jumped off and was injured; *Bishop v. Union R. Co.* 14 R. I. 314, 51 A. R. 386, holding street car company not liable for injury to six-year-old child who jumped upon rear platform of car and fell off and was injured; *Biddle v. Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485, 17 W. N. C. 436, 43 Phila. Leg. Int. 306, holding street railway liable for injury to trespassing child, where driver compelled him to jump from a moving car, thereby causing the injury.

Cited in reference notes in 38 A. S. R. 258, on liability of railroad for injuries to boys trespassing on trains; 67 A. S. R. 119, on injury by street car to trespassing child.

Cited in notes in 59 A. R. 604, on railroad's liability for injuries to child while stealing ride on train; 12 L.R.A. 338, on liability of carrier for removing trespassing child from train.

Liability for injury by railroads to trespassing children.

Cited in *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 38 A. S. R. 254, 21 S. W. 1062, holding railroad company not liable for injury to boy stealing ride on its train; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069, holding railway not liable for injury to boy trespassing in its yards; *McMullen v. Pennsylvania R. Co.* 132 Pa. 107, 19 A. S. R. 591, 19 Atl. 27, 25 W. N. C. 308, holding that no recovery can be had for injury to boy 10 years of age who is trespassing upon railroad track and run over by train.

Distinguished in *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 58 A. R. 387, 6 N. E. 310, holding railroad liable where child of 7 years entered train, was carried to another station, there put off with no one in charge, wandered upon track where he could easily be seen and was run over by train which could easily have been stopped.

Capacity of infant to see and avoid danger.

Cited in reference note in 32 A. R. 413, on presumption of infant's capacity to see and avoid danger.

Cited in note in 21 L. ed. U. S. 745, on degree of care required from infants to avoid injury.

Negligence in getting on or off moving cars.

Cited in note in 38 L.R.A. 786, on negligence in getting on or off moving street cars.

32 AM. REP. 476, DUNCAN v. BARNETT, 11 S. C. 333.**Restrictiveness of constitutional grant of specific legislative power.**

Distinguished in *Pelzer v. Campbell*, 15 S. C. 581, 40 A. R. 705, holding there is nothing in the Constitution which prevents the legislature from giving to married women rights and powers in addition to those conferred by that instrument; *Utsey v. Charleston, S. & N. R. Co.* 38 S. C. 399, 17 S. E. 141, holding Constitutional provision requiring legislature "to pass the necessary laws for change of venue in all cases upon proper showing, etc." was not an exhaustive grant of legislative power.

— Constitutional exemptions.

Cited in *Oliver v. White*, 18 S. C. 235, as to attempt of legislature to add to exemptions enumerated in the Constitution; *Norton v. Bradham*, 21 S. C. 375, holding legislature cannot change the character, amount or beneficiaries of exemptions provided for in the Constitution.

Cited in note in 21 L. ed. U. S. 213, on constitutionality of laws changing exemption from execution.

Distinguished in *Ketchin v. McCarley*, 26 S. C. 1, 4 A. S. R. 674, 11 S. E. 1099, holding law exempting homestead from lien of judgment is not unconstitutional as an attempt on part of legislature to extend provision of homestead law beyond limits fixed by Constitution.

32 AM. REP. 479, WEBB v. GRANITEVILLE MFG. CO. 11 S.C. 396.**Notice of trust to charge persons dealing with trustee.**

Cited in *Salinas v. Pearsall*, 24 S. C. 179, as to duty of persons dealing with trustee to inquire into terms of the trust; *Neal v. Bleckley*, 51 S. C. 506, 29 S. E. 249, holding there was sufficient notice in this case.

Knowledge of agent as knowledge of principal.

Cited in *Morris v. Georgia Loan, Sav. & Bkg. Co.* 109 Ga. 12, 46 L.R.A. 506, 34 S. E. 378, as to knowledge of corporation when one is officer of two corporations having business transactions; *Knoblock v. Germania Sav. Bank*, 50 S. C. 259, 27 S. E. 962, holding knowledge of agent while engaged in a fraud for his own benefit, in which the principal is not in any way a participant, cannot be imputed to the principal.

Cited in reference note in 24 A. S. R. 728, on imputation to corporation of knowledge of president.

Disapproved in *Gunster v. Scranton Illuminating Heat & P. Co.* 181 Pa. 327, 59 A. S. R. 660, 37 Atl. 550, holding an exception to the general rule that notice to the agent is notice to the principal arises in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where agent acts for himself in his own interest and adversely to that of principal.

32 AM. REP. 483, LYONS v. HOLMES, 11 S. C. 429, Later appeal in 19 S. C. 406.**Proving attested instruments.**

Cited in note in 35 L.R.A. 332, on necessity of calling subscribing witnesses to prove attested instruments where they cannot be procured.

— When signature is by mark.

Cited in *Robinson v. Robinson*, 20 S. C. 567, holding note signed by a mark

may be proved by one who witnessed it, whether named as a subscribing witness or not; *Sanborn v. Cole*, 63 Vt. 590, 14 L.R.A. 208, 22 Atl. 716, holding where the signature to a promissory note is by the mark of the maker, which is attested by a subscribing witness, evidence that the name of the witness is in his hand writing, and that such witness is dead, is competent to prove execution of note.

Cited in notes in 35 L.R.A. 351, on necessity of calling subscribing witnesses to prove attested instruments signed by mark; 22 L.R.A. 372, on deeds, notes, and contracts signed or attested by mark; 44 L.R.A. 142, on proof of signature of testator by mark when attesting witnesses thereto are dead; 44 L.R.A. 146, on proof of signature by mark where attesting witness is dead.

32 AM. REP. 495, CENTRAL NAT. BANK v. ADAMS, 11 S. C. 452.

Due diligence in giving notice of dishonor as law question.

Cited in *Diercks v. Roberts*, 13 S. C. 338, holding whether holder has used due diligence to discover the indorser's place of residence is a question of fact for the jury; but it is error to submit to them the inquiry whether due diligence has been used in giving to the indorser notice of dishonor of note.

Cited in reference note in 1 A. S. R. 682, on sufficiency of notice of protest by mail.

32 AM. REP. 500, McDUFFIE v. MCINTYRE, 11 S. C. 551.

Rights of guardian over estate of ward.

Cited in *Johnson v. Payne & W. Bank*, 56 Mo. App. 257, holding a bank cannot pay a note due to it out of a guardian's deposit of his ward's money; *Easterling v. Horning*, 30 App. D. C. 225; *Hardy v. Citizens' Nat. Bank*, 61 N. H. 34,—holding a guardian has no authority to bind his ward, either by note or pledge of property of ward; *Webb v. Graniteville Mfg. Co.* 11 S. C. 396, 32 A. R. 479, holding guardian had no authority to sell ward's beneficial interest in stock without order of court; *Gary v. People's Nat. Bank*, 26 S. C. 538, 4 A. S. R. 733, 2 S. E. 568, holding where guardian deposited sum of money in bank as guardian and then died his executor was not entitled to recover deposit as it was property of wards.

Cited in note in 89 A. S. R. 282, on power of guardian over sale of ward's personal property.

Distinguished in *Hyatt v. McBurney*, 18 S. C. 199, as to distinction between right of guardian to dispose of property of ward and that of an executor or administrator who is authorized to sell property of estate and take note thereof to themselves.

Right of guardian to foreclose mortgage in his own name.

Distinguished in *Barnwell v. Marion*, 54 S. C. 223, 32 S. E. 313, holding a guardian to whom a bond secured by a mortgage has been assigned eo nomine may maintain an action of foreclosure on the mortgage without joining ward with him.

Notice of trust to person dealing with trustee.

Cited in *Neal v. Bleckley*, 51 S. C. 506, 29 S. E. 249, holding sufficient notice of trust shown.

Purchase of ward's property by third persons.

Cited in reference note in 70 A. S. R. 49, on purchase of ward's property by third persons.

32 AM. REP. 506, GRANT v. GRANT, 12 S. C. 29.

Right of legislature to divest court of jurisdiction already acquired.

Cited in *Riddle v. Reese*, 53 S. C. 198, 31 S. E. 222, holding it has the right.

Right of court to take jurisdiction of divorce.

Cited in *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456 (dissenting opinion), as to courts not having jurisdiction unless conferred by Constitution.

Cited in note in 20 L. ed. U. S. 154, on effect of repeal of statute on pending actions.

32 AM. REP. 508, STATE v. PITTS, 12 S. C. 180.

Right of married woman to acquire separate property by gift from husband.

Cited in *Battle v. Columbia, N. & L. R. Co.* 70 S. C. 329, 49 S. E. 849, holding test as to whether property belongs to wife is whether it was the intention of the parties that husband should part with ownership of property and title should vest in wife as her separate estate; *Smith v. Abair*, 87 Mich. 62, 49 N. W. 509, holding that husband have sufficient title to wearing apparel purchased with his money by wife to maintain replevin against officer seizing it for taxes against wife's estate.

Cited in reference note in 35 A. R. 618, on sufficiency of indictment for larceny, laying property in husband, where it was purchased by wife's separate money.

Cited in notes in 11 L.R.A.(N.S.) 389, on right of man to dispose of ornaments and wearing apparel purchased by him for his wife's use; 69 L.R.A. 364, on effect of statutes on conveyance by husband to wife.

Contents of brief on appeal.

Cited in *State v. Dodson*, 14 S. C. 619, as to necessity of containing report of circuit judge.

32 AM. REP. 511, CRIBB v. ROGERS, 12 S. C. 564.

Grant of fee with reservation for life.

Cited in *Ellen v. Ellen*, 16 S. C. 132; *Jacobs v. Mutual Ins. Co.* 52 S. C. 110, 29 S. E. 533; *Sumner v. Harrison*, 54 S. C. 353, 32 S. E. 572; *Koen v. Bartlett*, 41 W. Va. 559, 56 A. S. R. 884, 31 L.R.A. 128, 23 S. E. 664,—holding fee may be granted with reservation of usufruct for life; *Steele v. Smith*, 84 S. C. 464, 29 L.R.A.(N.S.) 939, 66 S. E. 200, to point that when fee in presenti is conveyed to grantee charged with usufruct for life in favor of grantor instrument is not covenant to stand seized to use.

Cited in reference notes in 56 A. S. R. 889, on reservation of life estate in conveyance; 80 A. S. R. 255, on vested remainder in child under deed from father reserving life estate.

32 AM. REP. 513, STATE v. SAMPSON, 12 S. C. 567.

Burglary, what constitutes appurtenance to dwelling house.

Cited in *State v. Evans*, 18 S. C. 137, as to term "dwelling house" at common law including all out houses contiguous thereto; *State v. Anderson*, 24 S. C. 109, holding a house in which no one slept, within a few yards of a dwelling house but not appurtenant to it, used for storage of goods by person who resided in dwelling house and rented one of its rooms for a store, is not the subject of burglary.

Cited in note in 2 A. S. R. 388, 390, on what constitutes a dwelling house in burglary.

Distinguished in *State v. Johnson*, 45 S. C. 483, 23 S. E. 619, holding that a fowl house is separated by a public highway from the dwelling house does not necessarily show that it is not appurtenant thereto, so as to make the taking of chickens therefrom not the subject of burglary.

32 AM. REP. 516, WALLACE v. LARK, 12 S. C. 576.

Contracts for illegal purpose.

Cited in *Frohlich v. Alexander*, 36 Ill. App. 428; *Graves v. Johnson*, 179 Mass. 53, 88 A. S. R. 355, 60 N. E. 383,—holding mere knowledge of seller that buyer may use goods for illegal purpose not sufficient to defeat action for purchase price; *Brown v. Newell*, 64 S. C. 27, 41 S. E. 835 (dissenting opinion), as to mere knowledge of illegal purpose of contract not being sufficient to defeat action thereon; *Pierson v. Green*, 69 S. C. 559, 48 S. E. 624, holding bond and mortgage given by wife for money to pay her husband's debt and to compromise criminal prosecution, which mortgagee actively aided in carrying to effect, is void as to so much of the mortgage debt as was used in compromising the criminal prosecution, but valid as to remainder *State v. Robinson*, 70 S. C. 468, 50 S. E. 192, holding contract on which money was advanced to settle a criminal prosecution, void; *Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.* 75 S. C. 378, 9 L.R.A.(N.S.) 501, 55 S. E. 973, 9 A. & E. Ann. Caa. 902 (dissenting opinion), as to policy of state toward contracts for illegal purpose.

Cited in reference notes in 45 A. R. 520, on knowledge of illegal purpose of purchaser on validity of note given for purchased article; 52 A. R. 382, on validity of sale of house to be used as bawdyhouse; 20 A. S. R. 583, on recovery of price of goods sold for unlawful use.

Cited in notes in 1 A. S. R. 303, on what will invalidate loan for gambling purposes; 32 A. S. R. 453, on sales having in view the subsequent violation of foreign or domestic law; 117 A. S. R. 502, on effect of knowledge of contemplated performance of contract in illegal manner; 9 L.R.A. 657, on validity of contract remotely connected with illegal transaction; 15 L.R.A. 834, on right to recover price of property sold for unlawful use; 15 L.R.A. 835, on right to recover price of property sold in aid of rebellion; 12 L.R.A.(N.S.) 601, on ethics of sale in violation of law by blameless vendors; 12 L.R.A.(N.S.) 603, on ethics of sale in violation of law where purchasers are culpable; 6 E. R. C. 336, on validity of contract tainted with illegal or immoral purpose known to both parties.

Distinguished in *Sawyer v. Sanderson*, 113 Mo. App. 233, 88 S. W. 151, holding the rule that the mere knowledge by the seller that an article sold is to be used for an illegal purpose, does not invalidate the sale has no application to sale of things prohibited by statute.

Construction of pleadings.

Cited in *Gist v. Western U. Teleg. Co.* 45 S. C. 344, 55 A. S. R. 763, 23 S. E. 143; *Jerkowski v. Marco*, 56 S. C. 241, 34 S. E. 386; *Grant v. Poyas*, 62 S. C. 426, 40 S. E. 891,—holding they should be liberally construed.

32 AM. REP. 516, ROBSON v. MILLER, 12 S. C. 586.

Implied warranty.

Cited in notes in 22 L.R.A. 190, on implied warranty of fitness of articles

by one manufacturing them for special purpose; 6 E. R. C. 502, as to what will constitute a warranty in sense of condition on failure of which other party may repudiate contract in toto.

Distinguished in *Peake v. Young*, 40 S. C. 31, 18 S. E. 237, holding under a contract to sell a certain brand of fertilizers at a sound price, the seller expressly warrants the article sold to contain the ingredients of that particular brand, but no warranty can be implied that the article will produce good results.

32 AM. REP. 522, LOVE v. MASONER, 6 BAXT. 24.

Seduction of previously unchaste woman.

Cited in *Patterson v. Hayden*, 17 Or. 238, 11 A. S. R. 822, 3 L.R.A. 529, 21 Pac. 129, holding that inducing a lewd and unchaste woman to submit was not seduction, otherwise where she had at the time fully reformed.

Cited in notes in 76 A. S. R. 665, on necessity of previous chastity in civil action by parent for seduction; 76 A. S. R. 669, on necessity of previous chastity in civil action by woman for seduction.

Former unchastity of plaintiff as evidence in mitigation of damages in seduction.

Cited in *Stowers v. Singer*, 113 Ky. 584, 68 S. W. 637, holding it is admissible.

Cited in reference note in 26 A. S. R. 56, on admissibility of evidence of previous unchastity to mitigate damages in seduction.

Cited in note in 44 A. D. 176, 177, on evidence as to seduced female's character for chastity.

Action by female for own seduction.

Cited in note in 44 A. D. 166, on right of female to sue for her own seduction.

Evidence of specific instances.

Cited in notes in 14 L.R.A.(N.S.) 735, on evidence of specific instances to prove character of prosecutrix in prosecution for bastardy; 14 L.R.A.(N.S.) 750, 752, on evidence of specific instances to prove character of child in parent's action for tort; 14 L.R.A.(N.S.) 753, on evidence of specific instances to prove character of plaintiff in action for seduction.

Compelling witness to furnish evidence against himself.

Cited in note in 29 L.R.A. 815, on constitutional protection against being compelled to furnish evidence to be used against one's self in a civil case.

32 AM. REP. 529, WILLARD v. WILLARD, 6 BAXT. 297.

Voidable marriage.

Cited in *Henneger v. Lomas*, 145 Ind. 287, 32 L.R.A. 848, 44 N. E. 462, holding it voidable for fraud in procurement.

Cited in notes in 79 A. S. R. 371, on validity of marriage without consent or obtained by force or duress; 43 L.R.A. 814, on effect of duress to avoid marriage.

32 AM. REP. 530, DE SOTO BANK v. MEMPHIS, 6 BAXT. 415.

Charter and statutory exemptions from taxation construed.

Cited in *Memphis v. Bluff City Ins. Co.* 91 Tenn. 546, 19 S. W. 758, as to presumption against exemption; *Memphis v. Memphis City Bank*, 91 Tenn.

574, 19 S. W. 1045, holding where insurance corporation was converted into a banking corporation the immunity from taxation did not pass.

Cited in note in 60 L.R.A. 87, on extent of exemptions from corporate taxation under contract clause in Federal Constitution.

—Taxes in lieu of all others.

Cited in *Tennessee v. Bank of Commerce*, 53 Fed. 735, holding charter which provides that bank shall pay to state annual tax on each share of capital stock in lieu of all other taxes exempts from taxation the property of bank as well as individual property of shareholders in corporate stock and its shares; *Union & Planters' Bank v. Memphis*, 49 C. C. A. 455, 111 Fed. 561, holding provision in charter of bank granted by state of Tennessee requiring the bank to pay to the state "an annual tax of one half of one per cent on each share of stock subscribed which shall be in lieu of all other taxes" does not exempt the bank from the assessment of ad valorem taxes on its capital, but applies only to stock in hands of shareholders; *State use of Memphis v. Butler*, 86 Tenn. 614, 8 S. W. 586, holding a bank charter providing that the bank "shall pay annually one half of one per cent on each share of its capital stock which shall be in lieu of all other taxes" exempts from taxation all realty owned and used by bank exclusive for banking purposes; *State v. Hernando Ins. Co.* 97 Tenn. 85, 36 S. W. 721, holding the capital stock of a corporation is not exempt from taxation under a provision in its charter that "it shall pay to the state an annual tax of one half of one per cent, on each share of capital stock subscribed which shall be in lieu of all other taxes."

—Exemption of realty used for banking purposes.

Cited in *State v. Butler*, 13 Lea, 400, holding the banking house of the Union and Planter's Bank exempt under same clause; *Bank of Commerce v. McGowan*, 6 Lea, 703, holding under charter which exempts from taxation real estate used for bank other property owned by bank is taxable.

Distinguished in *Re Suffolk Sav. Bank*, 149 Mass. 1, 20 N. E. 331, holding under statute exempting from state tax so much of savings bank "deposits as are invested in real estate and used for banking purposes" the exemption extends to the whole of a bank building erected by such bank under authority conferred by statute, and is not confined to that part actually used in transaction of business.

Taxation of corporate property in addition to tax on shares.

Cited in *Nashville Gaslight Co. v. Nashville*, 8 Lea, 406, holding under statute joint stock companies are liable to pay the tax imposed upon their shareholders and also upon their real estate though the real estate may have been purchased with money paid in as capital stock.

32 AM. REP. 532, MEMPHIS v. ENSLEY, 6 BAXT. 553.

Taxation of corporations.

Cited in reference notes in 44 A. S. R. 952, on taxation of corporate stock; 42 A. R. 589, on exemption of academic building from taxation.

Cited in notes in 67 A. S. R. 380, on taxation of corporate stock; 58 L.R.A. 582, on taxation of nonresident stockholders in domestic corporation; 58 L. R.A. 590, on double taxation in taxing corporations and stockholders.

Distinction between capital stock and shares of stock for purposes of taxation.

Cited in *Memphis v. Bluff City Ins. Co.* 91 Tenn. 546, 19 S. W. 758; *Mem-*

phis v. Home Ins. Co. 91 Tenn. 558, 19 S. W. 1042; *Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045,—holding they are distinct subjects of taxation and the assessment or exemption of one is not the assessment or exemption of the other.

Cited in notes in 2 L.R.A. 799; 12 L.R.A. 767,—on distinction between tax on shares of stock and on capital stock.

Distinction between shares of stock and corporate property for purposes of taxation.

Cited in *Nashville Gaslight Co. v. Nashville*, 8 Lea, 406, holding under statute joint stock companies are liable to pay the tax imposed upon their shareholders and also upon their real estate though the real estate may have been purchased with money paid in as capital stock; *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L.R.A. 853, 11 S. W. 348, holding a statute neither imposes double taxation nor violates constitutional mandate that "all property shall be taxed according to value" which requires corporations to pay tax upon value of their property and their shareholders also upon value of their shares.

Cited in reference note in 33 A. R. 688, on validity of tax on corporate stock as well as on franchise and property.

Distinguished in *Stroh v. Detroit*, 131 Mich. 109, 90 N. W. 1029, holding the taxation of shares of stock held by resident of Michigan in a foreign corporation all of whose property is located and taxed within the state is double taxation, and as such is prohibited by constitutional requirement that taxation shall be uniform.

What constitutes "capital stock paid in."

Cited in *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 49 A. S. R. 943, 31 L.R.A. 593, 32 S. W. 1097, holding it is the amount subscribed and paid by stockholders and not the amount of all the assets on hand available for payment of debts, no matter how derived.

32 AM. REP. 539, GREENWOOD v. STATE, 6 BAXT. 567.

Conviction under statute and also city ordinance as double punishment for crime.

Cited in *Cassidy v. Texarkana*, 53 Ark. 368, 14 S. W. 38; *Hughes v. People*, 8 Colo. 536, 9 Pac. 50; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *State v. Preston*, 4 Idaho, 215, 38 Pac. 694; *Neola v. Reichart*, 131 Iowa, 492, 109 N. W. 5; *State v. Fourcade*, 45 La. Ann. 717, 40 A. S. R. 249, 13 So. 187; *State v. Lee*, 29 Minn. 445, 13 N. W. 913; *State ex rel. Karr v. Taxing Dist.* 16 Lea, 240,—holding judgment for violation of municipal ordinance no bar to prosecution for same offense against the state committed by same act; *O'Haver v. Montgomery*, 120 Tenn. 448, 127 A. S. R. 1014, 111 S. W. 449; *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564,—holding conviction under state law no bar to conviction under city ordinance for same offense; *State ex rel. Young v. Robinson*, 101 Minn. 277, 20 L.R.A.(N.S.) 1127, 112 N. W. 269, to point that prosecution under city ordinance is not bar to prosecution under general statute.

Cited in reference note in 34 A. R. 199, on judgment under one statute as bar to penal suit under another.

Cited in notes in 92 A. S. R. 100, on plea of former jeopardy where act violates both state law and municipal ordinance; 17 L.R.A.(N.S.) 70, on con-

viction of violation of municipal ordinance as bar to prosecution for violation of state statute.

What constitutes former jeopardy.

Cited in reference note in 77 A. D. 697, as to when prisoner has been once in jeopardy.

Cited in notes in 92 A. S. R. 93, on rule against double jeopardy for same offense; 92 A. S. R. 104, to what class of offenses rule against former jeopardy applies; 31 L.R.A.(N.S.) 700, 706, on right to convict for several offenses growing out of same facts; 21 L. ed. U. S. 874, on what constitutes former jeopardy.

Nature of municipal corporations.

Cited in *State ex rel. Young v. Robinson*, 101 Minn. 277, 20 L.R.A.(N.S.) 1127, 112 N. W. 269, as to their nature.

32 AM. REP. 546, BLOODWORTH v. STATE, 6 BAXT. 614.

Rape by fraud.

Cited in reference note in 32 A. R. 134, on rape on woman failing to resist because of fraud.

Disapproved in *Cody v. State*, 119 Ga. 418, 46 S. E. 647, holding a man who has sexual intercourse with an imbecile female who is mentally incapable of expressing any intelligent assent or dissent is guilty of rape though the woman offer no resistance.

Disqualification of juror.

Cited in note in 28 L.R.A. 202, on prior service as disqualifying grand juror.

Waiver of objection to competency of juror.

Cited in *Brewer v. Jacobs*, 22 Fed. 217, holding the objection that one of the jury was not of lawful age and was not a freeholder comes too late after verdict, in Tennessee practise.

32 AM. REP. 549, STATE v. BELL, 7 BAXT. 12.

Power of legislature to declare miscegenation criminal.

Cited in notes in 78 A. S. R. 256, on power of legislature to declare miscegenation criminal; 27 L. ed. U. S. 836, on civil rights.

When marriage celebrated in another state invalid.

Cited in *Georgia v. Tutty*, 7 L.R.A. 50, 41 Fed. 753, holding where the marriage is inhibited by a positive policy of the state as affecting the morals and good order of society and leading to serious social results a marriage made in another state by persons resident in former for purpose of evading laws of former state is void; *State use of Newman v. Kimbrough*, (Tenn Ch.), 52 L.R.A. 668, 59 S. W. 1061; *Pennegar v. State*, 87 Tenn. 244, 10 A. S. R. 648, 2 L.R.A. 703, 10 S. W. 305,—holding marriage celebrated in another state, between citizens and residents of this state, temporarily there, is invalid here, where the contracting parties, being a wife divorced for adultery, and the adulterer, procured the solemnization of their marriage abroad for purpose of evading statute forbidding such marriage during lifetime of former husband; *Re Wilbur*, 8 Wash. 35, 40 A. S. R. 886, 35 Pac. 407, as to marriages made outside of domicile of parties for purpose of evading statute there; *Greenhow v. James*, 80 Va. 636, 56 A. R. 603, to the point that personal capacity of parties to

marriage must depend on law of domicile; *McIlvain v. Scheibley*, 109 Ky. 455, 59 S. W. 498, as being read in evidence to show laws of Tennessee relative to valid marriages.

Cited in reference notes in 32 A. R. 690, on what law governs marriage between white person and negro; 10 A. S. R. 658, as to validity of marriage performed in another state.

Cited in notes in 57 L.R.A. 164, on conflict of laws as to matrimonial capacity of the parties to the marriage; 57 L.R.A. 169, on conflict of laws as to validity of marriage between members of different races; 5 E. R. C. 830, on universal validity of marriage valid where celebrated.

32 AM. REP. 551, STATE v. WILBURN, 7 BAXT. 57.

Right to carry arms.

Cited in *Ex parte Thomas*, 21 Okla. 770, 20 L.R.A.(N.S.) 1007, 97 Pac. 260, 17 A. & E. Ann. Cas. 566, 1 Okla. Crim. Rep. 210, holding statute relating to carrying of concealed weapons constitutional.

Cited in reference note in 8 A. S. R. 447, on carrying concealed weapons as criminal offense.

Cited in notes in 78 A. S. R. 263, on power of legislature to make the bearing of arms criminal; 115 A. S. R. 201, on effect of state constitutions on right to keep and bear arms when carried concealed; 14 L.R.A. 600, on constitutionality of laws restricting right to carry weapons; 3 L.R.A.(N.S.) 169, on constitutional right to bear arms.

32 AM. REP. 555, STATE v. LORRY, 7 BAXT. 95.

Violation of Sunday law.

Cited in reference notes in 33 A. R. 110, on violation of law against labor on Sunday; 35 A. R. 205, on right of innkeeper to sell cigars on Sunday; 37 A. R. 808, on business conducted on Sunday; 55 A. R. 558, as to what is work of necessity and charity within meaning of Sunday laws; 48 A. S. R. 648, on validity of Sunday contracts.

Cited in notes in 107 A. S. R. 227, on disturbing public worship or desecrating the observance of Sunday; 14 L.R.A. 194, on employments within Sunday law.

Working on Sunday as nuisance at common law.

Cited in *Re King*, 46 Fed. 905, as to it not being a nuisance.

Power of legislature to declare barbering on Sunday a misdemeanor.

Distinguished in *Breyer v. State*, 102 Tenn. 103, 50 S. W. 769, holding it has the power.

Exclusion of other punishment than that provided by statute.

Cited in *Pressley v. State*, 114 Tenn. 534, 108 A. S. R. 921, 69 L.R.R. 291, 86 S. W. 378, holding where the statute creating an offense prescribes a special form of punishment therefor any other or additional punishment is excluded.

Criminal action upon misdemeanor where statute provides civil remedy.

Cited in *Murphy v. State*, 114 Tenn. 531, 86 S. W. 711, holding no criminal action can be predicated upon it.

Am. Rep. Vol. XVII.—34.

32 AM. REP. 561, WOOD v. TIPTON COUNTY, 7 BAXT. 112.**Liabilities of counties and townships.**

Cited in *McAndrews v. Hamilton County*, 105 Tenn. 399, 58 S. W. 483, holding county not liable for negligence of employee engaged in public institution; *Rhea County v. Sneed*, 105 Tenn. 581, 58 S. W. 1063, holding neglect to take bond on letting a county contract gave no private action.

Cited in notes in 68 A. D. 294, on liability of counties for torts; 35 A. R. 159, on liability of municipality for injury by unsafe conditions in public places.

—As to defective roads and bridges.

Cited in *Iron Mountain R. Co. v. Memphis*, 37 C. C. A. 410, 96 Fed. 113, as to remedy of citizen against county for failure to keep roads in repair; *Vail v. Amenia*, 4 N. D. 239, 59 N. W. 1092, holding township not liable for defective bridge; *Templeton v. Linn County*, 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795, holding county not liable at common law for defective highway; *White's Creek Turnp. Co. v. Davidson County*, 14 Lea, 73, holding action will not lie against county for damages sustained by the laying off of a public road afterwards ordered closed by court; *Williams v. Taxing Dist.* 16 Lea. 531, holding it not liable for failure to keep streets in repair; *Rea County v. Sneed*, 105 Tenn. 581, holding county not liable for neglect of its bridge commissioners in letting contract for public bridge to take bond required by statute from contractor to "pay for all materials and labor used in said contract;" *Jesper County v. Allman*, 142 Ind. 573, 39 L.R.A. 58, 42 N. E. 206; *Heigel v. Wichita County*, 84 Tex. 392, 31 A. S. R. 63, 19 S. W. 562,—holding them not liable for defective bridges.

Cited in reference notes in 2 A. S. R. 591, on liability of county for damages received on defective bridge; 4 A. S. R. 35, on right of private action against town for injury sustained through defective highway; 12 A. S. R. 115, on municipal duty as to streets.

Cited in note in 39 L.R.A. 34, on implied liability of counties for injuries to travelers and vehicles by bridges and approaches being out of repair.

Power of county as to roads and bridges.

Cited in *Cincinnati, N. O. & T. P. R. Co. v. Morgan County*, 75 C. C. A. 56, 143 Fed. 798; *State v. Wayne County Justices*, 108 Tenn. 259, 67 S. W. 72,—holding it legislative and discretionary and its exercise will not be enforced or controlled by court.

32 AM. REP. 562, WYNNE v. ALLEN, 7 BAXT. 312.**Fraud in statement as to credit of third person.**

Cited in note in 35 L.R.A. 421, on statement as to credit of third person as fraud.

32 AM. REP. 565, SUMNER v. SOUTHERN R. ASSO. 7 BAXT. 345.**Initial carrier as agent for shipper in forwarding goods over connecting lines.**

Cited in *Glover v. Cape Girardeau & S. R. Co.* 95 Mo. App. 369, 69 S. W. 599, holding it is the agent of shipper.

32 AM. REP. 568, HENLY v. HENNING, 7 BAXT. 524.

Preference given testimony of attesting witness.

Cited in 2 Wigmore Evidence, § 1291, on preference given to testimony of witnesses attesting documents incidentally or collaterally in issue.

32 AM. REP. 571, COOPER v. STATE, 5 TEX. APP. 215.

Exoneration from forfeiture of bail bond.

Cited in *Huston v. People*, 12 Colo. App. 271, 55 Pac. 262, holding when after forfeiture but before judgment against sureties defendant was arrested and placed in jail under another charge the sureties were discharged; *Allee v. State*, 28 Tex. App. 531, 13 S. W. 991, holding where defendant was imprisoned in penitentiary but escaped the sureties on bail bond were not discharged; *Woods v. State*, 51 Tex. Crim. Rep. 595, 103 S. W. 895, holding under statute defendant is exonerated from forfeiture of bail bond when his failure to appear is by reason of his being held in custody in another county.

Cited in reference notes in 35 A. R. 437; 25 A. S. R. 527,—on effect of principal's imprisonment in another state on surety's obligation to pay; 37 A. R. 62, on act of law excusing nonperformance of bond.

Cited in note in 99 A. D. 220, on subsequent arrest or indictment of principal as exoneration of bail.

Discharge of prisoner by discontinuance of prosecution.

Cited in *Ex parte Stearnes*, 104 Ala. 93, 16 So. 122, holding where after a prisoner is committed to jail upon preliminary examination and while still in custody, a regular term of court is held and no indictment found against him and no order made by court continuing cause or investigation and court adjourns he is entitled to be discharged.

32 AM. REP. 573, SUMMERS v. STATE, 5 TEX. APP. 365.

Compensation of expert witness.

Cited in *Flinn v. Prairie County*, 60 Ark. 204, 29 S. W. 459, 27 L.R.A. 662, 46 A. S. R. 168, holding expert witness who testifies on behalf of the state in a criminal case cannot demand compensation in addition to the usual fees allowed witnesses, but he cannot without extra compensation be required to make any examination or preliminary preparation nor be compelled to attend and listen to testimony that he may be better enabled to testify as expert. *United States v. Cooper*, 21 D. C. 491, holding where expert is summoned to testify he is obliged to do so when reasonable fees beyond common witness fees have been tendered him; *Larimer County v. Lee*, 3 Colo. App. 177, 32 Pac. 841; *Dixon v. People*, 168 Ill. 179, 39 L.R.A. 116, 48 N. E. 108; *Main v. Sherman County*, 74 Neb. 155, 103 N. W. 1038; *State v. Bell*, 212 Mo. 111, 111 S. W. 24,—holding expert can be compelled to testify without further compensation than allowed to other witnesses; *Philler v. Waukesha County*, 139 Wis. 211, 131 A. S. R. 1055, 25 L.R.A. (N.S.) 1040, 120 N. W. 829, 17 A. & E. Ann. Cas. 712, to point that physician may be compelled to testify as to opinion in case coming under his observation.

Cited in reference note in 46 A. S. R. 171, on fees of expert witness.

Cited in notes in 27 L.R.A. 670, on compensation of expert witnesses in matters requiring examination or preparation; 27 L.R.A. 672, on right of expert witnesses to additional compensation; 39 L.R.A. 121, on right of state to require services of expert witnesses without compensation; 39 L.R.A. 120,

on right of state under constitutional provision to require services of witnesses without compensation; 11 E. R. C. 176, on right of expert to refuse to testify for ordinary fees.

Proof of express malice.

Cited in *Sharpe v. State*, 17 Tex. App. 486, holding it may be inferred by external circumstances; *Cano v. State*, 53 Tex. Crim. Rep. 609, 111 S. W. 406, to point that express malice will be presumed however sudden killing is, if means and manner of doing it indicate formed design to kill.

Cited in reference note in 78 A. D. 529, on what constitutes express malice in homicide.

General objections to evidence.

Cited in *Sims v. State*, 30 Tex. App. 605, 18 S. W. 410, holding general objection bad if evidence is in any wise admissible.

Necessity of bill of exceptions setting forth objections to evidence.

Cited in *Davis v. State*, 14 Tex. App. 645, holding it necessary.

Doubt as to propriety of requested instruction.

Cited in *Sigler v. State*, 2 Tex. App. 427, as to it being solved in favor of accused.

Necessity of presence of counsel for accused when verdict is received.

Cited in *Richardson v. State*, 7 Tex. App. 486, holding it is not necessary.

— Necessity for presence of accused.

Cited in *Darden v. State*, 56 Tex. Crim. Rep. 396, 133 A. S. R. 986, 120 S. W. 485, holding that under statute defendant in felony case must be present where verdict received.

Cited in note in 28 A. D. 630, as to when trial may be had in absence of accused.

32 AM. REP. 575, BOSTON v. STATE, 5 TEX. APP. 383.

Judicial knowledge of political divisions.

Cited in *Carson v. Dalton*, 59 Tex. 500, holding courts will take judicial notice that town is situated in county of which it is the county seat; *Lasher v. State*, 30 Tex. App. 387, 28 A. S. R. 922, 17 S. W. 1064, holding courts will take judicial notice of cession and segregation of portion of territory of state to United States; *Mischer v. State*, 41 Tex. Crim. Rep. 212, 96 A. S. R. 780, 53 S. W. 627, holding courts will take judicial knowledge of judicial districts of state.

Cited in notes in 49 A. R. 206, as to what will be judicially noticed; 89 A. D. 676, 679, on judicial notice of geographical facts and political divisions of state; 82 A. S. R. 439, 440, on judicial notice of localities and boundaries; 13 A. S. R. 823; 4 L.R.A. 36,—on judicial notice of geographical facts.

32 AM. REP. 577, EX PARTE FOSTER, 5 TEX. APP. 625, Later appeal in 8 Tex. App. 248.

Test of right to bail in capital case.

Cited in *Ex parte Beacom*, 12 Tex. App. 318, holding evidence should be sufficient to sustain verdict of murder in first degree; *Thrasher v. State*, 26 Fla. 526, 7 So. 847, holding that bail will be denied person under indictment for murder where evidence is such that if jury found verdict of guilty, judge would refuse new trial; *Re Thomas*, 20 Okla. 167, — L.R.A. (N.S.) —, 93 Pac.

980, 1 Okla. Crim. Rep. 15, holding that if evidence on application for bail is insufficient to raise reasonable doubt whether accused committed act charged bail should be refused.

Cited in reference note in 78 A. D. 529, on expression "proof is evident or presumption great" as applied to right to bail.

Cited in notes in 81 A. D. 89, on admission to bail after indictment for murder; 8 E. R. C. 110, on right to bail.

Overruled in *Ex parte Coldiron*, 15 Tex. App. 464; *Ex parte Smith*, 23 Tex. App. 100, 5 S. W. 99,—holding if the evidence is clear and strong, leading a well guarded and dispassionate judgment to the conclusion that the offense has been committed that the accused is the guilty agent that he will probably be punished capitally if the law is administered, but is not a matter of right.

—Burden of proof.

Cited in *Ex parte Jones*, 31 Tex. Crim. Rep. 422, 20 S. W. 983, holding burden on applicant to show that killing was of a bailable degree.

Successive writs of habeas corpus.

Cited in *Ex parte Rucker*, 6 Tex. App. 81, as to granting second writ upon evidence that defendant should not produce at first hearing; *Ex parte Rosson*, 24 Tex. App. 226, 5 S. W. 666, holding second writ obtainable where it appears that important testimony has been obtained which, though not newly discovered or which, though known to applicant could not be produced by him at former hearing; *Ex parte Angus*, 28 Tex. App. 293, 12 S. W. 1099, holding it not essential to decide which of two judges had jurisdiction on habeas corpus where one of them must have had it both cases being before the reviewing court; *Miskimins v. Shaver*, 8 Wyo. 372, 49 L.R.A. 831, 58 Pac. 411, holding decision under one writ refusing to discharge person restrained is no bar to a second writ by another court or officer.

32 AM. REP. 580, SULLIVAN v. STATE, 6 TEX. APP. 319.

Admission of testimony given at former trial by witness since deceased or not available.

Cited in *Matthews v. State*, 96 Ala. 62, 11 So. 203; *State v. Fitzgerald*, 63 Iowa, 268, 19 N. W. 202,—holding testimony of witness, given on preliminary examination, who had since died, admissible on trial; *Lowe v. State*, 86 Ala. 47, 5 So. 435; *Atchison, T. & S. F. R. Co. v. Osborn*, 64 Kan. 187, 91 A. S. R. 189, 67 Pac. 547,—holding testimony of witness given at former trial is admissible where it appears that witness is out of the jurisdiction of court and beyond reach of its process; *People v. Elliott*, 172 N. Y. 146, 60 L.R.A. 318, 64 N. E. 837, 17 N. Y. Crim. Rep. 30, holding evidence of witness at prior trial may be proved as evidence in subsequent trial for same offense if witness is dead or has become incompetent by reason of mental derangement; *People v. Williams*, 35 Hun, 516, 3 N. Y. Crim. Rep. 63 (dissenting opinion), as to testimony of deceased witnesses; *Cooper v. State*, 7 Tex. App. 194, holding the fact that a material witness is a resident of the state who, a few days before the trial, went and still is beyond the limits of the state constitutes no predicate for introduction of testimony given by him at a previous judicial investigation of the case; *Cline v. State*, 36 Tex. Crim. Rep. 320, 61 A. S. R. 850, 36 S. W. 1099, holding testimony of witness, who has since died, taken and reduced to writing at a preliminary examination cannot be reproduced and used as evidence against the defendant; *State v. Riddle*, 179 Mo. 287, 78 S. W. 606; *Evans v. State*, 12 Tex.

App. 370; *Martinas v. State*, 26 Tex. App. 91, 9 S. W. 356; *Smith v. State*, 48 Tex. Crim. Rep. 65, 85 S. W. 1153,—holding nonavailability of witness must be clearly and satisfactorily established in conformity with the statute; *Wise Terminal Co. v. McCormick*, 107 Va. 376, 58 S. E. 584, holding sufficient reason must be shown why original witness is not produced; *Garcia v. State*, 12 Tex. App. 335, holding testimony of absent witness in criminal case given before committing magistrate admissible, if privilege of cross-examination was afforded; *Pratt v. State*, 53 Tex. Crim. Rep. 281, 109 S. W. 138, holding testimony of deceased witness given on former trial for murder admissible.

Cited in notes in 65 A. D. 676; 61 A. S. R. 887, 888,—on admissibility in criminal trial of evidence of absent witness; 65 A. D. 678, on conditions and restrictions surrounding admission of former testimony of absent witness; 61 A. S. R. 891, on admissibility in criminal trial of evidence of deceased witness.

Middle names in law.

Cited in *Delphino v. State*, 11 Tex. App. 30, holding middle name or initial is not recognized by law.

Cited in note in 14 L.R.A. 691, on form of Christian name.

Distinguished in *English v. State*, 30 Tex. App. 470, 18 S. W. 94, holding it fatal to aver a forgery to defraud M. R. L. and the purport of the writing as by R. M. L.

32 AM. REP. 586, AKE v. STATE, 6 TEX. APP. 398.

Burden of proof in criminal cases.

Cited in *Walker v. State*, 7 Tex. App. 627; *Guffee v. State*, 8 Tex. App. 187,—holding it is never incumbent on a defendant to show mitigating facts unless they fail to appear from the evidence against him, nor unless the evidence for the state has made a prima facie case beyond a reasonable doubt; *King v. State*, 9 Tex. App. 515 (dissenting opinion), as to burden of proof of insanity; *Shafer v. State*, 7 Tex. App. 239; *Dubose v. State*, 10 Tex. App. 230; *Jones v. State*, 13 Tex. App. 1,—holding when the accused pleads “not guilty” and does not rely upon any matter as a defense which is separate and distinct from and independent of the facts constituting the charge, the burden does not rest upon him to prove anything; *Leonard v. State*, 7 Tex. App. 417; *Luera v. State*, 12 Tex. App. 257; *Donaldson v. State*, 15 Tex. App. 25,—holding when distinct substantive matter is relied upon by the defense as exemption from punishment, such matter is foreign to the issue presented by the state, and the burden of proving it is upon the defense; *Branch v. State*, 15 Tex. App. 96, holding charge to effect that when unlawful act is clearly shown and it does not appear from testimony offered by state that it was done under circumstances which mitigate, excuse or justify it, it is for defendant to show facts which excuse or justify it, so that reasonable doubt may arise on the evidence as to his guilt, error; *Manning v. State*, 37 Tex. Crim. Rep. 180, 39 S. W. 118, holding on a trial for slander a charge of the court which requires the defendant to prove the truth of the alleged slander beyond a reasonable doubt, is erroneous; *Hozier v. State*, 6 Tex. App. 501, holding defendant having interposed the plea of autrefois acquit the burden of proof, to that extent, was upon him; *Dent v. State*, 45 Tex. Crim. Rep. 166, 79 S. W. 525, holding if deceased himself, by his aggression and on account of his assault dazed defendant rendering him unconscious and incapable of knowing right from wrong, the burden of proof to show his mental condition was not on defendant.

—As to nonage of defendant.

Cited in *Ellis v. State*, 30 Tex. App. 601, 18 S. W. 139, holding burden of proof of nonage is on the defendant; *Wilcox v. State*, 32 Tex. Crim. Rep. 284, 22 S. W. 1109 (dissenting opinion), on necessity of defendant's proving his nonage.

Punishment of infants for crime.

Cited in notes in 36 L.R.A. 210, on punishment of infants for crime; 36 L.R.A. 208, on age of presumed discretion in children committing rape.

Competency and capacity of infant as witness.

Cited in *Burk v. State*, 8 Tex. App. 336; *Williams v. State*, 12 Tex. App. 127; *Taylor v. State*, 22 Tex. App. 529, 58 A. R. 656, 3 S. W. 753; *Brown v. State*, 6 Tex. App. 286,—holding the competency of witnesses of tender years is confined to the discretion of the trial court.

Cited in notes in 19 L.R.A. 607; 40 L. ed. U. S. 245,—on competency of child as a witness.

32 AM. REP. 591, YANEZ v. STATE, 6 TEX. APP. 429.

Disqualification of juror for ignorance.

Cited in *Garcia v. State*, 12 Tex. App. 335, holding inability of a proposed juror to read and write the English language is a ground of challenge for cause, unless it appears that the requisite number of jurors who can read and write that language cannot be found in the county of the forum; *Etheridge v. State*, 8 Tex. App. 133, holding though not enumerated in the code among the causes for challenge, ignorance of the English language, or inability to speak and understand it, disqualifies a juror in a criminal case.

Objection to organization of petit jury.

Cited in *Caldwell v. State*, 12 Tex. App. 302, holding it comes too late upon motion for a new trial.

Discretion to control cross-examination.

Cited in *Browder v. State*, 30 Tex. App. 614, 18 S. W. 197, presuming trial judge's control of cross-examination correct.

Application for new trial on ground of newly discovered evidence.

Cited in *Williams v. State*, 7 Tex. App. 163, holding it must show that such evidence was unknown to defendant at the time of trial, and not merely that it was unknown to his counsel.

32 AM. REP. 593, HUDSON v. STATE, 6 TEX. APP. 565.

Insult to female relative as defense to homicide.

Cited in reference notes in 47 A. S. R. 57, on insults to female relatives as mitigating homicide; 70 A. S. R. 739, on insulting language to wife as defense to homicide.

Cited in note in 4 L.R.A.(N.S.) 163, on insult to female relative as provocation to homicide.

When dangerous character of deceased is admissible in evidence in trial for homicide.

Cited in *Garner v. State*, 28 Fla. 113, 29 A. S. R. 262, 9 So. 835, holding evidence of the violent and dangerous character of deceased is admissible to show, or as tending to show, that a defendant has acted in self defense; *West v. State*, 18 Tex. App. 640; *Harrison v. Com.* 79 Va. 374, 52 A. R. 634,—holding

when case of self-defense has been *prima facie* made out such evidence is admissible.

Cited in note in 3 L.R.A.(N.S.) 352, 354, on character and reputation of the deceased as affecting homicide.

Privilege of counsel to read law to jury.

Cited in *Foster v. State*, 8 Tex. App. 248; *Cross v. State*, 11 Tex. App. 84,—holding extent to which counsel may read to jury from books is a matter largely in discretion of trial judge and will not be revised on appeal unless discretion was abused; *Lott v. State*, 18 Tex. App. 627, holding under the circumstances of the case it was abuse of discretion to refuse to allow counsel for defendant to read law to jury.

Cited in notes in 40 L.R.A. 572, on use of scientific books and treatises relating to inexact sciences in argument; 40 L.R.A. 573, on scientific books and treatises relating to law as evidence.

32 AM. REP. 595, WALKER v. STATE, 7 TEX. APP. 245.

Compelling accused to be witness against himself.

Cited in *State v. Atkinson*, 40 S. C. 363, 42 A. S. R. 877, 18 S. E. 1021, holding papers taken from the room of defendant in his absence, without his authority, may be used in evidence against him on his trial for murder; *Bruce v. State*, 31 Tex. Crim. Rep. 590, 21 S. W. 681, holding carrying suspected party before the injured person for identification is not compelling him to give evidence against himself; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639, holding not error to allow state to use clothing of prisoner in evidence, which state claimed showed blood spots; *Wright v. State*, 56 Tex. Crim. Rep. 353, 120 S. W. 458, to point that evidence going to show system or intent in criminal trial is admissible.

Cited in notes in 68 A. S. R. 252, on physical examination of parties in criminal cases; 75 A. S. R. 329, on what is testifying against one's self within rule as to privilege of witness; 28 L.R.A. 701, on right to compel accused to exhibit himself for identification; 136 Am. St. Rep. 146, on admissibility of evidence wrongfully obtained.

Disapproved in *State v. Height*, 117 Iowa, 650, 94 A. S. R. 323, 59 L.R.A. 437, 91 N. W. 935, holding compulsory physical examination of a person accused of rape, for purpose of ascertaining if he is affected with a venereal disease, alleged to have been communicated to prosecutrix is compelling defendant to give evidence against himself.

— Compelling making of foot prints or re-enactment of alleged crime.

Cited in *Meyers v. State*, 14 Tex. App. 35; *Thompson v. State*, 45 Tex. Crim. Rep. 190, 74 S. W. 914; *Thornton v. State*, 117 Wis. 338, 98 A. S. R. 924, 93 N. W. 1107,—holding compulsory comparison of foot prints is not compelling accused to be witness against himself; *State v. Graham*, 116 La. 779, 41 So. 90, holding testimony showing comparison of foot prints admissible, it being shown that prisoner made no objection to the experiment and no force was used by the officer; *People v. Ecarus*, 124 Mich. 616, 83 N. W. 628, holding when accused, charged with murder with an iron bar as a weapon, being sworn on his own behalf, was required, on cross-examination to put bar in his pocket, to show the manner in which it might have been concealed, he was not being compelled to give evidence against himself; *Guerrero v. State*, 46 Tex. Crim. Rep. 445, 80 S. W. 1001, holding that it was not confession while under arrest where sheriff

required accused when arrested to take off his shoe, so that sheriff might see if it fitted in track near scene of crime.

Cited in reference notes in 28 A. S. R. 935, on footprints as evidence in criminal prosecution; 38 A. S. R. 150, on admissibility of comparison of prisoner's shoe with footprints near place of crime.

Cited in note in 94 A. S. R. 343, on making of footprints by accused for purpose of comparison.

Tests and experiments as evidence.

Cited in notes in 49 A. R. 191, on right to put in evidence various practical tests and experiments; 53 A. S. R. 379, on experiments as evidence.

Distinction between acts done and confessions made by defendant under arrest.

Cited in *Rhodes v. State*, 11 Tex. App. 563, holding former are admissible in evidence against him, but the latter, unless clearly within the provisions of the statute, are not admissible.

Distinguished in *Nolen v. State*, 14 Tex. App. 474, 46 A. R. 247, holding where the confessions of a defendant under arrest are inadmissible against him because made while he was uncautioned, his acts if tantamount to such a confession, and done under similar circumstances, are likewise inadmissible.

Admissibility of confessions.

Cited in *Grammer v. State*, 42 Tex. Crim. Rep. 518, 61 S. W. 402, as to the admissibility.

Murder committed in perpetration of a crime.

Cited in *Oates v. State*, 51 Tex. Crim. Rep. 449, 103 S. W. 859, holding charge "if any person in the perpetration or attempt to perpetrate a robbery upon another, he shall be deemed guilty of murder in first degree," not error.

Effect of change of law upon pending trials.

Cited in *Myers v. State*, 8 Tex. App. 321; *Simms v. State*, 8 Tex. App. 230,—holding change made in code in the penalty for murder in the first degree had no application or effect in a trial for that offense which was in progress when code took effect.

Construction of statutes.

Cited in *Lane v. Missoula County*, 6 Mont. 473, 13 Pac. 136; *Sartain v. State*, 10 Tex. App. 651, 38 A. R. 649; *Albrecht v. State*, 8 Tex. App. 313,—holding when a statute is capable of two constructions equally reasonable, that should be adopted which effects the intention of the law-making power in the enactment of the statute, unless such construction contravenes some other potent provision of law.

Repeal of statutes by implication.

Cited in *Saguache County v. Decker*, 10 Colo. 149, 14 Pac. 123; *State ex rel. Blossom v. Horton*, 21 Nev. 300, 30 Pac. 876; *Braun v. State*, 40 Tex. Crim. Rep. 236, 49 S. W. 620; *Ex parte Keith*, 47 Tex. Crim. Rep. 283, 83 S. W. 683,—holding the law does not favor repeals by implication, and unless there exists an irreconcilable conflict between the two laws both will stand especially in the case of a subsequent general law and a pre-existing special law partly upon same subject.

Cited in note in 88 A. S. R. 274, on necessity of inconsistency and repugnancy to repeal of statute by implication.

Failure to assert objection to evidence.

Cited in *Bryant v. State*, 18 Tex. App. 107, holding it a waiver of the objection.

Surprise as ground for new trial.

Cited in *Webb v. State*, 9 Tex. App. 490, holding surprise by unexpected testimony is not ground for new trial, but although it arises after commencement of the trial, may entitle to a continuance of the cause or postponement of the trial; *Childs v. State*, 10 Tex. App. 183; *Cunningham v. State*, 20 Tex. App. 162,—holding the primary remedy against a surprise by reason of the self-contradictory evidence of a witness is by seeking a continuance or a postponement of trial to a subsequent day of term.

32 AM. REP. 599, WRIGHT v. STATE, 7 TEX. APP. 574.**Testimony of feigned accomplices.**

Cited in *State v. Dudoussat*, 47 La. Ann. 977, 17 So. 685, holding persons who for purpose of discovering crime enter into communication with criminal, not accomplices; *State v. Douglas*, 26 Nev. 197, holding deputy sheriff invited by defendant to participate in commission which defendant committed alone, the deputy keeping the sheriff informed as to what was transpiring, not an accomplice; *People v. Noelke*, 29 Hun, 461, 1 N. Y. Crim. Rep. 252, holding one purchasing a lottery ticket with the intent to inform against the seller is not an accomplice; *Freeman v. State*, 11 Tex. App. 92, 40 A. R. 787, as to what constitutes an accomplice; *O'Grady v. People*, 42 Colo. 312, 95 Pac. 346, holding that instructions as to weighing of testimony of private detectives rests largely in discretion of trial judge.

Cited in reference note in 2 A. S. R. 843, on who is an accomplice.

Cited in note in 98 A. S. R. 160, on informers and detectives as accomplices.

Admissibility of evidence obtained by illegal means.

Cited in *Shields v. State*, 104 Ala. 35, 53 A. S. R. 17, 16 So. 85, holding it admissible to fix guilt of criminal offense upon person searched.

Cited in note in 136 Am. St. Rep. 150, 163, on admissibility of evidence wrongfully obtained.

32 AM. REP. 602, JOHNSON v. MITCHELL, 50 TEX. 212.**Rights of purchaser of note.**

Cited in reference note in 1 A. S. R. 807, on rights of purchaser of note.

Cited in note in 36 L.R.A. 233, on rights acquired on transfer of title to note by indorsement in form of guaranty.

Possession of blank indorsed note as evidence of title.

Cited in *Garrett v. Findlater*, 21 Tex. Civ. App. 635, 53 S. W. 839, holding plaintiff's possession at time of trial of note upon which he has brought suit is sufficient evidence of his ownership thereof, though it bears his indorsement in blank; *Myrick Bros. Co. v. Jackson*, 44 Tex. Civ. App. 553, 99 S. W. 143, holding a negotiable promissory note indorsed in blank is transferrable by delivery, and one in possession of such note is presumed to be the owner; *Grant v. Ennis*, 5 Tex. Civ. App. 44, 23 S. W. 998, holding that note payable to plaintiff or order and indorsed by her in blank make prima facie case of ownership and further indorsement for collection does not disprove ownership; *Sovereign Bank*

v. Gordon, 9 Ont. L. Rep. 146, holding that holder of note indorsed in blank may alter special indorsement he made thereof and transfer title to another.

Cited in note in 1 L.R.A. 712, on blank indorsements.

Liability of indorsers of bearer paper.

Cited in *Shaw v. Jacobs*, 89 Iowa, 713, 48 A. S. R. 411, 21 L.R.A. 440, 55 N. W. 333, holding by indorsing it the payees assumed the same liability they would have been under by such an indorsement had check been payable to order.

Effect on negotiability of indorsement.

Cited in *Halbert v. Ellwood*, 1 Kan. App. 95, 41 Pac. 67, holding negotiable promissory note payable to bearer does not lose its negotiable character by payee indorsing it payable to third person, omitting words "or order;" nor by an indorsement in blank by such third person, preceded by guaranty of payment and waiver of protest.

Cited in note in 4 E. R. C. 363, on indorsement as affecting negotiability of paper.

32 AM. REP. 605, STEELE v. RENN, 50 TEX. 467.

Bona fide purchaser under invalid will.

Cited in *Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757, holding will having been duly proved in probate court the title of bona fide purchaser of the property is not affected by the subsequent discovery and probate of a later will appointing another person executor and making a different disposition of the property.

Cited in reference note in 52 A. R. 169, on right to property held under will duly proved and recorded, though subsequently set aside.

Distinguished in *Hughes v. Burriss*, 85 Mo. 660, holding under statute conveyance by devisee under will after probate of will but before institution of suit by heirs to test validity of will passed no title.

Conclusive effect of probate of will.

Cited in *Orr v. O'Brien*, 55 Tex. 149; *Ward v. Logan County*, 12 Okla. 267, 70 Pac. 378,—holding will admitted to probate by court having jurisdiction cannot be collaterally attacked; *Reeves v. Hager*, 101 Tenn. 712, 50 S. W. 760, holding it is a proceeding in rem and operates upon the subject-matter.

Cited in notes in 21 L.R.A. 680, on nature of probate decree; 21 L.R.A. 682, on conclusiveness of probate court decree as res judicata; 21 L.R.A. 686, on conclusiveness of probate court decree in ejectment; 10 L.R.A.(N.S.) 447, on protection to one purchasing after decree and before any steps have been taken to review the same; 60 A. D. 357, on statutes relating to will.

Effect of subsequent revocation of letters of administration.

Cited in notes in 21 L.R.A. 152, on validity of acts done by personal representative under letters subsequently revoked where the court had jurisdiction; 21 L.R.A. 154, on validity of payments by personal representative under letters subsequently revoked where the court had jurisdiction; 21 L.R.A. 155, on validity of sales, etc., by personal representative under letters subsequently revoked where court had jurisdiction.

Payment to administrator as discharge of debtor.

Cited in *Zeigler v. Storey*, 220 Pa. 471, 17 L.R.A.(N.S.) 878, 69 Atl. 894, holding a bona fide payment to an administrator to whom letters have been regularly issued by an authority having jurisdiction to grant letters is a legal discharge to the debtor.

Burden of proof in will contest.

Cited in *Fowler v. Stagner*, 55 Tex. 393, holding it is upon party seeking to establish invalidity of will or its probate.

Nature of probate proceedings.

Cited in note in 60 A. D. 353, 354, on proceedings as to probate of wills as proceedings in rem.

32 AM. REP. 609, RAINS v. SIMPSON, 50 TEX. 495.**Liability of judicial officers for official acts.**

Cited in *Hamma v. People*, 42 Colo. 401, 15 L.R.A.(N.S.) 621, 94 Pac. 326, 15 A. & E. Ann. Cas. 655, holding that judge cannot be held in damages for acts in performance of judicial duties; *Root v. Rose*, 6 N. D. 575, 72 N. W. 1022; *Gaines v. Newbrough*, 12 Tex. Civ. App. 466, 34 S. W. 1048; *Wright v. Jones*, 14 Tex. Civ. App. 423, 38 S. W. 249; *Taylor v. Goodrich*, 25 Tex. Civ. App. 109, 40 S. W. 515; *Johnston v. Moorman*, 80 Va. 131,—holding when acting within their jurisdiction they are exempt in all civil actions from liability, although such acts are alleged to have been done maliciously and corruptly.

Cited in reference note in 37 A. R. 189, on civil liability of arbitrator for corrupt action.

Cited in note in 137 Am. St. R. 47, 52, on personal liability of judges and judicial officers.

Distinguished in *Smyth v. State*, 51 Tex. Crim. Rep. 408, 103 S. W. 899, holding where election judge wrongfully imprisoned voter such power being not conferred by law he was liable for false imprisonment; *Elmore v. Overton*, 104 Ind. 548, 54 A. R. 343, 4 N. E. 197, holding county superintendent is liable in damages for maliciously withholding license to teach from applicant lawfully entitled to receive the same.

Ministerial acts.

Cited in *Grider v. Tally*, 77 Ala. 422, 54 A. R. 65; *State ex rel. Irvine v. Brooks*, 14 Wyo. 393, 6 L.R.A.(N.S.) 750, 84 Pac. 488, 7 A. & E. Ann. Cas. 1108,—holding where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial.

Mandamus to compel judicial act.

Cited in *Wyatt v. Barmore*, 5 Tex. App. 333, holding it will not lie.

32 AM. REP. 613, KELLER v. CORPUS CHRISTI, 50 TEX. 614.**Police power and eminent domain.**

Cited in *Livingston v. Ellis County*, 30 Tex. Civ. App. 19, 68 S. W. 723, holding killing of diseased animals exercise of police power and owners not entitled to compensation; *Aitken v. Wells River*, 70 Vt. 308, 67 A. S. R. 672, 41 L.R.A. 566, 40 Atl. 829, holding destruction of plaintiff's mill and dam during freshet by village authorities has exercise of police power and not eminent domain and plaintiff was not entitled to compensation.

Cited in notes in 16 A. S. R. 615, on what is a taking of property for public use; 102 A. S. R. 812, on distinction between eminent domain and the taxing or police powers.

Liability of municipal corporations for exercise of police power.

Cited in reference notes in 32 A. R. 337, on municipal liability for destruc-

tion of buildings to prevent spread of fire; 46 A. S. R. 765, on municipal liability for acts of officers.

Cited in notes in 47 A. D. 207, on statutes authorizing destruction of property in case of fire; 47 A. D. 208, on liability of municipal corporation for acts of officers in destroying property to prevent spread of fires; 47 A. D. 210, on police power authorizing destruction of property to prevent spread of fire; 19 L.R.A. 197; 25 L. ed. U. S. 980,—on municipal liability for damages for destruction of building to prevent spread of fire.

—For improper exercise.

Cited in *Whitfield v. Paris*, 84 Tex. 481, 31 A. S. R. 69, 15 L.R.A. 783, 19 S. W. 566, holding city not liable to person injured by officers when shooting at an unmuzzled dog; *Givens v. Paris*, 5 Tex. Civ. App. 705, 24 S. W. 974, holding city not liable for failure of officer to enforce its police regulations; *Bates v. Houston*, 14 Tex. Civ. App. 287, 37 S. W. 383, holding city not liable for negligent acts of health officers in wrongfully quarantining citizen; *Wallace v. Richmond*, 94 Va. 204, 36 L.R.A. 554, 26 S. E. 586, holding it not liable.

Cited in note in 73 A. D. 264, on municipal liability for negligence of officers.

Liability of municipalities for misfeasances.

Cited in *Galveston v. Ponninsky*, 62 Tex. 118, 50 A. R. 517, as to their liability.

Liability of officers of municipality for negligent performance of their duties.

Cited in *Wallace v. Dallas*, 2 Posey, Unrep. Cas. (Tex.) 424, holding if officers of city, who were charged with duty of grading street performed their duty unskillfully or negligently, they and not the city would be liable.

Liability of municipal corporation for failure to supply water to extinguish fires.

Cited in *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341, holding city which for its advantage and gain has voluntarily assumed duty of supplying inhabitants with water for general purposes and for the extinguishing of fires, is liable.

Special remedy given by statute.

Cited in *Umatilla Irrig. Co. v. Umatilla Improv. Co.* 22 Or. 366, 30 Pac. 30, holding it must be strictly pursued.

Distinguished in *Hamilton County v. Garrett*, 62 Tex. 602, holding statutory provisions are to be considered as limitations on right of commissioner's court to open public road through inclosed land rather than rule fixing owner's remedy for injury and a disregard of the conditions supposed on a commissioner's court in opening a road cannot affect the right of land holder to sue for damages.

Authority to remove officer.

Cited in reference note in 32 A. R. 640, on right of mayor to remove police officer.

32 AM. REP. 621, PEISER v. PETICOLAS, 50 TEX. 638.

Fraudulent conveyances.

Cited in *McCormack v. Signal*, 1 Tex. App. Civ. Cas. (White & W.) 417, holding assignment by which assignor continued the business and reserving right to him to defeat its operation by substituting other assignees under certain circumstances, void; *Perea v. Colorado Nat. Bank*, 6 N. M. 1, 27 Pac. 322; *Van Bibber v. Mathis*, 52 Tex. 406; *Eicks v. Copeland*, 53 Tex. 581, 37 A. R. 760,—

holding if there is apparent upon the face of the instrument by its express terms, or as the indisputable legal presumption therefrom, either such actual fraud in fact or such constructive fraud in law as should avoid it, it is the duty of court to construe its legal effect; otherwise it is a question of intention to be decided by jury.

— **Chattel mortgages without change of possession.**

Cited in *Cook v. Halsell*, 65 Tex. 1, holding that if it was the intention of mortgagee to leave mortgagor in possession of the goods and allow him to sell same in ordinary course of trade the mortgage was void as to creditors.

Cited in reference notes in 6 A. R. 34, on validity as to subsequent attaching creditors of chattel mortgage authorizing mortgagor to obtain possession of property; 39 A. R. 160, on validity, as against creditors, of mortgage of retail stock reserving in mortgagor power to sell in ordinary course of trade.

Cited in notes in 18 L.R.A. 611, on effect of recording acts upon validity of mortgage of merchandise giving mortgagor possession and power of sale; 18 L.R.A. 623, 624, on analysis of law as to validity of mortgage of merchandise giving mortgagor possession with power of sale.

Distinguished in *Crow v. Red River County Bank*, 52 Tex. 362, holding where mortgagor remains in possession of goods but mortgage contained no stipulation for such possession or authority to mortgagor to sell goods who did sell them as agent of mortgagee, mortgage was not therefor void; *Scott v. Alford*, 53 Tex. 82, holding a stipulation in a deed of trust executed on a stock of goods to secure a creditor, which attempts to create a lien on such goods as may afterwards be added to the stock, cannot affect the other provisions of the deed if it be otherwise valid.

Right of subsequent attaching creditors to impeach previous attachment on ground of fraud.

Cited in *Joseph Peters Furniture Co. v. Dickey*, 2 Posey, Unrep. Cas. (Tex.) 337, as to their right.

Rights of parties in foreclosure of liens.

Cited in *Templeman v. Gresham*, 61 Tex. 50, holding the district court will adjust them though the interest claimed by some may not be such as of itself to confer jurisdiction.

Construction of assignment act.

Cited in *Bettes v. Weir Plow Co.* 84 Tex. 543, 19 S. W. 705, holding it but a declaration of rule of common law.

Fraudulent intent as question for jury.

Cited in note in 75 A. D. 819, on fraudulent intent as question for jury.

32 AM. REP. 627, DAUENHAUER v. DEVINE, 51 TEX. 480.

Nature of interest in party wall.

Cited in *Shiverick v. R. J. Gunning Co.* 58 Neb. 29, 78 N. W. 460, holding owners of party walls, built at joint expense, are not tenants in common, but each owns in severalty the part thereof situated on his own land, with an easement of support from the other part.

Rights as to party walls.

Cited in reference notes in 42 A. S. R. 729; 46 A. R. 635,—on right to add to party wall; 13 A. S. R. 63, on increasing height of party walls.

Cited in note in 20 L.R.A.(N.S.) 387, on right to raise height of party wall.

—Rights as to windows or openings.

Cited in *Corcoran v. Nailor*, 6 Mackey, 580, holding under building regulations a party wall cannot be erected with windows overlooking the servient land; *Springer v. Darlington*, 207 Ill. 238, 69 N. E. 946; *Normille v. Gill*, 159 Mass. 427, 34 A. S. R. 441, 34 N. E. 543,—holding by usage the words “party wall” and “partition wall” have come to mean a solid wall; *Graves v. Smith*, 87 Ala. 450, 13 A. S. R. 60, 5 L.R.A. 296, 6 So. 308; *Harber v. Evans*, 101 Mo. 661, 20 A. S. R. 646, 10 L.R.A. 41, 14 S. W. 750,—holding injunction will lie to prevent placing of windows in party wall; *Paul v. Cook*, 4 Neb. (Unof.) 467, 94 N. W. 997, as to granting of injunction to prevent windows being made in party wall; *National Commercial Bank v. Gray*, 71 Hun, 295, 24 N. Y. Supp. 997, holding windows have no place in party wall; *Everly v. Driskill*, 24 Tex. Civ. App. 413, 58 S. W. 1046, holding a party wall, in absence of an agreement to the contrary, necessarily means a solid wall; and the fact alone that the adjoining proprietor did not consent to the erection of it with windows is sufficient to entitle to an injunction against so constructing it.

Cited in notes in 89 A. S. R. 928, on right to windows or openings in party wall; 10 L.R.A.(N.S.) 1192, on right to open windows or other apertures in a party wall.

Power to grant injunctions.

Cited in note in 20 L.R.A. 162, on power of equity to grant mandatory injunctions as to use of property.

—Power of district courts in Texas.

Cited in *Scripture v. Kent*, 1 Tex. App. Civ. Cas. (White & W.) 592; *Gascamp v. Drews*, 2 Tex. App. Civ. Cas. (Willson) 73; *Hoby v. Koenig*, 2 Posey Unrep. Cas. (Tex.) 439,—holding title to land was so far involved in the suit as to confer jurisdiction upon district court independently of damages claimed; *Anderson County v. Kennedy*, 58 Tex. 616, holding district courts have power to issue writs of injunction in cases in which a court of chancery, under the settled rules of equity, would have power to issue them, and this without reference to the amount in controversy, under the express power given in the Constitution; *Galveston, H. & S. A. R. Co. v. Dowe*, 70 Tex. 1, 6 S. W. 790, as to their power.

Jurisdiction of action for damages to easement.

Cited in *Henslee v. Boyd*, 48 Tex. Civ. App. 496, 107 S. W. 128, holding that justice court has no jurisdiction of suit for damages for injury to easement over land.

32 AM. REP. 632, CUNNINGHAM v. INTERNATIONAL R. CO. 51 TEX. 503.**Liability for acts of independent contractors.**

Cited in *Scarborough v. Alabama Midland R. Co.* 94 Ala. 497, 10 So. 316; *Chattahoochee & G. R. Co. v. Behrman*, 136 Ala. 508, 35 So. 132; *Sanford v. Pawtucket Street R. Co.* 19 R. I. 537, 33 L.R.A. 564, 35 Atl. 67; *Gulf, C. & S. F. R. Co. v. Flake*, 1 Tex. App. Civ. Cas. (White & W.) 99,—holding company not liable for acts of independent contractor not under its control; *Choctaw, O. & T. R. Co. v. McLaughlin*, 43 Tex. Civ. App. 523, 96 S. W. 1091, holding carrier liable for personal injuries where it had let the contract for the construction of the road to construction company, and the latter had sublet the contract for laying rails to a third party by whom plaintiff was employed when injured; *Bibb v. Norfolk & W. R. Co.* 87 Va. 711, 14 S. E. 163, holding carrier not liable for negli-

gence of competent carefully selected contractor; *Cogswell & West Street & N. E. Electric R. Co.* 5 Wash. 46, 31 Pac. 411, holding carrier cannot, by means of lease or other contract for operation of their means of transportation or management or control of their right of way, relieve themselves from liability for torts committed by their lessees, or the parties with whom they specially contract; *Herrman v. Great Northern R. Co.* 27 Wash. 472, 57 L.R.A. 390, 68 Pac. 82, holding a railway company which uses and occupies premises for depot purposes is not relieved from liability for the unsafe approaches to such premises by the mere fact that another may own and control the depot grounds.

Cited in reference notes in 21 A. S. R. 178, on liability of railroad company for injuries inflicted by construction company; 44 L.R.A. 752, on liability of lessor of railroad for injuries caused by negligence of other company using road under contracts for construction or otherwise.

Cited in notes in 76 A. S. R. 384, on nonliability for negligence and other torts of independent contractors; 76 A. S. R. 411, 413, on liability for negligence of independent contractor in performing railroad work; 9 L.R.A. 604, on railroad's liability for independent contractor's negligence; 44 L.R.A. 752, 753, on liability of lessor of railroad for injuries caused by negligence of other company using road under contracts for construction or otherwise; 65 L.R.A. 630, on distinction between real and personal property in reference to employer's liability for torts of independent contractors; 65 L.R.A. 643, on nonliability of employer for negligent work on railways by independent contractors not productive of permanently dangerous conditions; 66 L.R.A. 139, on employer's liability for acts of independent contractor resulting in injuries arising from nonperformance of absolute duties of employer in respect to construction work.

Distinguished in *Burton v. Galveston, H. & S. A. R. Co.* 61 Tex. 526, holding if employees operating train who were employed and could be discharged by company alone, were yet operating the train in transporting supplies according to the directions and subject to will of contractors, they would still be servants of the company, which would be responsible for their negligence.

Test of relationship of independent contractor.

Cited in *Clark v. Geer*, 32 C. C. A. 295, 57 U. S. App. 473, 86 Fed. 447; *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591, 7 So. 94; *Brown v. McLeish*, 71 Iowa, 381, 32 N. W. 385; *Knoxville Iron Co. v. Dobson*, 7 Lea, 367; *Powell v. Virginia Constr. Co.* 88 Tenn. 692, 17 A. S. R. 925, 13 S. W. 691; *Wallace v. Southern Cotton Oil Co.* 91 Tex. 18, 40 S. W. 399 (reversing 23 Tex. Civ. App. 12, 54 S. W. 638); *Southern Oil Co. v. Church*, 32 Tex. Civ. App. 325, 74 S. W. 797; *Southwestern Teleg. & Teleph. Co. v. Paris*, 39 Tex. Civ. App. 424, 87 S. W. 724,—holding it is to ascertain whether he renders the service in the course of an independent occupation, representing the will of the employer only as to the result of the work and not as to means by which it is accomplished; *Smith v. Humphreyville*, 47 Tex. Civ. App. 140, 104 S. W. 495, holding independent contractor one who, in rendering service, exercises independent employment and has entire control of means to be used.

Cited in note in 65 L.R.A. 457, on testing character of contract as that of an independent contractor by existence or absence of right of control on employer's part.

Relation of master and servant.

Cited in *Cunningham v. Moore*, 55 Tex. 373, 40 A. R. 812, holding liability of master is dependent upon his right to control servant; *Walker v. Simmons Mfg.*

Co. 131 Wis. 542, 111 N. W. 694, holding evidence sufficient to sustain verdict that relationship existed; *Chapman v. Warden*, 50 Tex. Civ. App. 282, 110 S. W. 533, to the point that "well digger" employing and controlling his own outfit is independent contractor.

Cited in reference notes in 32 A. R. 462, on whether employee is servant or contractor and who are fellow servants as questions for jury; 35 A. R. 132, on railroad's liability for injury to servant of telegraph company riding free.

Cited in note in 37 L.R.A. 76, on position as master of servants sent to work in charge of plant.

Fellow servants.

Cited in *Capper v. Louisville, E. & St. L. R. Co.* 103 Ind. 305, 2 N. E. 749, holding tunnel repairer and fellow trainman fellow servants; *Indianapolis & G. Rapid Transit Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145, holding track repairer being carried to work fellow servant with motorman and conductor.

32 AM. REP. 637, BRYAN v. PAGE, 51 TEX. 532.

Powers of municipal corporations.

Cited in *Flood v. State*, 19 Tex. App. 584, holding they can do no act for which authority is not given, or may not be reasonably inferred; *Charleston v. Reed*, 27 W. Va. 681, 55 A. R. 336, holding they can exercise the following powers and no others those granted by express terms in its charter as the general statute under which it is incorporated, those necessarily implied from those granted, those essential to declared purpose of corporation, not simply convenient but indispensable; *Baldwin v. Travis County*, 40 Tex. Civ. App. 149, 88 S. W. 480, holding county commissioners have no power to bind county by contract except so far as the general or special authority to so contract is conferred upon them by Constitution or by law; *Miller v. State*, 44 Tex. Crim. Rep. 99, 69 S. W. 522, holding that where mode by which city is authorized to do certain thing is prescribed, that mode must be pursued.

Cited in note in 1 L.R.A. 169, on power and authority of municipal corporations.

Contracts made by municipalities.

Cited in *Pryor v. Kansas City*, 153 Mo. 135, 54 S. W. 499 (dissenting opinion), as to validity of contracts not in compliance with charter; *McCloud v. Columbus*, 54 Ohio St. 439, 44 N. E. 95, holding contract of municipality for improvement of streets not in compliance with statute in mode and time of advertising for bids, invalid; *Fayette County v. Krause*, 31 Tex. Civ. App. 569, 73 S. W. 51, holding contracts made by a county, in order to be valid and binding, must be made by, or under authority of an order of the county commissioner's court.

Cited in note in 38 A. S. R. 910, on employment of special counsel by municipal corporations, counties, and towns.

— Implied contracts.

Cited in *San Antonio v. French*, 80 Tex. 575, 26 A. S. R. 763, 16 S. W. 440, holding act of holding over leased premises occupied by city under a lease for one year will not bind city; *Stubbs v. Galveston*, 3 Tex. App. Civ. Cas. (Willson) 183, holding city cannot be bound by implied contract for services rendered, unless services were authorized by ordinance or subsequently accepted by express corporate action; *Peck v. Hempstead*, 27 Tex. Civ. App. 80, 65 S. W. 653, holding city is only liable upon express contracts authorized by ordinance or other due corporate proceedings.

Cited in reference note in 26 A. S. R. 766, on liability of municipalities on implied contracts.

Cited in note in 27 L.R.A.(N.S.) 1128, on liability of municipality upon implied contract for labor or services.

Ratification of implied contract by municipality.

Cited in *Boydston v. Rockwall County*, 86 Tex. 234, 24 S. W. 272, holding commissioner's court could ratify unauthorized act of county judge in buying bonds of another county on account of county public school fund; *German-American Sav. Bank v. Spokane*, 17 Wash. 315, 38 L.R.A. 259, 49 Pac. 542, as to ratification of ultra vires contracts; *Berlin Iron Bridge Co. v. San Antonio*, 62 Fed. 882; *Nichols v. State*, 11 Tex. Civ. App. 327, 32 S. W. 452; *Noel v. San Antonio*, 11 Tex. Civ. App. 580, 33 S. W. 263; *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *State v. Pullman*, 23 Wash. 583, 83 A. S. R. 836, 63 Pac. 265,—holding where contract is absolutely ultra vires the fact that the municipality has received benefits thereunder affords no ground for an estoppel against its denying the validity of the contract; *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601, holding municipal contract not made in compliance with requirements of the provisions of the charter requiring it to be by ordinance cannot be ratified except by ordinance.

32 AM. REP. 640, BURCH v. HARDWICKE, 30 GRATT. 24.

Power of legislature over municipal police.

Cited in *Horton v. Newport*, 27 R. I. 283, 1 L.R.A.(N.S.) 512, 61 Atl. 759, 8 A. & E. Ann. Cas. 1097, holding the legislature has control, in the absence of express prohibition, of the police department of any municipality and the power to provide for the expenses of keeping up the same; *Wiggin v. Manchester*, 72 N. H. 576, 58 Atl. 522, holding the legislature has the power to establish boards of police commissioners who should have control over local police matters; *State ex rel. Atwool v. Hunter*, 38 Kan. 578, 17 Pac. 177, holding the legislature has power to confer upon boards of police commissioners, whose powers come directly from the state, the police control of cities.

Power of legislature to create city courts.

Cited in *Ex parte Abrams*, 56 Tex. Crim. Rep. 468, 120 S. W. 883, 18 A. & E. Ann. Cas. 45, holding that act creating city court with jurisdiction to try offenses against state was within legislative power.

Constitutional powers of mayor over city police.

Cited in *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652, holding the power to suspend and remove city officers by mayor as conferred by the Constitution, has no application to city police.

Distinguished in *Newport News v. Woodward*, 104 Va. 58, 51 S. E. 193, 7 A. & E. Ann. Cas. 625, holding the new Constitution is not self-executing so as to give the mayor power to remove members of the police force but merely refers the subject to the legislature for action.

State or city officers.

Cited in *State ex rel. Broatch v. Moors*, 52 Neb. 770, 73 N. W. 399, holding the office of mayor of the city of Omaha, is an office under the state; *Winchester v. Redmond*, 93 Va. 711, 57 A. S. R. 822, 25 S. E. 1001, holding the state constantly makes use of officers of municipal corporations and while such officers are exercising state power they are in that respect state officers.

Police and constabulary as state officers.

Cited in *State ex rel. Atty. Gen. v. George*, 23 Fla. 585, 3 So. 81, holding municipal officers charged with the duty of preserving the peace and good order of society, are at the same time state officers; *Re Readings' Constables*, 8 Pa. Co. Ct. 101, holding constable not a ward or township officer so as to forbid distinctions between city and county constables in manner of election; *Re Newport Police Commission*, 22 R. I. 654, holding the board of police commissioners of the city of Newport is a state board, within the act providing for legal advice to all state boards and commissions; *Haynes v. Com.* 104 Va. 854, 52 S. E. 358, holding a policeman a state officer; *State ex rel. Quintin v. Edwards*, 38 Mont. 250, 99 Pac. 940, holding policeman not state officer; *McCleave v. Moncton*, 35 N. B. 296, on police officers as servants or agents of city.

—Dual nature of authority.

Cited in *Wallace v. Richmond*, 94 Va. 204, 36 L.R.A. 554, 26 S. E. 586, holding where liquors were destroyed to keep them from falling into the hands of an invading army a pledge of the city to pay owners for same is void as such exercise of power pertained to the state.

Liability of city for acts of police officer.

Cited in reference notes in 100 A. D. 360, on liability of city for acts of its officers or agents within the scope of the powers of the corporation and of their employment; 33 A. R. 154, on liability of city for wrongful act of police.

Cited in note in 30 A. S. R. 401, on municipal liability for negligence or misconduct of police department.

Right to require local officers to execute state laws.

Cited in *Newport v. Horton*, 22 R. I. 196, 50 L.R.A. 330, 47 Atl. 312, holding the right of self-government is not violated by requiring local officers to execute state laws; *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650, holding the legislature has the power to confer jurisdiction upon a municipal court to try offenses against the general penal laws of the state; *Ex parte Corliss*, 16 N. D. 470, 114 N. W. 962, to point that towns and cities are entirely subject to legislative control in absence of constitutional restrictions.

Exemption of judicial officers for official acts.

Distinguished in *Johnston v. Moorman*, 80 Va. 131, holding judicial officers are exempt in civil actions for official acts within their jurisdiction, though such acts are alleged as maliciously done.

De facto appointments and removals from office.

Cited in *State ex rel. Crow v. Vallins*, 140 Mo. 523, 41 S. W. 887 (dissenting opinion), on validity of an appointment of a police officer ineligible for office.

32 AM. REP. 650, CHEATHAM v. HATCHER, 30 GRATT. 56.**Proof of will where a subscribing witness is beneficially interested.**

Cited in *Davis v. Davis*, 43 W. Va. 300, 27 S. E. 323, holding will proved independently of an attesting witness beneficially interested is not void.

Attestation and proof of will.

Cited in *Coffman v. Hedrick*, 32 W. Va. 119, 9 S. E. 65, on point that two must attest but need not prove in court; *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488, to point that family physician is competent to prove will when present at execution.

Cited in notes in 77 A. S. R. 469, 470, on number of witnesses required for

proof of will; 77 A. S. R. 474, 476, 478, on weight and effect of testimony of subscribing witness on probate of will; 114 A. S. R. 237, on right to put in evidence outside testimony of attesting witnesses; 39 L.R.A. 717, on necessity of subscribing witnesses giving opinion as to sanity or insanity.

Necessity of a formal request to witness to subscribe will.

Cited in *Herbert v. Berrier*, 81 Ind. 1, holding it is not necessary to prove a formal request to the witnesses to subscribe to the will.

Cited in notes in 114 A. S. R. 216, on request to attesting witnesses to sign will; 8 L.R.A. 827, on signing will at testator's request.

What constitutes signing in presence of testator.

Cited in *Baldwin v. Baldwin*, 81 Va. 405, 59 A. R. 669, holding where subscribing witnesses subscribed the will at a table near foot of bed upon which testatrix reclined in such position that she was obliged to see the statute was complied with; *Nicholas v. Hershner*, 20 W. Va. 251, holding an instruction on presence of testator and witnesses taken in connection with other instructions was correct.

Presumption as to will witnessed by beneficiary.

Cited in *Coffman v. Hedrick*, 32 W. Va. 119, 9 S. E. 65, holding charge correct wherein the words "jealous eye" asked in an instruction was changed to "careful scrutiny," they being nearly synonymous when taken with language of the instruction.

Cited in note in 31 A. S. R. 683, on burden of proof and presumption as to undue influence in execution of will.

Effect to be given testimony of physician as to mental condition.

Cited in *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492, holding a family physician's testimony as to the mental soundness of a testator when he told him he had destroyed his will, is entitled to the highest consideration; *Montague v. Allan*, 78 Va. 592, 49 A. R. 384, holding same as to testimony as to mental condition of testatrix at time of her dissolution; *Jones v. McGruder*, 87 Va. 360, 12 S. E. 792, holding same as to testimony of an expert family physician who testified his patient showed permanent injury of the brain.

Cited in note in 39 L.R.A. 328, on weight of expert opinion as to sanity or insanity.

— Of subscribing witness testifying against validity of will.

Cited in *Stevens v. Leonard*, 154 Ind. 67, 77 A. S. R. 446, 56 N. E. 27, holding an instruction, that subscribing witness impliedly certifies that the testator is of sound mind, and when he testifies to the contrary such contradiction may be considered by the jury, is not objectionable; *Dickson's Estate*, 20 Pa. Co. Ct. 152, holding proof of attestation is prima facie proof that witness regarded testator as sane; *Webb v. Dye*, 18 W. Va. 376, holding testimony of a subscribing witness against the validity of a will must be viewed with suspicion.

Cited in notes in 39 L.R.A. 719, on contradiction of subscribing witnesses as to sanity or insanity; 39 L.R.A. 721, on weight of opinions of subscribing witnesses as to sanity or insanity; 6 L.R.A.(N.S.) 575, on weight of testimony of subscribing witness against competency of testator.

Capacity to make will.

Cited in note in 6 L.R.A. 168, on effect of old age and infirmity on capacity to make will.

Validity of will drawn by beneficiary.

Cited in reference note in 2 A. S. R. 532, on validity of will drawn by beneficiary.

Presumption as to regularity of proceedings in court below.

Cited in *Smith v. Hutchinson*, 78 Va. 683, holding an appellate court will presume all proceedings had, as well as the judgment of the court below, to be regular unless the contrary appears.

32 AM. REP. 661, BANK OF GREENSBORO v. CHAMBERS, 30 GRATT. 202.

Power of a married woman over her separate estate.

Cited in *Bailey v. Hill*, 77 Va. 492; *Green v. Claiborne*, 83 Va. 386, 5 S. E. 376, —holding a married woman is regarded in equity as the owner of her separate estate and has the *jus disponendi* incident to such estate; *Ropp v. Minor*, 33 Gratt. 97, holding no particular phraseology is required to confer the right of alienation but the intention must be clear; *Bain v. Buff*, 76 Va. 371, holding a full power of disposition is given where the fund was not to be under the control and management of the trustee, the restriction being it should be for exclusive use of woman and her children.

Cited in reference note in 94 A. D. 498, on rights of married woman in her separate estate.

— Implied restraints.

Cited in *Justis v. English*, 30 Gratt. 565, on effect of prescribing a mode of disposing of separate estate; *Bailey v. Pizzini*, 1 Va. Dec. 538, holding alienation of estate settled on married woman not binding where its manifest result was to defeat the object of the settlement.

Distinguished in *Averett v. Lipscombe*, 76 Va. 404, holding though the property is to be held by a trustee and is not to be liable for the husband's debts, the wife, may with her husband and trustee alienate the property; *Christian v. Keen*, 80 Va. 369, holding where property is conveyed to the wife for her exclusive benefit, fact that there is a grant of special power of disposal in a particular way, does not divest her of her general power of disposal.

— Charge of other's debts on estate.

Cited in *Smith v. Fox*, 82 Va. 763, 1 S. E. 200, holding she may make her separate estate liable for her debts or those of her husband, or any other person, unless restrained by the instrument creating the estate; *Price v. Planters' Nat. Bank*, 92 Va. 468, 32 L.R.A. 214, 23 S. E. 887, holding where property is settled to the separate use of a married woman, and power given to deal with it, she has the other power incident to property of creating debts to be paid out of it; *Garland v. Pamplin*, 32 Gratt. 305, holding in order for the separate estate to be bound her engagements must have reference to and be made upon the credit of such estate.

Extent of power of trustee where right is given to sell and reinvest.

Cited in *Pracht v. Lange*, 81 Va. 711, holding where trustee is given merely power under specific circumstances to sell and reinvest, he had no power to encumber the real estate with his subsequent mercantile accounts; *Norris v. Woods*, 89 Va. 873, 17 S. E. 552, holding the power to sell for re-investment, does not confer the right to encumber or mortgage the corpus; *Green v. Woolridge*, 89 Va. 632, 16 S. E. 875, holding the burden is upon those attempting to justify the

encroachment, to show the exigencies of the situation justified such encroachment by the trustee upon the capital of the trust estate.

Necessity of consideration to support deed of wife to husband.

Cited in *Griffin v. Birkhead*, 84 Va. 612, 5 S. E. 685, holding it is not material or indispensable that there should be a valuable consideration to support a deed of property to the husband by his wife.

Rules of interpretation applicable to wills and antenuptial contracts.

Cited in *Haymond v. Jones*, 33 Gratt. 317, holding whether a separate estate is created in a particular case is a question of intention resting upon a construction of the will; *Stace v. Bumgardner*, 89 Va. 418, 16 S. E. 252, holding there is no material difference in principle, in the rules of interpretation between wills and ante-nuptial contracts, except what naturally arises from the different circumstances of the parties.

Cited in note in 50 A. D. 375, on marriage settlements.

32 AM. REP. 668, BURKHOLDER v. LUDLAM, 30 GRATT. 255.

Equitable titles under parol agreements.

Cited in *Halsey v. Peters*, 79 Va. 60, holding no writing is necessary to create a good equitable title to real estate; *Pack v. Hansbarger*, 17 W. Va. 313, holding where a parol contract for purchase of land is so far executed as to vest right to the enforcement in equity the vendee will be protected against subsequent lien of a judgment against the vendor.

Specific enforcement of executed parol agreement concerning land.

Cited in *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. 361, holding a parol agreement to give a house and lot in consideration of being kept in old age, should be specifically executed, where carried out and valuable improvements made in reliance upon it; *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530, holding where a parol contract for land has been partly performed, the vendee having taken possession and made improvements, equity will enforce the conveyance of the legal title; *Trout v. Trout*, 2 Va. Dec. 399, 25 S. E. 98, holding the ground upon which a court of equity considers part performance as creating equity to have a specific execution is that it would be fraud upon the party if it were not completed.

Cited in reference note in 51 A. R. 37, on applicability of statute of frauds to parol gift of land followed by possession.

Cited in note in 23 A. D. 429, on specific performance of voluntary agreements.

— Parol gifts executed by donee.

Cited in *Stokes v. Oliver*, 76 Va. 72; *Bevington v. Bevington*, 133 Iowa, 351, 9 L.R.A. (N.S.) 508, 110 N. W. 840, 12 A. & E. Ann. Cas. 490,—holding parol gifts of land where the donee goes into possession and makes permanent improvements will be upheld in equity if not at law; *Crim v. England*, 46 W. Va. 480, 76 A. S. R. 826, 33 S. E. 310, specifically enforcing gift of land based on meritorious consideration, by reason of which the donee has been induced to make valuable improvements; *Keffer v. Grayson*, 76 Va. 517, 44 A. R. 171, holding where a father in consideration of the love proposes to settle upon daughter and her husband a farm provided the husband pay rent in arrears by a certain time he is not bound to do so where the condition is not fulfilled; *Swales v. Jackson*, 126 Ind. 282, 26 N. E. 62, holding a mere parol agreement between parent and child that a conveyance of land will be made if child will enter and improve it, rests upon no consideration and is not cured by making lasting improvements; *Nicholas v. Nicholas*, 100 Va. 660, 42 S. E. 669, holding under the provisions

of the code possession and improvements under a parol gift of land from father to child carries with it no right to a conveyance of the land to the donee.

Distinguished in *Bruce v. Slemph*, 82 Va. 352, holding a gift by a father to his daughter's husband is deemed an advancement and change of circumstances and possession of the property do not import a consideration.

Necessity of certainty as to terms and proof of parol gift of land.

Cited in *Lightner v. Lightner*, 2 Va. Dec. 258, 23 S. E. 301; *Griggsby v. Osborn*, 82 Va. 371,—holding the gift must be definite in its terms and clearly proved; *Stone v. Hill*, 52 W. Va. 63, 43 S. E. 93, holding where evidence of a parol gift of land is conflicting it should be held within the statute of frauds.

Cited in note in 9 L.R.A.(N.S.) 510, on degree of proof necessary to establish parol gift of real estate.

Rights of donor's judgment creditors against parol gift.

Cited in *Snyder v. Martin*, 17 W. Va. 276, 41 A. R. 670, holding where statute of frauds does not apply the judgment-creditor can acquire no better right to the estate than the debtor himself has when the judgment is recovered.

Cited in note in 12 E. R. C. 354, on validity of voluntary settlement.

Right to question admissibility of evidence for first time on appeal.

Cited in *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492, holding the question of the admissibility of evidence, relied upon by both parties, cannot be raised for the first time in the court.

Rights of appellees brought up for review by an appeal.

Cited in *Alexander v. Alexander*, 85 Va. 353, 1 L.R.A. 125, 7 S. E. 335, holding an appeal, where two causes were heard together and the decree rendered in both suits, brings up for review the rights asserted by the appellees also; *Blackwell v. Bragg*, 78 Va. 529, holding where parties whose bill was dismissed in part, do not appeal from such dismissal they are not entitled to a correction as against co-appellees.

32 AM. REP. 673, BOWLER v. HUSTON, 30 GRATT. 266.

Right to impeach foreign judgment for want of jurisdiction.

Cited in *Reed v. Reed*, 52 Mich. 117, 50 A. R. 247, 17 N. W. 720, holding no one in another state or country is concluded by a record reciting a prima facie case of jurisdiction, but he may show the real facts and disprove the authority for making such record; *Adams v. Adams*, 154 Mass. 290, 13 L.R.A. 275, 28 N. E. 260, holding same where the validity of a divorce was immediately in issue; *Michels v. Stork*, 52 Mich. 260, 17 N. W. 833, holding where suit is brought upon a foreign judgment it seems to be competent to disprove jurisdiction by showing no service was made upon the party defendant.

Cited in reference notes in 1 A. S. R. 663, on defenses available in action on foreign judgment; 3 A. S. R. 44, on actions on judgments.

Effect of foreign judgment.

Cited in *Piedmont & A. L. Ins. Co. v. Ray*, 75 Va. 821, holding a writ of error from the supreme appellate court of Texas to a judgment of a district court of that state will be given same effect in Virginia as in Texas; *Moch v. Virginia F. & M. Ins. Co.* 4 Hughes, 61, 10 Fed. 696, holding the principle of res judicata applies and binds a home court where jurisdiction of a court of another state has been passed on when expressly raised by plea.

Cited in reference note in 44 A. D. 570, on effect of a judgment against partnership or joint debtors on service on one.

Cited in notes in 75 A. D. 150, as to whether foreign judgment on unauthorized appearance by attorney is void, voidable, or conclusive; 103 A. S. R. 307, on character of proceedings or mode of conducting them and of obtaining jurisdiction over parties in other states; 50 L.R.A. 595, on what service of process is sufficient to constitute due process of law as basis of judgment in personam against debtor.

Distinguished in *Stewart v. Northern Assur. Co.* 45 W. Va. 734, 44 L.R.A. 101, 32 S. E. 218, holding a judgment by default will not protect the garnishee when sued by his creditor where he refused to plead, even though the judgment rendered in a foreign state is absolutely void.

Power of one partner to enter appearance for another.

Cited in *Taylor v. Felder*, 3 Ga. App. 106, 59 S. E. 328, holding a partner has no implied power to enter an appearance for another partner so as to bind him personally.

32 AM. REP. 682, MARTIN v. LEWIS, 30 GRATT. 672.

Admissibility of parol evidence to explain or vary written instrument.

Cited in *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544, holding in the absence of fraud or mistake evidence to contradict the terms of a valid written instrument is inadmissible; *Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co.* 105 Va. 785, 54 S. E. 884, holding where a written contract is unequivocal, its meaning must be found in the instrument itself.

Cited in reference notes in 1 A. S. R. 114, on admissibility of parol evidence to explain written instrument; 2 A. S. R. 230, on admissibility of parol evidence to contradict written instrument.

—To qualify liability on bills and notes.

Cited in *Riverview Land Co. v. Dance*, 98 Va. 239, 35 S. E. 720, holding evidence tending directly to vary and contradict the legal effect of a written indorsement is inadmissible; *Citizens' Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890, holding same where an assignment equivalent to a blank indorsement is sought to be varied by evidence of a contemporaneous parol agreement; *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583, holding where notes were given for purchase money of lots and a trust executed to secure them, they are complete in themselves, and evidence to show an alleged warranty and other promises is inadmissible.

Presumption as to consideration from drawing of bill.

Cited in *Yager v. McCormack*, 41 Fla. 204, 25 So. 883, holding the mere drawing of a bill imports the most certain and precise contract, for presumed adequate consideration.

Effect of a recital of the consideration on negotiability of note.

Cited in *Beatty v. Western College*, 177 Ill. 280, 69 A. S. R. 242, 42 L.R.A. 797, 52 N. E. 432, holding the statement in a note of the consideration upon which it is founded, or the effect to be given to the payment, does not affect its negotiable character.

Jurisdiction of equity in legal matters.

Cited in *Miller v. Miller*, 25 W. Va. 495, on power of equity to enjoin prosecution of law action when defenses are legal but doubtful; *Annon v. Brown*, 65 W. Va. 34, 63 S. E. 691, to point that causes of actions in respect to rights of partners are within equity jurisdiction.

32 AM. REP. 690, KINNEY v. COM. 30 GRATT. 858.**Validity of marriage, generally.**

Cited in reference notes in 10 A. S. R. 658, as to validity of marriage performed in another state; 40 A. S. R. 892, on validity of marriages prohibited by statute.

Cited in notes in 2 L.R.A. 704, on prohibitions against remarriage by guilty party in divorce action; 5 E. R. C. 820, on universal validity of marriage valid where celebrated.

Validity of a marriage contracted outside of state to avoid laws of state.

Cited in *Re Wilbur*, 8 Wash. 35, 40 A. S. R. 886, 35 Pac. 407, holding where a marriage is prohibited by statute or is against rules of morality and decency it is vain for parties to go beyond their domicile for the purpose of avoiding the prohibition; *Colwell's Succession*, 34 La. Ann. 265, holding a marriage taking place in the very teeth of a prohibitory statute would be absolutely null; *Greenhow v. James*, 80 Va. 636, 56 A. R. 603, holding personal capacity to contract the marriage depends on the law of the domicile; *Stull's Estate*, 183 Pa. 625, 63 A. S. R. 776, 39 L.R.A. 539, 39 Atl. 16, 41 W. N. C. 481, 28 Pittsb. L. J. N. S. 291; *Pennegar v. State*, 87 Tenn. 244, 10 A. S. R. 648, 2 L.R.A. 703, 10 S. W. 305,—holding a marriage between one divorced for adultery and the adulterer, contracted outside the state for purpose of evading a statute prohibiting the marriage is invalid in this state; *State v. Fenn*, 47 Wash. 561, 17 L.R.A. (N.S.) 800, 92 Pac. 417, holding that marriage outside state within six months after divorce is invalid if parties are domiciled here.

Cited in notes in 60 A. S. R. 946, on validity of marriages contracted by residents of state or country in violation of its laws, but beyond its boundaries; 57 L.R.A. 164, on conflict of laws as to matrimonial capacity of the parties to the marriage.

Distinguished in *Re Chace*, 26 R. I. 351, 69 L.R.A. 493, 58 Atl. 978, 3 A. & E. Ann. Cas. 1050, holding a marriage of one under guardianship without guardian's consent as required by laws of state, if valid by laws where performed will be held valid in this state—the domicile of both parties.

— Marriage of negro with white person.

Cited in *Georgia v. Tutty*, 7 L.R.A. 50, 41 Fed. 753, holding where laws of the state of Georgia prohibited the marriage of whites and negroes a marriage entered into between a white man and negress outside the state will not be recognized though valid where contracted.

Cited in note in 57 L.R.A. 168, on conflict of laws as to validity of marriage between members of different races.

Legislative power to forbid marriage.

Cited in note in 2 L.R.A. (N.S.) 532, on legislative power to forbid marriage.

— Marriages between white persons and negroes.

Cited in *Dodson v. State*, 61 Ark. 57, 31 S. W. 977, holding statutes forbidding marriages between white persons and negroes are not in conflict with federal constitution conferring equal rights upon the negro race; *Pace v. State*, 69 Ala. 231, holding fact that the punishment for adultery when committed by a negro and a white person together is different than that where the two persons are white or both negroes is not a discrimination.

Cited in reference note in 32 A. R. 549, on white man and colored wife as subject to indictment for living together as husband and wife.

Cited in notes in 78 A. S. R. 256, on power of legislature to declare misce-

genation criminal; 2 L.R.A.(N.S.) 536, on legislative power to forbid miscegenation.

32 AM. REP. 700, CLINE v. LIBBY, 46 WIS. 123, 49 N. W. 832.

Right of chattel mortgagee to take possession under insecurity clause.

Cited in *Hill v. Merriman*, 72 Wis. 483, 40 N. W. 399, holding where mortgage clause gave mortgagee right to take possession when ever he deemed himself insecure this gave absolute discretion as to time and circumstances; *Gage v. Wayland*, 67 Wis. 566, 31 N. W. 108, holding this equivalent to giving the right of possession whenever they chose to demand the property; *Richardson v. Coffman*, 87 Iowa, 121, 54 N. W. 356, holding same where mortgagee acts in good faith; *Werner v. Bergman*, 28 Kan. 60, 42 A. R. 152; *Sanger v. Slayden*, 7 Tex. Civ. App. 605, 26 S. W. 847,—holding the mortgagee in such case is not under obligation to prove that facts and circumstances justified him in deeming himself insecure; *Evans v. Graham*, 50 Wis. 450, 7 N. W. 380, holding same where there was some evidence to justify the mortgagee's opinion that she deemed herself insecure; *Barrett v. Hart*, 42 Ohio St. 41, 51 A. R. 801, holding he may in such case when acting in good faith upon facts arising since making the mortgage, take possession on deeming himself insecure.

Cited in reference notes in 36 A. R. 151, on right to chattel mortgagee to take possession without reasonable cause to think himself insecure; 3 A. S. R. 289, on effect of chattel mortgage authorizing mortgagee to take possession whenever he may "deem himself in danger of losing said debt."

Cited in notes in 54 A. R. 718, on effect of chattel mortgage allowing mortgagee to take possession when he deems himself insecure; 23 L.R.A. 782, on effect of taking possession under "danger," "safety," or "insecurity" clause in chattel mortgage.

Right of possession under a chattel mortgage.

Cited in *Lee v. Fox*, 113 Ind. 98, 14 N. E. 889, holding a chattel mortgage a conditional sale, vesting the legal title and right of possession in the mortgagee.

Retention by chattel mortgagor as evidence of fraud.

Cited in reference note in 33 A. R. 717, on retention by mortgagor of control over chattels as evidence of fraud on creditors.

Effect of stipulation in contract making it operative at discretion of party.

Cited in *Allen v. Mutual Compress Co.* 101 Ala. 574, 14 So. 362, holding where contract of hiring "guarantees to give satisfaction" the employer is vested with full power to determine whether the labor performed is satisfactory; *Mullally v. Greenwood*, 127 Mo. 138, 48 A. S. R. 613, 29 S. W. 1001, holding where the article sold or services rendered are warranted "or agreed" to give satisfaction the purchaser or master is vested with full power to determine whether it is satisfactory.

Cited in reference note in 33 A. R. 353, on effect of contract for an article to be "satisfactory" to purchaser.

Cited in notes in 54 A. R. 711, on effect of contract for goods or services to be satisfactory; 17 L.R.A. 210, on right of purchaser to reject article guaranteed to give satisfaction.

Disapproved in *Mobile, J. & K. C. R. Co. v. Hayden*, 116 Tenn. 672, 94 S. W. 940, holding the burden of proving the incompetency of servant is upon the

employer where he seeks to dismiss where contract was contingent upon servant proving himself capable and efficient.

Effect of giving bond on motion to dissolve injunction.

Cited in *Atkinson v. Hewett*, 51 Wis. 275, 8 N. W. 211, holding the exaction of a bond of indemnity against unlawful waste on motion to dissolve an injunction was a virtual admission of the right to the injunction.

32 AM. REP. 703, WHITNEY v. CLIFFORD, 46 WIS. 138, 19 N. W. 835.

Liability of one employing another to do a specific work resulting in injury.

Cited in *Hackett v. Western U. Teleg. Co.* 80 Wis. 187, 49 N. W. 822, holding one employing another as independent contractor to do a specific job does not thereby become liable for injuries caused solely by negligence of such one or his servants; *Fink v. Missouri Furnace Co.* 82 Mo. 276, 52 A. R. 376, holding same where one employed by a furnace company represented the will of the employer only as to the results of his work; *Meier v. Morgan*, 82 Wis. 289, 33 A. S. R. 39, 52 N. Y. 174, holding the owner cannot dictate that a building be constructed upon an unsafe plan and escape liability because he made a contract with a third party to build it.

Cited in notes in 76 A. S. R. 402, on employer's liability for negligence and other torts of independent contractor where work is dangerous; 14 L.R.A. 834, on employer's liability for injury by independent contractor in work constituting nuisance.

— Of mill owner for acts of lessee.

Distinguished in *Ziebel v. Eclipse Lumber Co.* 33 Wash. 591, 74 Pac. 680, holding where one taking control of a shingle mill assumed the relation of an independent contractor the owner of mill would not be liable where injuries resulted to an employee of such contractor.

Disapproved in *Mason v. Clifford*, 4 Fed. 177, holding a contract by which one is to operate a mill, hire and pay the help furnished certain tools and repair breakage for an amount payable monthly, the other party furnishing the logs, does not create the relation of master and servant.

Occupancy of premises.

Cited in note in 4 L.R.A.(N.S.) 703, on occupation of premises by way of service or tenancy.

Liability of lessor for nuisance.

Cited in note in 92 A. S. R. 528, on lessor's liability to strangers where nuisance exists at time of lease.

32 AM. REP. 710, NOYES v. STATE, 46 WIS. 250, 1 N. W. 1.

Validity of a judgment for costs against the state.

Cited in *State v. Williams*, 101 Md. 529, 109 A. S. R. 579, 1 L.R.A.(N.S.) 254, 61 Atl. 297, 4 A. & E. Ann. Cas. 970, holding costs cannot properly be awarded against the state in civil actions, in the absence of express statutory authority; *Sandberg v. State*, 113 Wis. 578, 89 N. W. 504, holding the rule that general statutes are not to be construed, to include, to its hurt, the sovereign, resolves the question whether general costs in a civil action might apply to the state; *Boykin v. People*, 23 Colo. 183, 46 Pac. 635, holding that in absence of

statute, costs incurred by successful defendant in criminal case cannot be taxed against county or state.

Cited in note in 42 L.R.A. 41, 42, on valid demands against state for costs.

Distinguished in *State v. Smith*, 52 Wis. 134, 8 N. W. 870, holding a judgment against the state including costs is not erroneous where the action is civil.

—Against a county.

Cited in *Larimer County v. Lee*, 3 Colo. App. 177, 32 Pac. 841, holding the court without power to bind the county to the payment of extra fees of a witness called to testify in a criminal action; *Eisen v. Multnomah County*, 31 Or. 134, 49 Pac. 730, holding a county is not liable for costs and disbursements of one tried and acquitted on a criminal charge.

Valid claims against estate.

Cited in notes in 42 L.R.A. 36, 37, on what claims constitute valid demands against a state; 42 L.R.A. 39, on claims against state where condition precedent is not complied with; 42 L.R.A. 69, 70, on claims for refunding money paid to state as valid demands against it.

Right to recover money voluntarily paid.

Cited in *Harrison v. Milwaukee*, 49 Wis. 247, 5 N. W. 326, holding where party with full knowledge of all the facts, voluntarily pays an unjust claim made upon him, and attempted to be enforced by legal proceedings he cannot recover back the money in absence of fraud of other party; *Monroe Waterworks Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685, holding a counterclaim set up in answer to reclaim such part of sum paid for water service as it believes it was worth less than stipulated price should not be allowed.

Cited in reference note in 86 A. S. R. 296, on recovery back of money voluntarily paid as tax or license under unconstitutional ordinance.

Cited in notes in 45 A. D. 166, 167, on right to recover money paid for license fee required by void statute or municipal ordinance; 94 A. S. R. 437, on recovery back of license taxes and fees; 22 L.R.A. (N.S.) 865, on right to recover license fee exacted under color of authority.

Power of court to assess costs separately from judgment.

Cited in *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210, 42 N. W. 232, holding where plaintiff in an action to foreclose a tax certificate accepts the money paid to redeem the land a judgment for costs is void as court is without jurisdiction.

Application of res adjudicata to an action under amended complaint.

Cited in *Smith v. Chicago & N. W. R. Co.* 49 Wis. 443, 5 N. W. 240, holding where action for statutory penalties is dismissed by reason of repeal of the statute and an amended complaint asks for an illegal excess charged, the question whether the action will lie is not res adjudicata.

32 AM. REP. 715, HAZELTINE v. CASE, 46 WIS. 391, 1 N. W. 66.

Right of upper riparian owner to use of stream.

Cited in *People v. Hulbert*, 131 Mich. 156, 100 A. S. R. 588, 64 L.R.A. 265, 91 N. W. 211, holding the lower proprietor has no superior right to the upper one, and may not say to him he shall not use the water for any other purpose because he is using it for drinking purposes; *Grand Rapids v. Powers*, 89 Mich. 94, 28 A. S. R. 276, 14 L.R.A. 498, 50 N. W. 661, holding a riparian proprietor has the right to use his land under the water the same as above water unless it injures some other riparian owner; *Janesville v. Carpenter*, 77

Wis. 288, 20 A. S. R. 123, 8 L.R.A. 808, 46 N. W. 128, holding the owner of the fee has the right to use and enjoy it to the center of the river in any manner not injurious to others and subject to the public right of navigation; Welsh v. Rutland, 56 Vt. 228, 48 A. R. 762, holding municipal corporations in the exercise of private franchises, powers and privileges are liable for the negligent exercise of them, as where the natural courses are obstructed or the waters polluted; McEvoy v. Taylor, 56 Wash. 357, 26 L.R.A.(N.S.) 222, 105 Pac. 851, holding that owner of land upon which springs exist forming pond cannot be enjoined by lower proprietor from use of same for geese and cattle.

Cited in reference notes in 3 A. S. R. 797, on rights of riparian owners to use of water in stream; 3 A. S. R. 797, on what constitutes reasonable use by riparian proprietor; 28 A. S. R. 249, on liability of riparian owner for pollution of streams.

Cited in notes in 79 A. D. 640, on riparian owner's right to reasonable use of water; 79 A. D. 645, on reasonable use or detention of water by riparian owner as question for jury; 84 A. S. R. 910, as to whether municipal corporations have any greater right than individuals to pollute waters; 41 L.R.A. 739, on reasonableness of use of water in stream as between upper and lower proprietors; 26 L.R.A.(N.S.) 223, on pollution of water course by stock; 10 E. R. C. 243, on right of riparian owner to purity of stream.

Reasonable use of one's own land.

Cited in *Ohio Oil Co. v. Westfall*, 43 Ind. App. 661, 88 N. E. 354, holding that whether use of land in operating oil well and discharging salt water and oil on another's land was reasonable is question for jury.

32 AM. REP. 716, MAMLOCK v. FAIRBANKS, 46 WIS. 415, 1 N. W. 167.

Actionable fraud.

Cited in reference note in 42 A. S. R. 448, on when misrepresentations are not actionable.

Cited in notes in 11 A. S. R. 350, on false representations which will not avoid or vitiate contract; 35 L.R.A. 434, on fraud in expressions of opinion as defense to contract; 12 E. R. C. 295, 296, on what constitutes fraud; 40 L. ed. U. S. 544, on fraud and false representations and their effect.

— As to matters in respect to which other party is ignorant of truth.

Cited in *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179, holding one cannot close her eyes to the facts which are before her, or to the information which is at hand; *Daly v. Brennan*, 87 Wis. 36, 57 N. W. 963, holding even equity will not relieve under such circumstances; *Van Beck v. Milbrath*, 118 Wis. 42, 94 N. W. 657, holding such will be the case where one failed to read a note and mortgage or request that it be read to him; *Kaiser v. Nummerdor*, 120 Wis. 234, 97 N. W. 932, holding courts will deny relief in such case, if knowing it, he could not have been deceived by defendant's misrepresentations; *Farr v. Peterson*, 91 Wis. 182, 64 N. W. 863; *Kruse v. Koelzer*, 124 Wis. 536, 102 N. W. 1072,—holding men cannot close their eyes to the means of knowledge equally accessible to themselves and those with whom they deal; *Bostwick v. Mutual L. Ins. Co.* 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, holding reasonable opportunity for obtaining knowledge is equivalent to knowledge; *Rauh v. Waterman*, 29 Ind. App. 344, 63 N. E. 42 (dissenting opinion) on effect of lack of diligence in ascertaining falsity of statement.

Effect of fraudulent representations by vendor on sale.

Cited in *Ward v. Borkenhagen*, 50 Wis. 459, 7 N. W. 340, holding defendants responsible for loss to injured party where they made false representations as to the soundness of a horse, the defects being such as not apparent to ordinary prudent person.

Cited in reference note in 10 A. S. R. 45, as to when sale will be set aside for erroneous statements of vendor.

—As to things visible or chargeable to notice of vendee.

Cited in *Daly v. Bernstein*, 6 N. M. 380, 28 Pac. 764, holding if the truth can be ascertained by the purchaser by use of ordinary diligence and he fails to avail himself of the results of such diligence, the false representations are not actionable; *Conner v. Welch*, 51 Wis. 431, 8 N. W. 260, holding equity will not relieve from the effects of one's gross negligence in not informing himself of a docketed judgment against land purchased; *Metcalf v. Mutual F. Ins. Co.* 132 Wis. 67 112 N. W. 22, holding where president of defendant company had information that some other person was interested in the property he was not justified in relying on the representations that no one else was interested; *Prince v. Overholser*, 75 Wis. 646, 44 N. W. 775, holding when the value of the thing sold was open to investigation of both parties, no disparity, however great, is to be received as evidence of fraud, in an action at law; *Grant Marble Co. v. Abbott*, 142 Wis. 279, 124 N. W. 264, holding that one cannot rescind contract for mistake due to his own want of ordinary care.

Cited in note in 37 L.R.A. 600, on right to rely on representations made to effect contract as basis for charge where defrauded person had means of knowing the truth.

Distinguished in *Gunther v. Ullrich*, 82 Wis. 222, 33 A. S. R. 32, 52 N. W. 88, holding where vendor makes a false representation as to the location of lots sold it is no defense that the vendee might have informed himself as to the location.

Notice from facts calling for inquiry.

Cited in *McKindly v. Dunham*, 55 Wis. 515, 42 A. R. 740, 13 N. W. 485, holding the words "agents not authorized to collect" when stamped on a bill sent to a purchaser is notice, and are presumed to have been noticed.

Presumption of waiver from conduct.

Cited in *Pabst Brewing Co. v. Milwaukee*, 126 Wis. 110, 105 N. W. 563, holding one is presumed to waive that which his conduct necessarily implies.

32 AM. REP. 719, KNEELAND v. VAN VALKENBURGH, 46 WIS. 424, 1 N. W. 63.**Extent of ownership of lots bounded by a public street.**

Cited in *Olin v. Denver & R. G. R. Co.* 25 Colo. 177, 53 Pac. 454, holding where the grantor conveys a parcel of land bounded by a street, the grantee takes to the center of the street unless restricted to the line of the street; *Sweatman v. Bathrick*, 17 S. D. 138, 95 N. W. 422, holding a conveyance by metes and bounds passes title to the center of street or highway.

Cited in reference notes in 85 A. S. R. 698; 93 A. S. R. 146; 30 A. S. R. 853,—on highways or streets as boundaries; 39 A. R. 307, on effect of description with road as one boundary as conveyance of title in roadbed.

Cited in note in 80 A. D. 794, on proprietors of land bounded by public street owning to center of street.

Distinguished in *Plumer v. Johnson*, 63 Mich. 165, 29 N. W. 687, holding the doctrine that a lot owner takes to the center of the street applies to actual streets only and not to mere paper ones.

—Of land bordering upon a stream.

Cited in *Gratz v. Land & River Improv. Co.* 40 L.R.A. 303, 27 C. C. A. 305, 53 U. S. App. 499, 82 Fed. 381, holding a deed by a cotenant of a tract bordering upon a river, conveys his interest in the bed of the stream; *Norcross v. Griffiths*, 65 Wis. 599, 56 A. R. 642, 27 N. W. 606, holding the owner of the bank and shore of a navigable stream in this state is presumed to be the owner of the bed of the stream to the center thereof in front of his land.

Cited in notes in 49 A. R. 312, as to whether deed of land described as bounding on a stream extends to center of stream; 27 A. S. R. 62, on lines running along shore as boundary.

—Rights as against users of street surface.

Cited in *Reidinger v. Marquette & W. R. Co.* 62 Mich. 29, 28 N. W. 775, holding a lot owner has a right to the aid of equity to restrain a company seeking to occupy the land bounding his lot and the center of the street; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.* 95 Wis. 561, 60 A. S. R. 136, 37 L.R.A. 856, 70 N. W. 678, holding proprietors of lots bounded by a street take to the center and an electric railway occupying such portion of street must compensate such lot owners.

32 AM. REP. 722, WILLIAMS v. WILLIAMS, 46 Wis. 464, 1 N. W. 98,
Later appeal in 63 Wis. 58, 53 A. R. 253, 23 N. W. 110.

Presumption as to marriage from cohabitation and repute.

Cited in *Klipfel v. Klipfel*, 41 Colo. 40, 124 A. S. R. 96, 92 Pac. 26, holding marriage by cohabitation and repute, must be established by convincing and positive evidence.

Cited in notes in 14 L.R.A. 364, on cohabitation as proof of marriage where it begins unlawfully; 7 L.R.A. 801, on sufficiency of proof of marriage.

—Where relations were illicit in their inception.

Cited in *Spencer v. Pollock*, 83 Wis. 215, 17 L.R.A. 848, 53 N. W. 490, holding where the relations are illicit in their inception they continue such unless actually transformed into matrimony; *Re Terry*, 58 Minn. 268, 59 N. W. 1013, holding proof of a common-law marriage insufficient where connection at first was illicit, and there never was any marriage ceremony; *Henry v. Taylor*, 16 S. D. 424, 93 N. W. 641; *White v. White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36,—holding the presumption is that such relation continues, unless the contrary be proven; *State v. Hancock*, 28 Nev. 300, 82 Pac. 95, 6 A. & E. Ann. Cas. 1020; *Lanham v. Lanham*, 136 Wis. 369, 128 A. S. R. 1085, 17 L.R.A. (N.S.) 804, 117 N. W. 787,—holding that no common law marriage is presumed where cohabitation was originally illicit.

Cited in notes in 57 A. R. 457, 461, on presumption from intercourse illicit at inception; 124 A. S. R. 116, on presumption of continuance of illicit nature of cohabitation illicit in inception.

Marriage as contract.

Cited in *Thompson v. Nims*, 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502, holding marriage is a civil contract.

Admissibility of evidence of common law marriage in action for divorce.

Cited in *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284, holding evidence tending to show a marriage valid by common law or by statute is admissible under a petition in divorce merely alleging parties were married.

What constitutes valid marriage.

Cited in note in 17 E. R. C. 171, on what constitutes valid marriage.

32 AM. REP. 731, KIEWERT v. RINDSKOPF, 46 WIS. 481, 1 N. W. 163.**Illegality as a defense to action for recovery of money paid on contract.**

Cited in *Urwan v. Northwestern Nat. L. Ins. Co.* 125 Wis. 340, 103 N. W. 1102, holding where one merely seeks the disaffirmance of an illegal contract and to have parties placed as before the contract was attempted, the court will lend its aid; *Eastern Expanded Metal Co. v. Webb Granite & Constr. Co.* 195 Mass. 356, 81 N. E. 251, 11 A. & E. Ann. Cas. 631, holding so long as it is entirely unexecuted in that part which the law forbids, there is a locus penitentiae; *Cheuvront v. Horner*, 62 W. Va. 476, 59 S. E. 964, holding that doctrine of "in pari delicto" does not govern where suit is by one of such parties to recover moneys received by third party in respect to illegal contract.

Cited in notes in 37 A. R. 204, on validity of contract founded on consideration contra bonos mores; 28 L.R.A.(N.S.) 996, as to whether promise by third party to pay claim arising out of performance of contract is tainted by its illegality.

—Agreements collateral to illegal object.

Cited in *Heckman v. Swartz*, 50 Wis. 267, 6 N. W. 891, holding a third party who gives his note to assist one threatened with an unlawful arrest is not particeps criminis; *Hurd v. Doty*, 86 Wis. 1, 21 L.R.A. 746, 56 N. W. 371, holding where one not having an insurable interest in the life of another takes out the insurance under an agreement to divide he may recover the money according to agreement.

—Estoppel of agent to plead illegality against principal.

Cited in *Veteo v. Geist*, 155 Mo. 27, 55 S. W. 871, holding an agent who receives money for his principal, not collectible by the principal himself because usurious, cannot avoid payment to principal on such ground; *Ware v. Spinney*, 76 Kan. 289, 13 L.R.A.(N.S.) 267, 91 Pac. 787, 13 A. & E. Ann. Cas. 1181, holding the principal may recover from his agent money placed in the agents hands though it was intended to be used for an illegal purpose; *State v. Patterson*, 66 Kan. 447, 71 Pac. 860, holding an officer who has received public revenue though without legal authority cannot retain the same from the city; *Remington v. Ward*, 78 Wis. 539, 47 N. W. 659, holding an officer receiving money for the use of his town cannot retain it by reason of its being paid under an illegal appropriation.

Cited in note in 13 L.R.A.(N.S.) 267, on right of principal who has placed money in hands of agent for illegal purpose to compel its return.

Actions arising out of illegal transaction.

Cited in *Wells v. McGeoch*, 71 Wis. 196, 35 N. W. 769, holding where the action is to recover damages suffered by reason of another's fraud and the illegal transaction is only incidentally involved a recovery may be had.

32 AM. REP. 735, HINCKS v. MILWAUKEE, 46 WIS. 559, 1 N. W. 230.

Power of legislature over highways of city.

Cited in *Anderton v. Milwaukee*, 82 Wis. 279, 15 L.R.A. 830, 52 N. W. 95, holding the legislature has no power to authorize change of grade as to certain blocks of the city and assess costs against lot owners against chartered rights and at same time leave other chartered rights unimpaired.

—Exemptions or regulations as to liability of city for safety of streets.

Cited in *Naumburg v. Milwaukee*, 77 C. C. A. 67, 146 Fed. 641 (dissenting opinion), on constitutionality of a charter exemption, violative of duty as to highways; *Daniels v. Racine*, 98 Wis. 649, 74 N. W. 553, holding fact that the legislature gives double the time for claim in case of counties and towns that it does in case of cities and villages within which notice of injuries may be given is no objection.

Distinguished in *Wilmington v. Ewing*, 2 Penn. (Del.) 66, 45 L.R.A. 79, 43 Atl. 305, holding there is no principle of constitutional law which prohibits the legislature from granting to a city special immunities not enjoyed by all other cities.

Disapproved in *MacLain v. Marquette*, 148 Mich. 480, 111 N. W. 1079, holding charter exemptions of city from liability for damages occasioned by obstructions on its sidewalk, is not invalid as class legislation.

Validity of requirement that notice of injury be given.

Cited in *Susenguth v. Rantoul*, 48 Wis. 334, 4 N. W. 328, holding a count fatally defective for want of an averment that notice in writing was given by the injured party within sixty days of the occurrence of the injury; *Webster v. Beaver Dam*, 84 Fed. 280, holding where injured party was by the accident rendered incapable of serving notice within the fifteen days her action against the city will not fail where notice was served as soon as reasonably possible; *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407, on validity of a requirement that notice of injury be given within five days.

Unequal privileges and immunities.

Cited in *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561, holding legislative requirements for privilege of practising medicine within the state are not in violation of the fourteenth amendment.

Primary liability of a city for injuries resulting from defective streets.

Cited in *Raymond v. Sheboygan*, 70 Wis. 318, 35 N. W. 540, holding where injured party by the use of the remedies furnished by law may recover his damages from the one primarily liable he must do so before resorting to his remedy against the city; *Kullock v. Madison*, 84 Wis. 458, 54 N. W. 725, holding a contractor for street work primarily liable for injuries resulting from his negligence, whether an independent contractor or not.

Cited in note in 16 L.R.A. 554, on right of one injured on highway to proceed in first instance against one ultimately liable.

Distinguished in *Papworth v. Milwaukee*, 64 Wis. 389, 25 N. W. 431, holding where injuries result from the negligence of both the city in keeping sidewalk in repairs and of lot owner in negligently maintaining a trap in the walk, either may be sued in the first instance; *McFarlane v. Milwaukee*, 51 Wis. 691, 8 N. W. 728, holding where complaint shows injuries were caused by negligence of one holding no contract relation with the city, reason—
Am. Rep. Vol. XVII—36.

able diligence must be exercised in pursuing the one whose negligence caused the injury.

—Defects made under license from city.

Cited in *Russell v. Columbia*, 74 Mo. 480, 41 A. R. 325, holding where city gave permission to a gas company to lay its mains it is liable for injuries resulting from leaving a ditch without guards, to the same extent as though its own servants had opened the ditch.

—Effect of charter provisions.

Cited in *Amos v. Fond du Lac*, 46 Wis. 695, 1 N. W. 346, holding the provision in charter involved, exempting the city from liability for negligence where party had no contract relation with the city, does not apply where a lot-owner's failure to repair sidewalk causes injury; *Hay v. Baraboo*, 127 Wis. 1, 115 A. S. R. 977, 3 L.R.A.(N.S.) 84, 105 N. W. 654, holding under our system of statutory liability of municipalities for safe condition of streets and sidewalks, charter provisions are only examined to see wherein the general law in a given case has been modified or repealed.

Distinguished in *Hall v. Chippewa Falls*, 47 Wis. 267, 2 N. W. 279, holding persons contracting with the city to put in improvements to be done at the expense of adjoining lots, are chargeable with knowledge of the city's exemption from liability to pay for same under its charter.

Municipal liability for acts of independent contractor.

Cited in notes in 66 L.R.A. 128, on duty of municipality to keep highway in safe condition during work by independent contractor; 66 L.R.A. 131, on liability of municipality for acts of independent contractor employed on municipal duties resulting from municipality's nonperformance of absolute duties.

Application of highway statute to cities.

Cited in *Huston v. Ft. Atkinson*, 56 Wis. 350, 14 N. W. 444, holding the statutory provision reserving to the owner the trees standing on highway being opened except such as needed for repairs, does not apply to cities, and the streets thereof.

32 AM. REP. 739, SNYDER v. VANDOREN, 46 WIS. 602, 1 N. W. 285.

Authority to fill up blank space in negotiable instrument.

Cited in *Smith v. Willing*, 123 Wis. 377, 68 L.R.A. 940, 101 N. W. 692, holding a negotiable instrument containing a blank space for any of the material elements thereof implies authority to fill up such blank in the hands of anyone to whom it may come; *Johnson v. Weed & G. Mfg. Co.* 103 Wis. 291, 79 N. W. 236, holding as between the party so intrusting a note and innocent third parties, the holder is deemed the agent of the maker who is bound by his act; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 46 A. R. 39, 15 N. W. 177, holding third parties dealing with the one in whose possession the note is placed are not bound by any private instructions as to amount to be inserted.

Cited in reference notes in 71 A. D. 370, on filling blanks in negotiable instruments and avoiding them by material additions; 44 A. R. 191, on effect of principal obtaining signature of a surety to a note before delivery on liability of precedent surety.

Cited in note in 35 L.R.A. 468, on filling blanks in note as affecting bona fide holders.

Distinguished in *Ludlow v. Berry*, 62 Wis. 78, 22 N. W. 140, holding where it is alleged the signature is forged the party claiming the note valid has the burden of proving the signature.

Effect of denying the execution of a note.

Cited in *Nielson v. Schuckman*, 53 Wis. 638, 11 N. W. 44, holding denying the execution of a note does not under the code put in issue the signature to it.

32 AM. REP. 749, READY v. HUEBNER, 46 WIS. 692, 1 N. W. 344.

Usury as personal defense.

Cited in *Hamilton v. Prouty*, 50 Wis. 592, 36 A. R. 866, 7 N. W. 659, holding a defense of usury is personal to the borrower; *Hill v. Alliance Bldg. Co.* 6 S. D. 160, 55 A. S. R. 819, 60 N. W. 752; *Cahn v. Farmers' & T. Bank*, 1 S. D. 237, 46 N. W. 185,—holding only the party to a usurious loan, his heirs, devisees, or personal representatives can avoid it; *Lee v. Feamster*, 21 W. Va. 108, 45 A. R. 549, holding a stranger cannot avail himself of it; *Barney v. Tontine Surety Co.* 131 Mich. 192, 91 N. W. 140, holding it can not be set up by an assignee of a company under an usurious contract.

Cited in notes in 55 A. D. 399; 20 A. S. R. 393; 10 L.R.A. 459;—on usury as defense; 28 A. R. 491, on right of persons other than borrower to set up usury as defense.

Usurious mortgage as binding on grantee subject thereto.

Cited in *Irwin v. Washington Loan Asso.* 42 Or. 105, 71 Pac. 142, holding one buying land upon which there is an usurious mortgage, cannot set up usury in the original transaction as a defense against the mortgage.

Validity of consideration.

Cited in reference note in 39 A. R. 150, on payment of accrued usurious interest as consideration for extension of time.

32 AM. REP. 751, REDMAN v. HARTFORD F. INS. CO. 47 WIS. 89, 1 N. W. 393.

Stipulations in an insurance policy amounting to warranties.

Cited in *Dunbar v. Phenix Ins. Co.* 72 Wis. 492, 40 N. W. 386, holding where answer to the question as to incumbrances was inserted by the agent of the company, it can not be charged as the fault of the insured; *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.* 56 Wash. 681, 28 L.R.A.(N.S.) 593, 106 Pac. 194, holding "sprinkler" clause warranty where rate was fifty per cent less than upon same risk without sprinkler system.

Cited in note in 11 L.R.A.(N.S.) 983, as to when statements may be regarded as representations although expressly denominated in policy as warranties.

—Ignorant or immaterial misrepresentations made according to best "knowledge and belief."

Cited in *Mutual L. Ins. Co. v. Selby*, 19 C. C. A. 331, 44 U. S. App. 282, 72 Fed. 980, holding where applicant stated he was on the pension roll for general disability as he remembered the facts, it must be shown he remembered or knew more that he stated to make the warranty effective; *Waterbury v. Dakota F. & M. Ins. Co.* 6 Dak. 468, 43 N. W. 697, holding where the warranty is qualified by words "so far as known to the applicant or material to the risk" burden is on the company to show knowledge, and materiality of the facts; *O'Connell v. Supreme Conclave K. D.* 102 Ga. 143, 66 A. S. R. 159, 28 S. E. 282, holding where facts stated as "true to the best

of applicant's knowledge and belief" are merely shown to be false without showing they were known to be so such falsity is no defense; *Manufacturers & M. Mut. Ins. Co. v. Zeitinger*, 68 Ill. App. 268, holding it must be shown the representation was a material one to the risk to avail as a defense to an action on the policy.

Distinguished in *McGowan v. Supreme Court I. O. F.* 107 Wis. 462, 83 N. W. 775, holding false statements in answer to questions concerning the health, death and age at death of applicant's relatives were warranties which avoided the policy.

Conditions in insurance.

Cited in *Harriman v. Queen Ins. Co.* 49 Wis. 71, 5 N. W. 12, holding the furnishing of proofs of loss as required by the terms of the policy is a condition precedent to the right to maintain the action.

Waiver by conduct inconsistent with stipulation in policy.

Cited in *Frels v. Little Black Farmers' Mut. Ins. Co.* 120 Wis. 590, 98 N. W. 522, holding a stipulation as to time within which suit or action on an insurance claim shall be commenced is waived by company's conduct in leading insured to believe claim would be paid.

Construction of contracts.

Cited in *Walsh v. Myers*, 92 Wis. 397, 66 N. W. 250; *McCall Co. v. Icka*, 107 Wis. 232, 83 N. W. 300,—holding courts are to construe contracts so as to sustain rather than defeat them, if that can reasonably be done.

32 AM. REP. 757, DAYTON v. WALSH, 47 WIS. 113, 2 N. W. 65.

Right of husband's creditors in wife's property produced by husband's labor.

Cited in *Mayers v. Kaiser*, 85 Wis. 382, 39 A. S. R. 849, 21 L.R.A. 623, 55 N. W. 688; *Kendall v. Blaudry*, 107 Wis. 180, 83 N. W. 314,—holding where the enterprise is in fact that of the wife, the husband may give or hire to her his skill and services, and the fruits of the enterprise will still be hers; *Arndt v. Harshaw*, 53 Wis. 269, 10 N. W. 390, holding fact that husband worked on the farm or in the business of butchering for the wife is not a badge or evidence of fraud; *Hossfeldt v. Dill*, 28 Minn. 469, 10 N. W. 781, holding same though the husband employ some of his own farming implements and animals in the work, and acting as her agent; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, holding labor for the owner, though mingled in the product, creates no title to the product, and this as well where labor is performed by the husband as by another.

Cited in reference note in 99 A. D. 177, on effect of employment of husband by wife to work her farm and act as her agent on rights of his creditors.

Cited in notes in 77 A. S. R. 99, on right of husband's creditors to charge wife's separate estate with increase in value due to husband's labor; 21 L.R.A. 630, on rights of creditor in profits on farm caused by debtor's labor.

Dealings between husband and wife.

Cited in note in 58 A. S. R. 497, on agreements between husband and wife to compensate each other's services, or to relinquish claims on each other's earnings or profits.

Distinguished in *Fuller & F. Co. v. McHenry*, 83 Wis. 573, 18 L.R.A. 512, 53 N. W. 896, holding under the statutes husband and wife cannot become partners in business.

Validity of a deed directly from husband to wife.

Cited in *Mehlhop v. Pettibone*, 54 Wis. 652, 11 N. W. 553, holding a deed based upon an adequate consideration, directly from the husband to the wife, is good in equity.

Cited in reference note in 99 A. D. 152, on when voluntary conveyance from husband to wife will be upheld.

Power of married woman, without separate property to bind herself.

Cited in *Cramer v. Hanaford*, 53 Wis. 85, 10 N. W. 15; *Citizens' Loan & T. Co. v. Witte*, 116 Wis. 60, 92 N. W. 443,—holding a married woman without any separate estate may acquire land by purchase from a stranger entirely on credit, and bind herself for its payment; *Kriz v. Peege*, 119 Wis. 105, 95 N. W. 108, holding under the statutes a married woman may acquire property of any kind, and pledge her credit therefor, without regard to possession of separate property and such right is not dependent on the use intended; *Petesich v. Hambach*, 48 Wis. 443, 4 N. W. 565 (dissenting opinion), on liability of a married woman, without separate property; *T. T. Haydock Carriage Co. v. Pier*, 74 Wis. 582, 43 N. W. 502, holding she has the power to engage in trade and business and bind herself in respect to the same.

Distinguished in *Gallagher v. Mjelde*, 98 Wis. 509, 74 N. W. 340, holding she may not, where she has no separate property and is not engaged in any business, bind herself by contract to repay money loaned to her to enable her husband or herself and husband, to go into business.

— Where she possesses separate property.

Cited in *Brunette v. Norber*, 130 Wis. 632, 110 N. W. 785, holding a married woman may acquire title to realty by tax deed in her name and for her benefit paying for the same out of her separate property; *Krouskop v. Shontz*, 51 Wis. 204, 37 A. R. 817, 8 N. W. 241, holding where a married woman owns a farm and she and her husband use same and they purchase goods for the use of themselves and family upon the credit of such separate estate, she and her husband both become liable; *Houghton v. Milburn*, 54 Wis. 554, 12 N. W. 23, holding a married woman bound jointly with her husband on their covenant to support her mother where the \$1,000 given in consideration of such support became one-half the separate property of the wife.

Title of married woman against mere trespasser.

Cited in *Cummings v. Friedman*, 65 Wis. 183, 56 A. R. 628, 26 N. W. 575, holding a married woman in actual possession of her personal property may recover against a mere trespasser, without proving title.

Right of an insolvent to accumulate property ostensibly as agent of another.

Cited in *Ansorage v. Barth*, 88 Wis. 553, 43 A. S. R. 928, 60 N. W. 1055, holding an insolvent debtor cannot accumulate property under the cover of another's name, acting ostensibly as the agent of such other, and hold it against his creditors.

Power to reach debt due husband and wife by action against one only.

Cited in *Badger Lumber Co. v. Stern*, 123 Wis. 618, 101 N. W. 1093, 3 A. & E. Ann. Cas. 802, holding the rule that a debt due jointly to the principal defendant and another cannot be reached by garnishment in an action against such defendant alone, applied to an indebtedness owing by the garnishee to husband and wife.

Married women as partners.

Cited in reference note in 34 A. S. R. 340, on power of married women to be partners.

32 AM. REP. 762, INGRAM v. RANKIN, 47 WIS. 406, 2 N. W. 753.**Measure of damage for breach of contract.**

Cited in *Kellogg v. Malick*, 125 Wis. 239, 103 N. W. 1116, 4 A. & E. Ann. Cas. 893, holding the measure of damage for breach of contract is such damage as may fairly and reasonably be considered as rising naturally from such breach; *Cockburn v. Ashland Lumber Co.* 54 Wis. 619, 12 N. W. 49, holding where breach of contract to sell and deliver goods is shown the measure of damage is the difference between contract price and the market price at time and place of delivery specified; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532, holding that measure of damages for breach of contract to convey land consideration for which was settlement of differences between parties is value of land at time and interest; *J. I. Case Plow Works v. Niles & S. Co.* 107 Wis. 9, 82 S. W. 568, holding where plaintiff is entitled to recover damages for breach of warranty, interest is payable from the time of the breach not as interest, but as compensation for the delay; *Holt Ice & Cold Storage Co. v. Arthur Jordan Co.* 25 Ind. App. 314, 57 N. E. 575, holding the value should be fixed at the time when by appellant's fault the loss culminates; *McCann v. Ullman*, 109 Wis. 574, 85 N. W. 493, holding it is such damages as result as the natural and probable consequences of the act complained of.

— For conversion.

Cited in *Summers v. Heard*, 66 Ark. 550, 51 S. W. 1057, holding recovery limited to the value of the goods converted, with interest from the time of conversion; *Parroski v. Goldberg*, 80 Wis. 339, 50 N. W. 191, holding where defendant still has the property, it is its value at the time of trial, in the form in which it was converted; *Findlay v. Knickerbocker Ice Co.* 104 Wis. 375, 80 N. W. 436, holding in case of conversion the measure of damage is the value of the property at the time of the taking; *Haseltine v. Mosher*, 51 Wis. 443, 8 N. W. 273; *Smith v. Morgan*, 73 Wis. 375, 41 N. W. 532,—holding under the statutes the damages for wrongful cutting of timber, is the highest market value of such timber while in the possession of the defendant, without interest on such value; *Wright v. Bolles*, 50 Wis. 167, 6 N. W. 508, holding where defendant is an innocent purchaser of logs wrongfully cut the statutory measure has no application.

Cited in notes in 24 A. D. 71, on value at time of conversion and interest as measure of damages where value is enhanced by wrongdoer; 24 A. D. 77, on right to recover enhanced value in case of willful wrong; 6 A. S. R. 365, on duty of party whose property has been converted or destroyed to repurchase other property to mitigate or fix measure of damage.

— Where crops are destroyed wrongfully.

Cited in *Gulf C. & S. F. R. Co. v. Holliday*, 65 Tex. 512, holding where crops are destroyed by wrongful construction of railway, interest upon the value of the crops from time of their destruction should be considered as part of damages, *Beede v. Lamprey*, 64 N. H. 510, 10 A. S. R. 426, 15 Atl. 133, holding that measure of damages for trees carelessly cut on another's land is value immediately after severance.

Return or acceptance of property converted as bar to action.

Cited in *Cernahan v. Chrisler*, 107 Wis. 645, 83 N. W. 778, holding where special damages have been sustained, the return and acceptance of the property converted, pending the suit, is not a bar to the action.

Interest on unliquidated damages.

Cited in note in 28 L.R.A.(N.S.) 36, 75, on interest on unliquidated damages.

33 AM. REP. 773, KLAUBER v. BIGGERSTAFF, 47 WIS. 551, 3 N. W. 357.**Negotiability of a certificate of deposit.**

Cited in *Mareness v. First Nat. Bank*, 112 Iowa, 11, 84 A. S. R. 318, 51 L.R.A. 410, 83 N. W. 711; *Cassidy v. First Nat. Bank*, 30 Minn. 96, 14 N. W. 363; *State v. Hill*, 47 Neb. 456, 66 N. W. 541; *Williams v. Williams*, 55 Wis. 300, 42 A. R. 708, 12 N. W. 465; *Curran v. Witter*, 68 Wis. 16, 60 A. R. 827, 31 N. W. 706,—holding a certificate of deposit in substance and legal effect a negotiable promissory note.

Cited in reference note in 42 A. S. R. 692, on negotiability of certificates of deposit.

Cited in note in 75 A. S. R. 52, on certificates of deposit as promissory notes and their negotiability.

Effect of the words "current funds" on negotiability.

Cited in *Hatch v. First Nat. Bank*, 94 Me. 348, 80 A. S. R. 401, 47 Atl. 908, holding the words "current funds" in a certificate of deposit do not impair its negotiability.

Cited in reference note in 34 A. S. R. 826, on what notes are negotiable.

Cited in note in 125 L. ed. U. S. 198, on effect of provision for payment in currency or current funds on negotiability of instruments.

— Of the words "or its assigns."

Cited in *Porter v. Janesville*, 3 Fed. 617, holding the words "or its assigns" in municipal bonds render them negotiable.

What included by the term money.

Cited in *State v. Boomer*, 103 Iowa, 106, 72 N. W. 424; *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953, holding money includes "what ever is lawfully and actually current in buying and selling, of value and as the equivalent of coin;" *State v. Finnegan*, 127 Iowa, 286, 103 N. W. 155, 4 A. & E. Ann. Cas. 628, holding "money" a generic term and as commonly understood, is anything that circulates as the ordinary medium of exchange in buying and selling.

Cited in note in 8 L.R.A. 746, on meaning of "money."

32 AM. REP. 781, MELLEN v. GOLDSMITH, 47 WIS. 573, 3 N. W. 592.**Validity of composition or compromise between debtor and his creditors.**

Cited in *Gillfillan v. Farrington*, 12 Ill. App. 101, holding an agreement by creditors to take less than the amount due displaces the original contract and may be shown under the general issue; *Lange v. Perley*, 47 Mich. 352, 11 N. W. 193, holding where defendant assigned all his property in accordance with an agreement between himself and sureties that he should be exonerated from liability, this is a good defense by way an executed compromise.

Cited in note in 1 E. R. C. 392, on validity of composition agreement.

— Parol composition.

Cited in *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 66 N. W. 606, holding a composition agreement between an insolvent debtor and his creditors is binding, even though it rests in parol.

32 AM. REP. 784, THOMPSON v. HERMANN, 47 WIS. 602, 3 N. W. 579.

Liability of shipowners where injuries result to seamen from acts of master or crew.

Cited in *Gabrielson v. Waydell*, 135 N. Y. 1, 31 A. S. R. 793, 17 L.R.A. 228, 31 N. E. 969 (dissenting opinion) on liability of ship owners where master assaults seaman.

Cited in reference note in 31 A. S. R. 807, on liability of shipowner for acts of officer within scope of authority.

Cited in notes in 31 A. S. R. 807, on shipowner's liability for wrongful discharge of seamen by master; 27 L.R.A. 183, on liability of owner of vessel for acts of master towards crew; 17 E. R. C. 240, on liability of master for injuries to servant.

Distinguished in *The City of Alexandria*, 17 Fed. 390, holding the ship owners are not liable for injuries resulting to a seaman through the negligence of any of his associates in the discharge of their ordinary duties; *Mathews v. Case*, 61 Wis. 491, 50 A. R. 151, 21 N. W. 513, holding owners of vessel not liable for injuries to the mate resulting from negligence of the master of the ship, the master and mate being employed in a common employment.

— Duty of seaman to obey orders involving danger and risk.

Cited in *Eldridge v. Atlas S. S. Co.* 134 N. Y. 191, 32 N. E. 66 (dissenting opinion) on question of negligence where seaman obeys master's orders; *Anderson v. New York & C. Mail S. S. Co.* 17 Misc. 93, 39 N. Y. Supp. 425, holding obedience to the master though the seaman knew the carrying out of the order exposed him to danger is not per se negligence.

Distinguished in *Heine v. Chicago & N. W. R. Co.* 58 Wis. 525, 17 N. W. 420, holding where an employee is injured by negligence of another employee, the principal is not liable, though the negligent employee had power to direct acts of one injured.

Effect of placing a servant under the control and direction of another.

Cited in *Gravelle v. Minneapolis & St. L. R. Co.* 3 McCrary, 359, 11 Fed. 569, holding where a railroad company invests a servant with such authority that another servant is placed under the control and direction of the servant they are not fellow servants.

Cited in note in 51 L.R.A. 591, on issuance of orders by superior servant as official act.

Duty of master to warn servant.

Cited in reference note in 50 A. R. 304, on duty of master to warn servant of dangers of new employment.

Cited in note in 39 L. ed. U. S. 465, on master's duty and liability as to warning servants.

Who are vice principals.

Cited in notes in 51 L.R.A. 582, on commanding officers of ships as vice-

principals; 51 L.R.A. 622, on vice-principalship with reference to relative rank of negligent servant.

What constitutes contributory negligence.

Cited in note in 55 A. D. 675, on act in discharge of legal duty to save life or the like as contributory negligence preventing recovery for injury.

32 AM. REP. 789, SANGER v. DUN, 47 WIS. 615, 3 N. W. 388.

Liability of mercantile agency for attorney's default.

Cited in note in 50 A. S. R. 116, on liability of collection agencies for default of their attorneys.

Effect of failure to know contents of written instrument.

Cited in *Kruse v. Koelzer*, 124 Wis. 536, 102 N. W. 1072, holding where a party accepts a written instrument in consummation of an agreement entered into, it is his duty to know its contents; *Cunningham v. Jones*, 108 Ky. 728, 57 S. W. 488, holding where parties execute an absolute bill of sale in the carrying out of a contract the plea that they did not understand the effect of such act is not available; *Chicago, St. P. M. & O. R. Co. v. Belliwith*, 28 C. C. A. 358, 55 U. S. App. 113, 83 Fed. 437; *Albrecht v. Milwaukee & S. R. Co.* 87 Wis. 106, 41 A. S. R. 30, 58 N. W. 72,—holding his inability to read English or understand the contents of the paper is no excuse; *Wagner v. National L. Ins. Co.* 33 C. C. A. 121, 61 U. S. App. 691, 90 Fed. 395, holding a beneficiary under an insurance policy cannot avoid a release signed by saying she did not read it; *Herbst v. Lowe*, 65 Wis. 316, 26 N. W. 751; *Deering v. Hoeft*, 111 Wis. 339, 87 N. W. 298, holding in the absence of fraud one cannot relieve himself by saying he did not read it, or did not know what it contained; *German Bank v. Muth*, 96 Wis. 342, 71 N. W. 361, holding a wife conclusively presumed to know the contents of a mortgage; *Loibl v. Breidenbach*, 78 Wis. 49, 47 N. W. 15, holding one liable in signing a libelous article though he did not inform himself as to its contents.

Cited in note in 32 A. S. R. 387, as to binding effect of party's signature to written instrument.

Distinguished in *Sheanon v. Pacific Mut. L. Ins. Co.* 83 Wis. 507, 53 N. W. 878, holding where a release is signed through the excusable mistake or negligence party is not bound but he must show absence of gross negligence; *Lusted v. Chicago & N. W. R. Co.* 71 Wis. 391, 36 N. W. 857, holding same as to a release signed by one while suffering from his injuries without knowledge of its contents.

Right to control written agreement by proof of verbal one.

Cited in *Jackowski v. Illinois Steel Co.* 103 Wis. 448, 79 N. W. 757, holding in absence of fraud or mistake, proof of antecedent or contemporaneous verbal agreements cannot be shown to control the written agreement; *Foulks v. Falls*, 91 Ind. 315, holding parol evidence admissible to show in what capacity one received a claim for collection, where action is brought for failure to collect, the receipt of the claim being in evidence.

Duties and liabilities of subagent.

Cited in note in 50 A. S. R. 121, on duties, rights, and liabilities of sub-agents.

32 AM. REP. 793, TOWNSEND v. SMITH, 47 WIS. 623, 3 N. W. 439.**Validity of service obtained by fraud.**

Cited in *Cavanaugh v. Smith*, 84 Ind. 380; *Van Horn v. Great Western Mfg. Co.* 37 Kan. 523, 15 Pac. 562; *Byler v. Jones*, 22 Mo. App. 623,—holding service where person is induced by fraudulent representations to come within the jurisdiction of the court is an abuse of process and will be set aside; *Re Robinson*, 29 Neb. 135, 26 A. S. R. 378, 8 L.R.A. 398, 45 N. W. 267, holding same where defendant is brought into the jurisdiction of the court, by force, fraud or deceit for purpose of obtaining service of summons on him; *Saveland v. Connors*, 121 Wis. 28, 98 N. W. 933, holding same as to a service by decoying party into the state by fraudulently holding out another and different purpose; *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 259, holding a service secured upon an insurance company by inducing the company to send a renewal receipt to a bank within the state thereby under state laws making the bank its agent was invalid; *Jaster v. Currie*, 69 Neb. 4, 94 N. W. 995, holding fact that defendant after taking of depositions, might by exercise of diligence have escaped the service does not entitle the plaintiff to retain any advantage gained by fraud; *Metzler v. Metzler*, 132 Wis. 601, 113 N. W. 49, holding void a service by publication where plaintiff by false and fraudulent affidavits declared the residence and post office address of defendant was unknown; *Re Taylor*, 29 R. I. 129, 69 Atl. 553, to point that service of process upon nonresident brought into district by false representations of plaintiff is void.

Cited in notes in 6 A. S. R. 180, on effect of decoying party within jurisdiction; 76 A. S. R. 540, on exemption of parties decoyed from service of process; 25 L.R.A. 733, on effect of fraud and deceit on privilege of nonresident witnesses from suit.

Distinguished in *Moletor v. Sinnen*, 76 Wis. 308, 20 A. S. R. 71, 7 L.R.A. 817, 44 N. W. 1099, holding in case one is brought into the state as a fugitive from justice and tried for the offense charged, he is not subject to arrest on a civil charge until he has had opportunity to return; *Wells v. Patton*, 50 Kan. 732, 33 Pac. 15, holding where a defendant, objecting to the jurisdiction of the court as fraudulently obtained, invokes a judgment upon the merits he waives his right to the defense of want of jurisdiction.

— Mode of objecting.

Cited in *Chubbuck v. Cleveland*, 37 Minn. 466, 5 A. S. R. 864, 35 N. W. 362, holding a party may plead in an answer that service of the process under which the jurisdiction was obtained was unlawful; *Copas v. Anglo-American Provision Co.* 73 Mich. 541, 41 N. W. 690, holding where the fraud affects the integrity of the process of the court it may be set up in a notice of defense under the general issue; *Campbell v. Hudson*, 106 Mich. 523, 64 N. W. 483, holding a plea in abatement in such case is to be treated as meritorious and rules applicable to other pleadings of that character apply.

Power of court to dismiss without costs.

Cited in *Schroeder v. Laubenheimer*, 50 Wis. 480, 7 N. W. 427, holding the power to dismiss without costs against a defendant in certain cases is inherent in the court to prevent the use of its process and powers for the purpose of fraud and oppression.

Acquiring jurisdiction of foreign corporations.

Cited in note in 53 A. S. R. 182, on acquiring jurisdiction of foreign corporation.

32 AM. REP. 796, COTTRILL v. CHICAGO, M. & ST. P. R. CO. 47 WIS. 634, 3 N. W. 376.

Contributory negligence in not leaving a position of danger.

Cited with special approval in *Central R. Co. v. Crosby*, 74 Ga. 737, 58 A. R. 463, holding where engineer had reason to believe, by remaining on his engine he might avert loss of life, then such act was not contributory negligence.

Cited in *Saylor v. Parsons*, 122 Iowa, 679, 101 A. S. R. 283, 64 L.R.A. 542, 98 N. W. 500, holding a person seeking to rescue another from imminent danger, thereby imperiling his life, is not necessarily guilty of contributory negligence; *Liming v. Illinois C. R. Co.* 81 Iowa, 346, 47 N. W. 66, holding he may recover for the consequent injuries where he acted with reasonable prudence; *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 A. S. R. 441, 42 L.R.A. 842, 42 Atl. 60, holding same where a servant interposed to avert a sudden and imminent danger, brought on by an incompetent fellow servant; *Warren v. Mendenhall*, 77 Minn. 145, 79 N. W. 661, holding a fireman on way to fight a fire, not contributorily negligent in passing in front of a street car as a question of law; *Harris v. Clinton Twp.* 64 Mich. 447, 8 A. S. R. 842, 31 N. W. 425, holding emergencies may some times be given in evidence, and will justify what otherwise would be considered a rash and indefensible act; *Moulton v. Aldrich*, 28 Kan. 300, holding it unjust to hold one negligent because the instinct of self-preservation did not suggest instantaneously the most effectual method of avoiding a running team; *Gulf, C. & S. F. R. Co. v. Duvall*, 12 Tex. Civ. App. 348, 35 S. W. 699, holding a servant not contributorily negligent in attempting to remove a pick from between the rails where danger to train was imminent and he acted upon the orders of the section foreman; *Connell v. Prescott*, 20 Ont. App. 49; *Da Rin v. Casualty Co.* 41 Mont. 175, 137 A. S. R. 709, 27 L.R.A. (N.S.) 1164, 108 Pac. 649,—holding that law will not impute negligence to one who, in attempt to save life, is injured, unless under circumstances constituting rashness.

Cited in reference note in 46 A. R. 173, on engineer's staying at his post in face of collision as negligence.

Cited in notes in 55 A. D. 676, on act in discharge of legal duty to save life or the like as contributory negligence preventing recovery for injury; 49 L. R.A. 717, on voluntarily incurring danger to save life of another person as contributory negligence.

—As question for jury.

Cited in *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 A. S. R. 553, 13 L.R.A. 190, 28 N. E. 172, holding the question whether one in attempting to save the life of another was chargeable with contributory negligence is rightfully left to the jury; *Atchison, T. & S. F. R. Co. v. Henry*, 57 Kan. 154, 45 Pac. 576, holding it should be left to the jury to determine whether under all the circumstances it was negligent for engineer to remain on engine.

Effect of a verdict inconsistent with findings of fact.

Cited in *Burns v. North Chicago Rolling Mill Co.* 60 Wis. 541, 19 N. W. 380, holding a verdict will be set aside where there appears a clear inconsistency in the findings tending to show a disposition on part of jury to distort the evidence; *Selleck v. Griswold*, 49 Wis. 39, 5 N. W. 213, holding a general verdict and findings of fact inconsistent therewith will not sustain a judgment.

Direction of nonsuit with plaintiff's consent.

Cited in note in 15 E. R. C. 74, on right of judge to direct nonsuit without plaintiff's consent.

Liability of master for injuries to servant.

Cited in notes in 17 E. R. C. 240, on liability of master for injuries to servant; 92 A. D. 220, on duty of employer to furnish safe premises and conditions in and under which to work.

NOTES

ON THE

AMERICAN REPORTS.

CASES IN 33 AM. REP.

33 AM. REP. 1, NICKERSON v. BRIDGEPORT HYDRAULIC CO. 46 CONN. 24.

Liability for negligence where contract relation exists.

Cited in reference note in 23 A. S. R. 224, on liability for negligence where contract relation exists.

Liability for negligence in absence of contractual relations.

Cited in *Montgomery v. Halse*, 148 Ala. 194, 40 So. 665, holding light company under contract with city to light streets, is not liable to individual for injuries sustained through its failure to have streets lighted; *Styles v. F. R. Long Co.* 67 N. J. L. 413, 51 Atl. 710, holding that contract made by public corporation for construction of public works, which contains stipulation intended for safety of public, will not support individual's action of tort against contractor based upon mere violation of contractual duty.

— **Liability to private individual, of water company under contract with city.**

Cited in *Boston Safe Deposit & T. Co. v. Salem Water Co.* 94 Fed. 238, holding that contract by city for fire protection does not entitle property owner to recover from water company for loss by fire due to insufficient pressure; *Metropolitan Trust Co. v. Topeka Water Co.* 132 Fed. 702, holding water company not liable to property owner for failure to fulfill contract with city to furnish sufficient water to extinguish fires and stipulated pressure; *Ukiah City v. Ukiah Water & Improv. Co.* 142 Cal. 173, 100 A. S. R. 107, 64 L.R.A. 231, 75 Pac. 773, holding water company which contracts with city to furnish water for general fire purposes is not liable to city for loss of city property due to neglect to furnish water; *German Alliance Ins. Co. v. Home Water Supply, Co.* — L.R.A.(N.S.) —, 99 C. C. A. 258, 174 Fed. 764; *Fowler v. Athens City Waterworks Co.* 83 Ga. 219, 20 A. S. R. 313, 9 S. E. 673; *Holloway v. Macon Gaslight & Water Co.* 132 Ga. 387, 64 S. E. 330; *Bush v. Artesian Hot & Cold Water Co.* 4 Idaho 618, 95 A. S. R. 161, 43 Pac. 69; *Peck v. Sterling Water Co.* 118 Ill. App. 533; *Anerum v. Camden Water, Light & Ice Co.*

82 S. E. 284, 21 L.R.A.(N.S.) 1029, 64 S. E. 151; *Fitch v. Seymour Water Co.* 139 Ind. 214, 47 A. S. R. 258, 37 N. E. 982,—holding that water company by its contract with city is not liable to property owner for loss by fire due to insufficient water pressure; *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 A. R. 185, 6 N. W. 126, holding water company which contracts with city to furnish water to extinguish fires, not liable to property owner for loss due to failure to furnish water; *Phoenix Ins. Co. v. Trenton Water Co.* 42 Mo. App. 118, holding water company under contract with city to furnish water to extinguish fires not liable to insurance company citizen of city compelled to pay loss due to failure to furnish adequate supply of water; *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 12, 30 A. S. R. 267, 15 L.R.A. 375, 28 Pac. 989; *Howsamon v. Trenton Water Co.* 119 Mo. 304, 41 A. S. R. 654, 23 L.R.A. 146, 24 S. W. 784,—holding water company which agrees with town to be liable for loss due to insufficient water supply, not liable on such agreement to citizen who pays special tax to company under that contract; *Lovejoy v. Bessemer Waterworks Co.* 146 Ala. 374, 6 L.R.A.(N.S.) 429, 41 So. 76, 9 A. & E. Ann. Cas. 1068; *Allen & C. Mfg. Co. v. Shreveport Waterworks Co.* 113 La. 1091, 104 A. S. R. 525, 68 L.R.A. 650, 37 So. 980, 2 A. & E. Ann. Cas. 471; *Eaton v. Fairbury Waterworks Co.* 37 Neb. 546, 40 A. S. R. 510, 21 L. R.A. 653, 56 N. W. 201,—holding water company, under contract with city to keep fire hydrants supplied with water not liable to property owner for loss by fire due to failure to furnish water; *Stone v. Uniontown Water Co.* 16 Pa. Co. Ct. 328, 4 Pa. Dist. Rep. 431, 13 Lanc. L. Rev. 155, holding water company under contract with borough to supply water, not liable to inhabitant of borough for loss due to failure to supply water; *Foster v. Lookout Water Co.* 3 Lea, 42, holding water company under contract with city to furnish water to extinguish fires, not liable to individual for loss due to negligent maintenance of its pipes; *House v. Houston Waterworks Co.* 88 Tex. 233, 28 L.R.A. 532, 31 S. W. 179, holding water works company, operating under contract with city not liable to property owner for loss by fire due to company's failure to keep pressure up to contract gauge; *Ferris v. Carson Water Co.* 16 Nev. 44, 40 A. R. 485; *Nichol v. Huntington Water Co.* 53 W. Va. 348, 44 S. E. 290,—holding water company under contract with city to maintain fire hydrants not liable to property owner for loss by fire because hydrant not supplied with water; *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, 29 A. S. R. 856, 51 N. W. 84, holding water company which accepts franchise from city not liable to individual for losses by fire because of insufficient supply of water; *Morris v. Bridgeport Hydraulic Co.* 47 Conn. 279, to point that water company by its contract with city is under no duty to furnish water to citizen; *Lancaster City v. Frescoln.* 22 Pa. Co. Ct. 225, 16 Lanc. L. Rev. 73, to point that property owner cannot enforce in his own name breach of contract between city and water company.

Cited in notes in 33 A. R. 6, 8; 81 A. S. R. 478, 480; 23 L.R.A. 148,—on liability of water company for loss by fire due to lack of adequate water supply; 49 A. S. R. 348, on private actions for breach of public duty; 6 L.R.A. (N.S.) 1175, on liability of water company in tort for loss to one sustaining no contract relation with it by its failure to comply with its contract with the municipality.

Distinguished in *Middlesex Water Co. v. Knappmann Whiting Co.* 64 N. J. L. 240, 81 A. S. R. 467, 49 L.R.A. 572, 45 Atl. 692, holding that water company which contracts to furnish water for fire purposes, is liable for neglect to furnish water, though failure due to break in pipes without company's fault.

Disapproved in *Mugge v. Tampa Waterworks Co.* 52 Fla. 371, 6 L.R.A. (N.S.) 1171, 42 So. 81, holding that water company which contracts with city to furnish sufficient water to extinguish fires is liable to property owner for loss due to insufficient supply.

Privity of contract between water company and municipality.

Cited in reference note in 18 A. S. R. 380, on privity of contracts between water company and municipality.

Right of citizen to enforce contract between water company and city.

Cited in note in 71 A. S. R. 197, on citizen's right to enforce contract between water company and city.

Effect of violation of agreement with third party, generally.

Cited in *Lewis v. Brookdale Land Co.* 124 Mo. 672, 28 S. W. 324, holding that contract between manufacturing company and land company whereby former agreed to locate and maintain plant on latter's land, will not entitle purchasers of lots from land company conditioned on plant locating on certain ground, to rescind purchases because plant was abandoned after construction.

Liability of city for negligent maintenance of waterworks voluntarily erected.

Cited in *Mendel v. Wheeling*, 28 W. Va. 233, 57 A. R. 664, holding that city which voluntarily erects waterworks is not liable for loss by fire through failure to keep water pipes cleared.

Liability of municipality for acts of fire department.

Cited in note in 30 A. S. R. 399, on municipal liability for acts of fire department.

Liability of municipality neglecting to perform duty imposed by charter.

Cited in note in 1 E. R. C. 622, on liability of municipal corporation neglecting to perform duty imposed by charter.

Power of municipality to make public improvements.

Cited in note in 11 L.R.A. 729, on power of municipal corporations to make public improvements.

Duty as element of negligence.

Cited in note in 12 L.R.A. 322, on duty as essential element of negligence.

When allegation of duty is insufficient.

Cited in *Green v. Indian Gold Min. Co.* 120 Fed. 715; *Spencer v. Bessemer Waterworks Co.* 144 Ala. 587, 39 So. 91; *King v. Interstate Consol. R. Co.* 23 R. I. 583, 70 L.R.A. 924, 51 Atl. 301,—holding allegation of duty insufficient without averment of facts sufficient to create duty.

Necessary allegations where right of action is statutory.

Cited in *Chicago & N. E. R. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. 213, holding that existence of facts upon which statute bases right of action must be averred, when right to sue is statutory.

Effect of demurrer.

Cited in *Hone v. Presque Isle Water Co.* 104 Me. 217, 21 L.R.A. (N.S.) 1021, 71 Atl. 769, holding demurrer does not confess matter of law deduced by either party from facts pleaded.

33 AM. REP. 10, HEDENBERG v. HEDENBERG, 46 CONN. 30.**Succession and administration of personal estate.**

Cited in note in 2 E. R. C. 90, on law governing succession and administration of personal estate.

Right of action against foreign executor or administrator.

Cited in *Courtney v. Pradt*, 135 Fed. 818, holding that executor who has not taken steps to collect nonresident's assets cannot be sued in foreign state, in absence of statute permitting suits against foreign executors; *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095, holding that judgment obtained against executor in another state of no effect in state where he was appointed; *Lyon v. Park*, 111 N. Y. 350, 18 N. E. 863, 16 N. Y. Civ. Proc. Rep. 109, holding that action against foreign executor to charge estate for debt must be maintained in state where he was appointed; *Burton v. Williams*, 63 Neb. 431, 88 N. W. 765, holding foreign executor not subject to suit here.

Cited in reference note in 1 A. S. R. 160, on liability of foreign executor.

Cited in note in 27 L.R.A. 101, 106, on judgment of another state or country rendered against executor or administrator.

Disapproved in *Falke v. Terry*, 32 Colo. 85, 75 Pac. 425, holding foreign executor who comes into another state to reside and takes with him assets of estate is liable to action to protect funds from loss.

Accountability of administrator or executor for assets without the state.

Cited in note in 45 A. S. R. 671, on accountability of administrator or executor for assets outside of state of appointment.

Necessity for appointment of ancillary administrator.

Cited in note in 35 A. D. 485, on necessity for appointment of ancillary administrator.

Title of executor to movable estate of deceased.

Cited in *Johnes v. Jackson*, 67 Conn. 81, 34 Atl. 709, holding that executor takes his title to movable estate of deceased person from will as recognized instrument of conveyance at common law.

Extraterritorial rights of receiver.

Cited in *Cooke v. Orange*, 48 Conn. 401, holding that receiver appointed in another state can sue here as receiver.

33 AM. REP. 14, PHOENIX MUT. L. INS. CO. v. DUNHAM, 46 CONN. 79.**Rights of personal representative of beneficiary under insurance policy.**

Cited in *Millard v. Brayton*, 177 Mass. 533, 83 A. S. R. 294, 52 L.R.A. 117, 59 N. E. 436, holding personal representatives of beneficiary entitled to recover insurance as against executor of assured; *Re Peckham*, 29 R. I. 250, 132 A. S. R. 813, 69 Atl. 1002; *Michigan Mut. L. Ins. Co. v. Basler*, 140 Mich. 233, 103 N. W. 596,—to point that rights of beneficiary pass to personal representatives upon his death; *Elgar v. Equitable L. Assur. Soc.* 113 Wis. 90, 88 N. W. 927, holding that beneficiary named in life insurance policy when there is no limitation over in case assured survives beneficiary, has vested right to recover insurance, which passes to his personal representative.

Effect of divorce on rights of beneficiary.

Cited in notes in 50 L.R.A. 553, on divorce as affecting wife's right to insur-

ance on husband's life under ordinary policy of life insurance, 3 L.R.A. (N.S.) 478, on effect of divorce on rights of beneficiary.

Life insurance in favor of one having no insurable interest.

Cited in note in 128 Am. St. R. 316, on life insurance in favor of persons having no insurable interest.

33 AM. REP. 18, JARVIS v. WILSON, 46 CONN. 90.

Acceptance of note or bill.

Cited in reference note in 1 A. S. R. 134, on nature of acceptor's contract.

Cited in note in 4 E. R. C. 242, on acceptance of bill of exchange.

—Defenses available to acceptor.

Cited in reference note in 37 A. R. 515, on defense of want of funds of drawer after acceptance.

Cited in note in 1 A. S. R. 136, 137, on defenses available to acceptor of negotiable paper.

Validity of parol acceptance or certification of check or bill.

Cited in *Farmers' & M. Bank v. Dunbier*, 32 Neb. 487, 49 N. W. 376, holding verbal acceptance of check by drawee valid and binding as though in writing; *Neumann v. Schroeder*, 71 Tex. 81, 8 S. W. 632, holding that verbal acceptance of check may be enforced; *Garrettsen v. North Atchison Bank*, 7 L.R.A. 428, 39 Fed. 163, holding that certification of check by telegram acts as effectual estoppel of defense of no funds.

Cited in note in 44 A. D. 253, on validity of parol acceptance of bill.

33 AM. REP. 21, HODGDON v. NEW HAVEN & H. R. CO. 46 CONN. 276.

Via major or inevitable accident as excusing performance of contract.

Cited in note in 1 E. R. C. 347, on vis major or inevitable accident as excusing performance of contract.

When demurrage allowable.

Cited in *Manson v. New York, N. H. & H. R. Co.* 55 Conn. 592, 31 Fed. 297 (affirming 26 Fed. 923), holding that carrier cannot claim demurrage for detention due to elements prior to vessel's arrival at particular place designated in bill of lading as part of delivery.

Commencement of lay days.

Cited in note in 30 A. S. R. 640, on commencement of lay days; 9 E. R. C. 217, 218, on when lay days for discharge of cargo commence to run.

33 AM. REP. 24, MITCHELL v. WHEATON, 46 CONN. 315.

Accord and satisfaction by partial payment.

Cited in *Larned v. Dubuque*, 86 Iowa, 166, 53 N. W. 105, holding judgment satisfied by acceptance of part together with payment of certain court costs for which debtor not liable; *Frey v. Hubbell*, 74 N. H. 358, 17 L.R.A. (N.S.) 1197, 68 Atl. 325, holding that payment and acceptance of sum less than entire debt in full satisfaction and discharge thereof is defense to action for balance; *Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. 415, holding bond satisfied by acceptance of part of amount secured thereby, when principal

Am. Rep. Vol. XVII—37.

and surety insolvent; *Jaffray v. Davis*, 124 N. Y. 164, 11 L.R.A. 710, 26 N. E. 351, 4 Silv. Ct. App. 315, 26 N. E. 351, holding book account discharged by payment of secured notes for half, accepted in full satisfaction; *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 44 L. ed. 1099, 20 Sup. Ct. Rep. 924, holding recovery of disputed portion of claim barred by acceptance of undisputed portion in full satisfaction; *Marshall v. Bullard*, 114 Iowa, 462, 54 L.R.A. 862, 87 N. W. 427, holding judgment discharged by acceptance of half the amount from third party in full satisfaction.

Cited in reference note in 1 A. S. R. 398, as to whether payment of less sum discharges debt.

Cited in notes in 100 A. S. R. 444, on part payment after commencement of suit as consideration for accord and satisfaction; 20 L.R.A. 790, on accord and satisfaction by part payment by one paying costs and expenses; 1 E. R. C. 391, on payment of smaller sum coupled with additional consideration as satisfaction.

33 AM. REP. 27, STATE v. WORDEN, 46 CONN. 349.

Right to jury trial in criminal case.

Cited in *State v. Main*, 69 Conn. 123, 61 A. S. R. 30, 36 L.R.A. 623, 37 Atl. 80, on right to trial by jury.

Cited in notes in 15 A. S. R. 758; 5 L.R.A. 836,—on right of trial by jury in civil cases.

Right to waive trial by jury in criminal cases.

Cited in *Schick v. United States*, 195 U. S. 65, 49 L. ed. 99, 24 Sup. Ct. Rep. 826, 1 A. & E. Ann. Cas. 585, holding that written waiver of jury by defendant in action brought by United States to recover penalty is not unconstitutional; *State v. Brockhaus*, 72 Conn. 109, 43 Atl. 850, to point that in capital case defendant may waive any matter of form or substance, excepting only what may relate to court's jurisdiction.

Cited in reference note in 33 A. R. 148, on binding effect of consent by prisoner, indicted for forgery, to trial by less than twelve jurors.

Cited in notes in 31 A. R. 37; 36 L. ed. U. S. 988,—on right to waive jury trial in criminal case.

Constitutionality of statute permitting waiver of jury trial in criminal actions.

Cited in *Belt v. United States*, 4 App. D. C. 25, holding that trial by jury can be validly waived in criminal case by accused, in pursuance of statute authorizing such waiver; *Brewster v. People*, 183 Ill. 143, 55 N. E. 640, holding that statute authorizing waiver of jury trial in case of misdemeanor not unconstitutional; *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *Re Staff*, 63 Wis. 285, 53 A. R. 285, 23 N. W. 587,—holding that statute permitting accused in criminal action to waive jury trial, is constitutional; *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; *Merrill v. St. Louis*, 83 Mo. 244, 53 A. R. 576; *Edwards v. State*, 45 N. J. L. 419,—to point that statute permitting accused to elect to be tried by court is constitutional.

Number and agreement of jurors necessary to constitute valid verdict in criminal case.

Cited in note in 43 L.R.A. 50, on number and agreement of jurors necessary to constitute valid verdict in felony and high grade offenses.

Right to trial by jury to determine degree of murder of one pleading guilty.

Cited in *State v. Almy*, 67 N. H. 274, 22 L.R.A. 744, 28 Atl. 372, holding that statute authorizing court to determine degree, where one pleads guilty to indictment for murder, is constitutional.

Right of accused to waive privilege of being confronted by witnesses.

Cited in *Butler v. State*, 97 Ind. 378, holding that defendant in criminal prosecution may waive benefit of constitutional privilege of being confronted by witness.

Necessity of stating age in indictment for rape.

Cited in note in 80 A. D. 373, on necessity of stating age in indictment for rape.

33 AM. REP. 34, HARBISON v. FIRST PRESBY. SOC. 46 CONN. 529.

Power of corporation to assist in defending action.

Cited in *Clark & M. Corporations*, § 191, on power of corporation to assist in prosecuting or defending action or proceeding directly affecting its own rights and privileges.

33 AM. REP. 36, FLANNERY v. ROHRMAYER, 46 CONN. 558, Later appeal in 49 Conn. 27.

Acceptance of article as estoppel to claim damages.

Cited in *United States v. Walsh*, 52 C. C. A. 419, 115 Fed. 697, holding that payment of contract price does not of itself constitute waiver of defects in article, though party paying actually aware of defects; *Ramsey v. Tully*, 12 Ill. App. 463, holding mere acceptance of purchased article after contract time for delivery not of itself waiver of damages for delay; *Hattin v. Chase*, 88 Me. 237, 33 Atl. 989, holding partial payment for work done not conclusive of waiver of right to claim damages for defective performance; *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25, holding mere acceptance of machinery by vendee without protest, after time specified for delivery, not waiver of right to claim damages for delay; *General Fireproofing Co. v. L. Wallace & Son Title Guaranty & Surety Co.* 99 C. C. A. 204, 175 Fed. 650, on acts of architects in permitting continuance of work after discovering poor work, as not binding owner.

Cited in note in 115 A. S. R. 259, on using and paying for building as waiver of imperfect performance of contract to erect structure.

Estoppel of married woman by knowledge of husband's contract.

Cited in *Huntley v. Holt*, 58 Conn. 445, 9 L.R.A. 111, 20 Atl. 469, holding wife's knowledge that buildings are being erected on her land under contract with her husband, and not objecting, not such consent as will enable contractor to subject her land to lien; *Lyon v. Champion*, 62 Conn. 75, 25 Atl. 392, holding mere fact that husband made contract for improvements on wife's property, in her presence, and that she gave directions, insufficient to subject her land to lien; *Geary v. Hennessy*, 9 Ill. App. 17, holding mere fact that husband made contract for building upon wife's land in her presence and hearing and that she daily inspected building, insufficient to subject her land to lien; *Campbell v. Jacobson*, 46 Ill. App. 287, holding wife's knowledge of improvements being made on her land not sufficient to hold her property for payment of obligations entered into without her acquiescence by her husband; *Wade*

worth v. Hodge, 88 Ala. 500, 7 So. 194, holding that contract of husband for improvements on wife's land will create no lien on it, though wife had knowledge of improvements and occupied house as dwelling after its completion.

Necessity for valid contract to existence of mechanics' lien.

Cited in reference note in 31 A. S. R. 238, on necessity for valid contract to existence of mechanics' lien.

Mechanics' lien on married woman's property.

Cited in reference notes in 77 A. S. R. 927; 31 A. S. R. 621,—on mechanics' lien on married woman's separate property; 1 A. S. R. 464, on possibility of creating mechanics' lien on wife's estate through husband's agency.

Cited in notes in 61 A. D. 694, on right of husband and wife to bind property by mechanics' lien; 83 A. S. R. 523, on effect of wife's knowledge and consent on right to mechanics' lien on her separate property.

33 AM. REP. 39, THATCHER v. STEVENS, 46 CONN. 561.

Liability of parties to bill or note.

Cited in notes in 18 L.R.A. 33, on liability of stranger who indorses commercial paper before delivery; 4 E. R. C. 549, on order of liability of parties to bill or note.

Parol evidence to affect bill or note.

Cited in notes in 13 L.R.A. 53, as to what may and may not be shown by parol in regard to indorsements; 13 L.R.A. 649, on admissibility of parol evidence as between immediate parties to promissory note.

Distinguished in Graves v. Johnson, 48 Conn. 160, 40 A. R. 162, holding that parol evidence to show apparent indorser surety only is admissible as between parties.

Indorsements before utterance.

Cited in reference notes in 34 A. R. 335, on indorsements before utterance; 34 A. R. 638, on liability of indorser before utterance.

33 AM. REP. 44, MIX v. NATIONAL BANK, 91 ILL. 20.

Rights of bona fide purchaser of negotiable instrument.

Cited in reference note in 57 A. S. R. 563, on rights of bona fide purchaser of negotiable instrument.

Who is bona fide purchaser.

Cited in Zollman v. Jackson Trust & Sav. Bank, 238 Ill. 290, 32 L.R.A. (N.S.) 858, 87 N. E. 297, holding substitution by bank of third person's notes as security for customer's debt in lieu of released collateral renders it purchaser for value.

Cited in note in 31 L.R.A. (N.S.) 290, on holder of bill or note as collateral as bona fide holder.

Equities of transferee of bill or note for pre-existing debt.

Cited in Bemis v. Horner, 62 Ill. App. 38, holding that indorsee before maturity taking note for pre-existing debt holds it free from latent defenses on part of maker; Mexican Asphalt Paving Co. v. Love, 73 Ill. App. 250, holding that person taking note as payment for debt is indorser for value and free from defenses existing between original parties; McIntire v. Yates, 104 Ill. 491, holding pre-existing indebtedness good and valid consideration for note and mortgage security, as against creditors giving such security; Straughan v.

Fairchild, 80 Ind. 598, holding that indorsee of commercial paper, who takes it as collateral security for pre-existing debt, is purchaser for value; **Rock Springs Nat. Bank v. Luman, 6 Wyo. 123, 42 Pac. 874** (dissenting opinion), to point that holder of negotiable paper taken as collateral security for pre-existing debt is holder for value.

Cited in notes in **35 A. R. 688; 3 A. S. R. 245**,—on rights of person taking negotiable instrument in good faith, before maturity, for antecedent debt; **32 A. S. R. 713**, on rights as bona fide holder of one taking collateral to secure pre-existing debt; **4 E. R. C. 330**, on creditor accepting negotiable paper given for pre-existing debt as bona fide holder.

Disapproved in **Loewen v. Forsee, 137 Mo. 29, 59 A. S. R. 489, 38 S. W. 712**, holding that negotiable note transferred merely as collateral security for pre-existing debt, without new consideration, is subject to equities existing between original parties.

Rights of correspondent bank in paper received for collection.

Cited in note in **14 A. S. R. 583**, on right of correspondent bank to hold paper received for collection or its proceeds as against owner in case of insolvency of forwarding bank.

Admissibility of corporate books and resolutions.

Cited in **Chesapeake & O. R. Co. v. Deepwater Co. 57 W. Va. 641, 50 S. E. 890**, holding that books and resolutions of private corporation are evidence of their acts and proceedings as against strangers, after proof by competent evidence that certain corporate acts were performed and memorials thereof made in form of resolutions.

How corporation de facto may be shown.

Cited in **Miami Powder Co. v. Hotchkiss, 17 Ill. App. 622**, holding that proof of statute under which incorporation was possible and fact that one dealt with it as corporation, and uses is sufficient.

33 AM. REP. 47, JOHNSON v. HUMBOLDT INS. CO. 91 ILL. 92.

Construction of bonding and insurance contracts.

Cited in **Leshar v. United States Fidelity & Guaranty Co. 239 Ill. 502, 88 N. E. 208**, on construction of bond.

Cited in note in **14 E. R. C. 21**, on rules of construction of contracts of insurance.

Rights under policy limiting time for bringing suit thereon.

Cited in note in **8 L.R.A. 769**, on rights under insurance policy limiting right of action to period less than that of statute of limitations.

Validity of limitation clause in policy.

Cited in **Blair v. Sovereign F. Ins. Co. 19 N. S. 372; Peoria Sugar Ref. Co. v. Canada F. & M. Ins. Co. 12 Ont. App. Rep. 418**, on validity of condition in policy requiring suit to be commenced within six months.

When limitation clause in policy begins to run.

Cited in **Fidelity & C. Co. v. Love, 49 C. C. A. 602, 111 Fed. 773**, to point that limitation to sue on life insurance policy begins from date of death; **Provident Fund Soc. v. Howell, 110 Ala. 508, 18 So. 311**, holding that limitation to sue on accident policy begins from date proof received by company though right of action does not accrue until later date; **McFarland v. Railway Officials & E. Acci. Asso. 5 Wyo. 126, 63 A. S. R. 29, 27 L.R.A. 48, 38 Pac. 347**, holding

that provision in accident insurance policy limiting time to sue begins at death, notwithstanding stipulation that action should not be commenced until ninety days after proof furnished; *Dickie v. Western Assur. Co.* 21 N. B. 544, as to when time commences to run on limitation in insurance policy for commencing action within twelve months.

Cited in reference note in 33 A. R. 607, on commencement of limitation for bringing action on insurance policy.

— Fire insurance.

Cited in *Travelers' Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L.R.A. 769, 45 N. W. 703, holding that limitation begins to run from date of fire though under provisions of policy right of action does not accrue until later; *Western Coal & Dock Co. v. Traders' Ins. Co.* 122 Ill. App. 138, holding that limitation to sue begins to run from date of fire, not date of extinguishment, where policy provides that action must be brought within specified period "next after fire;" *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478; *Bradley v. Phoenix Ins. Co.* 28 Mo. App. 7,—holding that limitation to sue begins from date of loss, not from date of proof of loss; *Appel v. Cooper Ins. Co.* 76 Ohio St. 52, 10 L.R.A.(N.S.) 674, 80 N. E. 955, 10 A. & E. Ann. Cas. 821; *Egan v. Oakland Ins. Co.* 29 Or. 403, 54 A. S. R. 798, 42 Pac. 990,—holding limitation begins to run from date of fire, notwithstanding provision that loss shall not be payable until sixty days after proof; *Sample v. London & L. S. Ins. Co.* 46 S. C. 491, 57 A. S. R. 701, 47 L.R.A. 696, 24 S. E. 334, holding that stipulation that suit shall be brought on policy within twelve months after fire means from accrual of right; *State Ins. Co. v. Meesman*, 2 Wash. 459, 26 A. S. R. 870, 27 Pac. 77 (dissenting opinion), on right to hold limitation to action on policy begins from date of fire, notwithstanding stipulations in proof of loss clause; *Murdock v. Franklin Ins. Co.* 33 W. Va. 407, 7 L.R.A. 572, 10 S. E. 777, holding that limitation of time to sue for insurance begins at close of sixty days allowed company for payment, not from actual loss; *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736, 3 S. E. 349, to point that limitation of time to sue on policy begins from time of fire.

Cited in note in 47 L.R.A. 697, 698, 700, as to when stipulation limiting time for suit on insurance policy for fixed period after loss begins to run.

Disapproved in *Friezen v. Allemania F. Ins. Co.* 30 Fed. 352, holding limitation to sue on insurance policy begins from date loss due and payable; *Read v. State Ins. Co.* 103 Iowa, 307, 64 A. S. R. 180, 72 N. W. 665, holding that limitation to sue begins at expiration of sixty days from proof of loss, which was time fixed for payment; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 A. R. 297, holding that period of limitation prescribed in policy does not commence until right to bring action accrues; *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 39 A. S. R. 877, 21 L.R.A. 743, 56 N. W. 322, holding that stipulation that suit can be brought within twelve months after fire does not mean from time right of action accrues.

Compliance with limitation clause in policy.

Cited in reference note in 2 A. S. R. 572, on what is compliance with condition in insurance policy limiting time for bringing suit.

Validity of limitation clause in policy or bond.

Cited in *Niagara F. Ins. Co. v. Bishop*, 49 Ill. App. 388, holding that provision that no loss shall become payable until sixty days after making of appraiser's award, where policy requires approval, is legal limitation; *Stephens v. Phoenix*

Assur. Co. 85 Ill. App. 671, holding that limitation by agreement in policy is valid and binding agreement between parties; **Phenix Ins. Co. v. Belt R. Co. 82 Ill. App. 265**, holding limitation clause not void because coupled with provision to arbitrate before bringing action; **Hesher v. United States Fidelity & Guaranty Co. 144 Ill. App. 632**, holding provision in bond requiring suit to be brought within certain period is not unreasonable.

Right to make arbitration condition precedent to recovery on policy.

Cited in **Niagara F. Ins. Co. v. Bishop, 154 Ill. 9, 45 A. S. R. 105, 39 N. E. 1102**, holding that agreement to fix amount of values by arbitration may be made condition precedent to right of recovery; **Hanover F. Ins. Co. v. Harper, 77 Ill. App. 453**, holding provision for appraisal in case of disagreement not condition precedent to bring suit unless there has been disagreement.

When writ of error lies to review judgment.

Cited in **International Bank v. Jenkins, 104 Ill. 143**, holding that writ of error lies from this court to review judgment of reversal of appellate court, which is final, though cause may be remanded.

Explained in **Trustees of Schools v. Potter, 108 Ill. 433**, holding that where appellate court reverses judgment of circuit court for error and remands cause for further proceedings without specific directions no writ of error lies from this court to review appellate court's judgment.

33 AM. REP. 51, ERIE & W. TRANSP. CO. v. DATER, 91 ILL. 195.

Evidence of shipper's assent to limitation of carrier's liability.

Cited in **O'Malley v. Great Northern R. Co. 86 Minn. 380, 90 N. W. 974**, holding extrinsic evidence admissible to show that shipper did not assent to contract limiting carrier's liability.

Cited in note in **88 A. S. R. 80, 86**, on evidence of shipper's assent to limitation of carrier's liability.

—Acceptance of bill of lading.

Cited in **Wabash R. Co. v. Harris, 55 Ill. App. 159**, holding mere acceptance of bill of lading without objection not conclusive of assent to limitations therein; **Chicago & A. R. Co. v. Davis, 159 Ill. 53, 50 A. S. R. 143, 42 N. E. 382**, holding that shipper must assent to clause limiting carrier's liability to make them binding on him; **Chicago & N. W. R. Co. v. Simon, 160 Ill. 648, 43 N. E. 596**, holding mere receiving of bill of lading without notice of restrictions on carrier's liability, not assent thereto; **Chicago & N. W. R. Co. v. Calumet Stock Farm, 194 Ill. 9, 8 A. S. R. 68, 61 N. E. 1095**, holding that carrier must show that shipper assented to limitations contained in bill of lading; **Missouri, K. & T. R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565**, holding signing of shipping contract only prima facie evidence of shipper's knowledge and assent to terms thereof.

Right of carrier to exact special contract of shipper.

Cited in note in **46 A. S. R. 778**, on right of carrier to exact special contract of shipper.

33 AM. REP. 54, CHICAGO & I. R. CO. v. RUSSELL, 91 ILL. 298.

Railroad employee's assumption of risk.

Cited in **Chicago, R. I. & P. R. Co. v. Clark, 11 Ill. App. 104**, holding that employee assumes all ordinary hazards of service; **Hemingsen v. Chicago, 124**

Wis. 412, 114 N. W. 785, holding insufficient to hold as matter of law that railroad employee assumed risk of particular dangerous condition from fact that he had been notified that there were obstructions dangerously close to track.

Cited in reference note in 61 A. S. R. 804, on acceptance of risk by employee.

— Dangerous structures.

Cited in *Choctaw, O. & G. R. Co. v. McDade*, 50 C. C. A. 591, 112 Fed. 883, holding that assumption of peril of water spout projecting unnecessarily close to cars, by experience brakeman who had been in company's employ but short time, is question for jury; *Mt. Vernon Co. v. Alabama G. S. R. Co.* 92 Ala. 300, 25 A. S. R. 47, 9 So. 252, holding that brakeman did not assume peril of projecting rock, of which he had no knowledge; *Illinois & St. L. R. Co. v. Whalen*, 19 Ill. App. 116, holding engineer did not assume peril of structure built within seven inches of track; *Chicago & A. R. Co. v. Stevens*, 91 Ill. App. 171, holding that brakeman would not be held to have assumed peril of "footboard" of coal chute, within sixteen inches of car ladder, in absence of proof that he knew of same; *Mobile & O. R. Co. v. Vallowe*, 115 Ill. App. 621, holding that railroad employee does not assume risk of dangerous structures erected along side track; *Mobile & O. R. Co. v. Vallowe*, 214 Ill. 124, 73 N. E. 416, holding that brakeman, not chargeable with knowledge thereof, did not assume peril of posts supporting coal chute, dangerously close to track; *Robel v. Chicago, M. & St. P. R. Co.* 35 Minn. 84, 27 N. W. 305, holding that negligence of railway company in permitting trestle fourteen inches from track, is question for jury; *Murphy v. Wabash R. Co.* 115 Mo. 111, 21 S. W. 862, holding that engineer having no knowledge of proximity of fence to track does not assume risk arising therefrom; *Whalen v. Illinois & St. L. R. Co.* 16 Ill. App. 320, on liability of railroad company for injuries sustained by employee by striking against structure constructed close to track; *South Side Elev. R. Co. v. Nesvig*, 114 Ill. App. 355, to point that railroad employee does not assume risks of obstructions on right of way.

— Dangerous bridges.

Cited in *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 13 A. S. R. 84, 4 L.R.A. 710, 6 So. 277, holding that brakeman, who has notice, assumes peril of low bridge overhead; *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627, holding railroad company liable to employee injured by low bridge, in performance of duties, danger of which he was ignorant; *Bryce v. Chicago, M. & St. P. R. Co.* 103 Iowa, 665, 72 N. W. 780, holding that brakeman did not assume peril of bolts in truss on bridge, which projected to within fifteen inches of side of car; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 1 A. S. R. 266, 16 Pac. 146, holding railroad company liable to freight conductor for injuries sustained from braces of bridge maintained at insufficient height, unknown to conductor; *Thain v. Old Colony R. Co.* 161 Mass. 353, 37 N. E. 309, holding that experienced engineer who passed place daily, assumed risk of temporary bridge support within four feet of track.

— Telegraph poles.

Cited in *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226, 71 N. E. 328 (affirming 112 Ill. App. 463), holding that railroad employee did not assume risk of telegraph pole in close proximity to track; *Potter v. Detroit, G. H. & M. R. Co.* 122 Mich. 179, 81 N. W. 80, holding that it cannot be said as matter of law, that brakeman assumes risk of telegraph pole in close proximity to track where not shown that he knew of its dangerous proximity; *Whipple v.*

New York, N. H. & H. R. Co. 19 R. I. 587, 61 A. S. R. 796, 35 Atl. 305, holding that brakeman did not assume risk of pole in dangerous proximity to track.

— Switch stands.

Cited in *Boas v. Northern P. R. Co.* 2 N. D. 128, 33 A. S. R. 756, 49 N. W. 655, holding that railroad employee does not assume peril of switch stand and target of such height and in such position and condition that target will sometimes come in contact with car; *Chicago & A. R. Co. v. Howell*, 109 Ill. App. 546, holding that switchman working in extensive railroad yards does not assume peril of switch stand, dangerously close to tracks; *Pidcock v. Union P. R. Co.* 5 Utah, 612, 1 L.R.A. 131, 19 Pac. 191, holding that brakeman did not assume risk of switch-stand located ten inches from track.

Liability of railroad for defective construction and appurtenances.

Cited in note in 53 A. R. 701, on liability of railroad for defective construction and appurtenances.

Liability of street railway for permanent obstructions.

Cited in *South Side Elev. R. Co. v. Neavig*, 214 Ill. 463, 73 N. E. 749; *North Chicago Street R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672 (affirming 40 Ill. App. 590),—holding street railway company negligent in running cars so near to obstructions that passengers or employees are liable to be hurt; *Anderson v. City R. Co.* 42 Or. 505, 71 Pac. 659, holding street railway negligent in permitting permanent obstructions to stand so close to tracks that passengers are in danger therefrom; *Davern v. Rockwell*, 105 App. Div. 618, 93 N. Y. Supp. 1125 (dissenting opinion) on right to hold that trolley conductor assumes peril of trolley pole dangerously close to track.

When master liable for negligence of fellow servant.

Cited in *Deering v. Barzak*, 227 Ill. 71, 81 N. E. 1, holding master's liability for injuries due to act of fellow servant, not excused when by use of reasonable diligence accident could have been prevented.

Cited in note in 41 L.R.A. 54, on employer's liability to injured servant when dangerous condition is due to act of stranger or fellow servant or to operation of some abnormal physical force.

Duty of employer to furnish safe premises and conditions.

Cited in *McDuffee v. Boston & M. R. Co.* 81 Vt. 52, 130 A. S. R. 1019, 69 Atl. 124, holding railroad company bound to place water spout at reasonably safe distance from track.

Cited in note in 92 A. D. 219, on duty of employer to furnish safe premises and conditions in and under which to work.

Delegation of duty as relieving from liability.

Cited in *Cunningham v. Union P. R. Co.* 4 Utah, 206, 7 Pac. 795, to point that one cannot absolve himself from duty by delegating it to others.

Admissibility of telegraphic messages in evidence.

Cited in *Chisholm v. Beaver Lake L. Co.* 18 Ill. App. 131, holding that it must be shown that person sought to be charged with consequences of telegraphic message either sent or caused message to be sent.

Cited in note in 41 L.R.A. 65, on length of time defect has existed as charging employer with knowledge of condition of instrumentalities.

Distinguished in *Pepper v. Western U. Teleg. Co.* 87 Tenn. 554, 10 A. S. R. 699, 4 L.R.A. 660, 11 S. W. 783, on power of telegraph company to bind sender by any alteration of message.

Presumption of notice from lapse of time.

Cited in *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619, to point that notice of defect or obstruction will be presumed from lapse of time.

When error is not ground for reversal.

Cited in *Citizens' Gaslight & H. Co. v. Granger*, 19 Ill. App. 201, holding that error which is not prejudicial will not work reversal.

33 AM. REP. 57, INDIANAPOLIS, B. & W. R. CO. v. TROY, 91 ILL. 474.**Liability of master to servant for injury from defective appliances.**

Cited in *Westinghouse Electric & Mfg. Co. v. Heimlich*, 62 C. C. A. 92, 127 Fed. 92, holding employer not negligent in failing to test claim by subjecting it to strain for purpose of discovering latent defects; *Petroleum Iron Works Co. v. Boyle*, 102 C. C. A. 579, 179 Fed. 433, on duty of master to inspect machinery and appliances; *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204, holding railroad company not liable to employee for defective appliance on car which was unknown to anyone prior to accident; *Beunk v. Valley City Desk Co.* 133 Mich. 440, 95 N. W. 548, holding employer not liable to employee for explosion of boiler which had recently been repaired and tested by competent workman who had pronounced it safe to be operated under higher pressure than that carried when explosion occurred; *Kent v. Yazoo & M. Valley R. Co.* 77 Miss. 494, 78 A. S. R. 535, 27 So. 620, holding railroad company not liable to employee for defective tool, which was new and of kind in general use by railroads, and was procured of reputable manufacturer, and before being furnished had been inspected and approved by railroad supervisor, and was also regarded by employee, experienced in use of tool, as sound; *Hart & C. Mfg. Co. v. Tima*, 85 Ill. App. 310, to point that employer is only bound to furnish reasonably safe appliances; *Ballou v. Chicago, M. & St. P. R. Co.* 54 Wis. 257, 41 A. R. 31, 11 N. W. 559, to point that master is not liable to servant for defect in machinery furnished, unless shown that he had or should have had knowledge thereof.

Cited in notes in 92 A. D. 221; 4 A. S. R. 396,—on master's duty and liability as to safe appliances and machinery; 41 L.R.A. 72, on master's duty to actively inspect instrumentalities purchased by him for the use of servant.

Opinion evidence as to master's knowledge of condition of instrumentalities.

Cited in note in 41 L.R.A. 153, on admissibility of opinions as to master's knowledge of abnormal condition of instrumentalities.

33 AM. REP. 60, ROPER v. SANGAMON LODGE, 91 ILL. 518.**Liability of sureties on successive bonds.**

Cited in reference note in 10 A. S. R. 847, on liability of sureties on successive bonds.

Cited in notes in 42 A. R. 753, on surety's liability for default after term for which bond given; 23 L.R.A.(N.S.) 132, on liability of sureties of public officer for default during prior term.

Official reports of principal as conclusive of sureties' liability.

Cited in *People v. Stewart*, 6 Ill. App. 62, holding court clerk estopped by his report from asserting that balance reported was not in fact on hand, to release sureties; *Ream v. Lynch*, 7 Ill. App. 161, holding guardian's report to court as to

ward's money coming into his hands, conclusive upon guardian and his sureties; *Fogarty v. Ream*, 100 Ill. 366, holding report of guardian as to amount of ward's money on hand, conclusive against sureties; *Trustees of Schools v. Cowden*, 240 Ill. 39, 88 N. E. 285; *Cowden v. Trustees of Schools*, 143 Ill. App. 241,—holding sureties bound by reports of principal; *Father Matthew Young Men's Total Abstinence Benev. Soc. v. Fitzwilliam*, 12 Mo. App. 445, holding surety estopped to show defalcation occurred during previous term, where bond given after officer who succeeded himself made report of amount on hand.

Distinguished in *Bartlett v. Wheeler*, 195 Ill. 445, 63 N. E. 169, holding sureties not estopped to show that defalcation occurred prior to their contract of suretyship where principal had made no report as to amount on hand.

— On bonds of municipal officers.

Cited in *Custer County v. Tunley*, 13 S. D. 7, 79 A. S. R. 870, 82 N. W. 84, holding official reports of county treasurer binding upon sureties as to amount on hand when bond executed; *Longan v. Taylor*, 130 Ill. 412, 22 N. E. 745, holding school treasurer's report of money on hand at date of bond conclusive against sureties; *Territory v. Cook*, 2 Ariz. 383, 17 Pac. 10; *Cawley v. People*, 95 Ill. 249; *Doll v. People*, 145 Ill. 253, 34 N. E. 413 (affirming 48 Ill. App. 418); *Cowden v. Trustees of Schools*, 235 Ill. 604, 126 A. S. R. 244, 23 L.R.A.(N.S.) 131, 85 N. E. 924,—holding that sureties on municipal treasurer's bond are estopped, by his official reports, from showing that defalcation occurred prior to term for which they became sureties.

Distinguished in *Salazar v. Territory*, 8 N. M. 1, 41 Pac. 531, holding one who becomes surety on treasurer's bond at beginning of second term not estopped by report filed thereafter to show that defalcation occurred during first term.

Failure of obligee to disclose facts concerning principal as releasing surety.

Cited in *Sherman v. Harbin*, 125 Iowa, 74, 100 N. W. 629, to point that to constitute fraud, intent to deceive must clearly appear.

Cited in notes in 63 A. S. R. 334, as to what matters existing at or prior to entering into contract of surety or guaranty will discharge the surety or guarantor; 63 A. S. R. 338, on existing defalcation of principal at execution of contract of surety or guaranty as discharge of surety or guarantor; 21 L.R.A. 412, on liability of surety for employee in case of fraud of obligee; 12 L.R.A.(N.S.) 250, on duty of obligee in fidelity bond to disclose prior defalcation to sureties in absence of inquiry in regard thereto.

Distinguished in *Wells, F. & Co.'s Exp. v. Walker*, 9 N. M. 170, 50 Pac. 353, holding surety on note released where obligee withheld information that note was for money embezzled by principal.

— On bond for fidelity of employee.

Cited in *Anaheim Union Water Co. v. Parker*, 101 Cal. 483, 35 Pac. 1048, holding failure of director of corporation to inform sureties of secretary of latter's defalcations, known to them, will not release sureties unless actual fraud shown; *Watertown Sav. Bank v. Mattoon*, 78 Conn. 388, 62 Atl. 622, holding bank director's failure to disclose to sureties prior defalcation of treasurer not fraudulent, where not shown obligee's relation to obligor was such as made disclosure duty; *Drabek v. Grand Lodge, B. S. Benev. Soc.* 24 Ill. App. 82, holding sureties upon bond of secretary of secret society released, where president, with knowledge of defalcation falsely represented principal's accounts to be correct; *Home Ins. Co. v. Holway*, 55 Iowa, 511, 39 A. R. 179, 8 N. W. 457, holding sureties on

agent's bond who signed without principal's knowledge or solicitation not released by obligee's failure to notify them of agent's misconduct under former agency; *Palatine Ins. Co. v. Crittenden*, 18 Mont. 413, 45 Pac. 555, holding mere neglect of obligee of agent's bond to inform surety, when bond executed, that agent was then indebted to him in former agency does not discharge surety; *Wilmington, C. & A. R. Co. v. Ling*, 18 S. C. 116, holding obligee's failure to notify surety that principal was behind in accounts when bond given not fraud as matter of law upon sureties; *Screwmen's Benev. Asso. v. Smith*, 70 Tex. 168, 7 S. W. 793, holding obligee who knows that person from whom he requires bond with security is dishonest, must so inform surety; *Lachman v. Block* (La. Ann.) 28 L.R.A. 255, 15 So. 649, on duty of obligee to notify intended surety that his principal was embezzler.

33 AM. REP. 64, McLEAN COUNTY COAL CO. v. LENNON, 91 ILL. 561.

Followed without discussion in *Thomas Pressed Brick Co. v. Herter*, 60 Ill. App. 58.

Measure of damages for trespass in removing property.

Cited in *Sunnyside Coal & Coke Co. v. Reitz*, 14 Ind. App. 478, 39 N. E. 541; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 A. R. 560,—holding that measure of damages for mining and carrying away coal is value as soon as severed from freehold without abatement of cost of severance; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 A. R. 196, holding that measure of damages for taking and removing ice from stream over another's land is value of ice as soon as it is made chattel.

Cited in reference note in 1 A. S. R. 498, on measure of damages in trespass or trover for timber cut on another's land.

Cited in notes in 24 A. D. 79; 36 A. R. 770,—on measure of damages for property taken by mistake; 33 A. R. 282; 28 A. S. R. 567,—on measure of damages for mining coal on another's land; 17 E. R. C. 882, on right of innocent trespasser to allowance for his labor and expense.

Right to take ice from streams.

Cited in note in 38 A. R. 258, on right to take ice from streams.

33 AM. REP. 70, CHICAGO & A. R. CO. v. ERICKSON, 91 ILL. 613.

Carrier's duty to receive and carry live stock.

Cited in *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372, 5 A. S. R. 226, 37 N. W. 432, holding it duty of common carrier of livestock to furnish cars when able.

Cited in note in 63 A. S. R. 550, on carrier's duty to receive and carry live stock.

Liability of carrier for refusal to carry or delay in taking live stock for transportation.

Cited in *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372, 383, 5 A. S. R. 226, 37 N. W. 432, holding carrier not liable for expense of keeping, shrinkage or depreciation after Saturday, where detained cattle arrived at destination in time for Saturday market; *Texas P. R. Co. v. Nicholson*, 61 Tex. 491, holding that carrier who delays taking cattle for transportation is liable for deterioration during detention.

Cited in note in 67 A. D. 213, on liability of carrier for refusal to carry or delay in transportation of animals.

Legislation protecting health of live stock.

Cited in notes in 97 A. S. R. 243, on constitutionality of statutes for quarantine of animals; 26 L.R.A. (N.S.) 279, on legislation for protection of health of live stock, as interference with interstate commerce.

33 AM. REP. 73, PITTSBURGH, C. & ST. L. R. CO. v. BROWN, 67 IND. 45.**Requirement of crossing signals as proper police regulation.**

Cited in Chicago, St. L. & P. R. Co. v. Fenn, 3 Ind. App. 250, 29 N. E. 790, holding that statute requiring crossing signals belongs to police powers of commonwealth; Cleveland, C. C. & St. L. R. Co. v. Carey, 33 Ind. App. 275, 71 N. E. 244, to point statute requiring signals at crossings designed to protect human life; State v. Indiana & I. S. R. Co. 133 Ind. 69, 18 L.R.A. 502, 32 N. E. 817, holding law requiring railway companies to sound steam whistle on approach of locomotive to public highway crossing, constitutional.

When nuisance may be permitted.

Cited in Re Flaherty, 105 Cal. 558, 27 L.R.A. 529, 38 Pac. 981, holding that nuisance may for special purposes, be permitted when public welfare requires it.

Municipal control over street railway nuisances.

Cited in note in 39 L.R.A. 615, on municipal control over public nuisances on public streets and highways created by street railroads.

Right to deem nuisance, use authorized by legislature.

Cited in State v. Louisville, N. A. & R. Co. 86 Ind. 114, holding that possession and use for railway purposes of city streets cannot be deemed nuisance if authorized by legislature.

Cited in note in 107 A. S. R. 224, on distinction between legislative authorization and negative use of authorization of work or condition alleged to be public nuisance.

When courts can declare statute unconstitutional.

Cited in Hedderich v. State, 101 Ind. 564, 51 A. R. 768, 1 N. E. 47, holding that courts cannot overthrow statute upon ground that it encroaches on natural rights; Wilkins v. State, 113 Ind. 514, 16 N. E. 192, to point that legislature act cannot be annulled by judiciary in any respect unless it clearly contravenes some Constitutional provision.

33 AM. REP. 76, McCLOSKEY v. INDIANAPOLIS MANUFACTURERS' & CARPENTERS' UNION, 67 IND. 86.**Liability of guarantor of negotiable instrument.**

Cited in reference notes in 11 A. S. R. 726, on liability of one executing negotiable instrument apparently as principal but in fact as surety; 22 A. S. R. 912, on liability of guarantor for payment of negotiable instruments.

Extension granted to principal as release of surety unknown as such.

Cited in Arms v. Beitman, 73 Ind. 85; Mullendore v. Wertz, 75 Ind. 431, 39 A. R. 155; Lamson v. First Nat. Bank, 82 Ind. 21; Williams v. Scott, 83 Ind. 405; Thorp v. Parker, 86 Ind. 102; Gipson v. Ogden, 100 Ind. 20; Post v. Losey, 111 Ind. 74, 60 A. R. 677, 12 N. E. 121; Durbin v. Northwestern Scraper Co. 36 Ind. App. 123, 73 N. E. 297,—holding that extension will not release surety not known as such to holder of obligation; Trentman v. Eldridge, 98 Ind. 525, to point that surety cannot claim any rights flowing from such relation as against one acting

without knowledge of such relation; *Ward v. Berkshire L. Ins. Co.* 108 Ind. 301, 9 N. E. 361, to point that creditor is not prejudiced by agreement between his debtors constituting one a surety, unless he has knowledge of agreement.

Cited in reference note in 33 A. R. 817, on effect of void usurious agreement for extension of time on liability of a surety who signs as maker.

Right to disregard immaterial answer.

Cited in *Allyn v. Allyn*, 108 Ind. 327, 9 N. E. 279, holding that trial court should disregard as immaterial issue joined on bad paragraph of answer and under judgment without reference thereto; *Evansville v. Martin*, 103 Ind. 206, 2 N. E. 596, to point that trial court may disregard immaterial answer; *Brown v. Searle*, 104 Ind. 218, 3 N. E. 871, to point that where, upon statements of pleadings, one party is entitled to judgment in his favor, judgment shall be so rendered by court even over verdict against him.

—Error in overruling demurrer to.

Cited in *Rawson v. Pratt*, 91 Ind. 9, holding error to overrule demurrer to answer insufficient to constitute defense.

Error in directing verdict for defendant, where answer is immaterial.

Cited in *Miller v. White River School Twp.* 101 Ind. 503, holding error for court to instruct jury to render verdict for defendant upon answer stating no defense; *Indiana, I. & I. R. Co. v. Larrew*, 130 Ind. 368, 30 N. E. 517, holding evidence sustaining answer which absolutely fails to state facts constituting defense, will not uphold judgment for defendant; *Pilcher v. Brown*, 6 Kan. App. 795, 51 Pac. 239, holding that judgment will be reversed where answer and evidence fail to make defense, though no objection was made at trial to such answer and evidence.

Effect of evidence sustaining immaterial answer.

Cited in *Miller v. McDonald*, 139 Ind. 465, 39 N. E. 159, to point that evidence establishing bad answer will not uphold judgment for defendant.

33 AM. REP. 79, LINDEMAN v. ROSENFELD, 67 IND. 246.

Note as payment of pre-existing debt.

Cited in *Mount v. Dehaven*, 29 Ind. App. 127, 63 N. E. 330, holding that original debt not discharged where holder of note against decedent, takes note of decedent's sons in lieu thereof and surrendered original note to sons, without agreement to accept son's notes in payment or satisfaction of debt.

Cited in note in 71 A. D. 348, as to when taking of negotiable paper for pre-existing debt is a satisfaction thereof.

—Note not governed by law merchant.

Cited in *Combs v. Bays*, 19 Ind. App. 263, 49 N. E. 358, holding giving of promissory, not governed by law merchant, for pre-existing debt, not payment thereof unless so expressly stipulated; *Jeffries v. Lamb*, 73 Ind. 202, holding that promissory note not payable at bank, nor governed by law merchant will not extinguish precedent debt for which given.

New contract between obligee and principal as releasing surety.

Cited in *Riner v. New Hampshire F. Ins. Co.* 9 Wyo. 81, 60 Pac. 262, holding taking of principal's note for debt releases surety.

Cited in reference notes in 28 A. S. R. 692; 65 A. S. R. 290,—on release of surety; 31 A. S. R. 737, on release of surety by indulgence of principal; 74 A. S. R. 637, on taking mortgage from principal debtor or stranger as discharge of sureties.

Distinguished in *Weed Sewing Mach. Co. v. Winchel*, 107 Ind. 260, 7 N. E. 881, holding sureties released where new contract is entered into between obligee and principal without sureties' knowledge on terms different than original imposed.

Conflict of laws as to negotiable paper.

Cited in *Midland Steel Co. v. Citizens' Nat. Bank*, 34 Ind. App. 107, 72 N. E. 290, holding that note executed in one state and made payable in bank in another state, is governed by laws of such foreign state.

Cited in reference note in 77 A. D. 87, as to what law governs liability on promissory notes.

Cited in note in 61 L.R.A. 200, on conflict of laws as to collateral effect of negotiable paper.

33 AM. REP. 86, ARBINTRODE v. STATE, 67 IND. 267.

Followed without discussion in *Surgart v. State*, 67 Ind. 601; *Norris v. State*, 69 Ind. 416; *Urbahns v. State*, 72 Ind. 602.

Indictment for illegal liquor selling — Necessity of averring quantity.

Cited in *Grupe v. State*, 67 Ind. 327, holding that indictment for selling intoxicating liquor to minor must affirmatively allege that quantity sold was less than one quart at time; *Payne v. State*, 74 Ind. 203; *State v. Corll*, 73 Ind. 535,—holding that in prosecution for illegal sale of liquor to be drank on premises, indictment need not allege that quantity was less than quart; *Strader v. State*, 92 Ind. 376, to point that indictment or information may be quashed when offense not stated with sufficient certainty.

Cited in reference note in 37 A. R. 415, on charging quantity of liquor sold in indictment.

— Sufficiency of evidence as to quantity of liquor sold.

Distinguished in *Hamilton v. State*, 103 Ind. 96, 53 A. R. 491, 2 N. E. 209, holding evidence of prosecuting witness that he "got drink of whisky" for which ten cents was paid sufficient to show sale of less quantity than quart.

Right to first question indictment on appeal.

Cited in *Burroughs v. State*, 72 Ind. 334; *Hays v. State*, 77 Ind. 450,—holding that sufficiency of indictment may be questioned for first time on appeal.

Right to appeal after plea of guilty.

Cited in *Orear v. State*, 22 Ind. App. 553, 53 N. E. 249, holding that appeal does not lie to circuit court from judgment upon plea of guilty in justice's court; *State v. Rosenblatt*, 185 Mo. 114, 83 S. W. 975, holding that one who pleads guilty is entitled to his appeal or writ of error; *Walter v. State*, 105 Ind. 589, 5 N. E. 735, holding that indictment charging sale "in less quantity than quart, to wit, one gill * * * at and for price of five cents" sufficiently charges sale in less quantity than one quart at one time.

33 AM. REP. 89, PERKINS v. STATE, 67 IND. 270.

What sufficient to constitute crime of false pretense.

Cited in *Jackson v. State*, 118 Ga. 125, 44 S. E. 833, holding that one may be guilty of obtaining by false pretense as to his official character and power, if party defrauded relied upon such statement; *Strong v. State*, 86 Ind. 208, 44 A. R. 292, holding that false representations, to constitute crime of false pretenses, must be as to existing fact.

Cited in reference notes in 25 A. S. R. 378, on crime of obtaining money under false pretenses; 36 A. S. R. 614, on crime of false pretenses.

Cited in notes in 25 A. S. R. 382, on illustrations of false pretenses; 17 L.R.A. (N.S.) 277, on illegal intent of prosecutor as affecting guilt of obtaining property by false pretense or confidence game.

Sufficiency of indictment for false pretense.

Cited in *Miller v. State*, 73 Ind. 88, holding that indictment which shows that false representations were such as would deceive man of common intelligence, sufficient.

Married woman's liability for crime.

Cited in reference note in 45 A. S. R. 937, on liability of married woman for crimes committed.

33 AM. REP. 96, DENSMORE v. STATE, 67 IND. 306.

Degree of certainty in proof in criminal case.

Cited in *Territory v. Barth*, 2 Ariz. 319, 15 Pac. 673, holding proof of guilt to moral certainty not required in criminal case.

How reasonable doubt of guilt may arise.

Cited in *Wright v. State*, 69 Ind. 163, 35 A. R. 212; *Batten v. State*, 80 Ind. 394; *State v. Andrews*, 77 N. J. L. 108, 71 Atl. 109; *Knight v. State*, 74 Miss. 140, 20 So. 860,—holding that reasonable doubt may arise from want of evidence as to some fact having natural connection with case; *Kennedy v. State*, 107 Ind. 144, 57 A. R. 99, 6 N. E. 305; *Voght v. State*, 145 Ind. 12, 43 N. E. 1049; *People v. Wileman*, 44 Hun. 187; *State v. De Lea*, 36 Mont. 531, 93 Pac. 814, to point that reasonable doubt may arise from lack of evidence.

Cited in note in 48 A. S. R. 571, on what constitutes reasonable doubt.

Instruction assuming fact as proved, as error.

Cited in *Steele v. Davis*, 75 Ind. 191, holding that instruction which assumes fact as proved is error.

Instruction that jury may use their "own judgment" in weighing evidence, as error.

Distinguished in *Timmis v. Wade*, 5 Ind. App. 139, 31 N. E. 827, holding it not error in action for falsely warranting soundness of horse, to instruct jury to use their "own judgment" as to defendant's guilt.

Explained in *Jenney Electric Co. v. Branham*, 145 Ind. 314, 33 L.R.A. 395, 41 N. E. 448, holding not error to instruct jury to take into account their experience and relations among men, in determining credibility of witnesses.

33 AM. REP. 98, SESSENGUT v. POSEY, 67 IND. 408.

Liability of owner for injuries from constructions on premises.

Cited in reference notes in 33 A. S. A. 43, on owner's liability for injuries in connection with erection of building on premises; 44 A. S. R. 366, on liability of owner of real property for injuries caused by unsafe construction.

Liability of owner of building for dangerous walls.

Cited in *Ainsworth v. Lakin*, 180 Mass. 397, 91 A. S. R. 314, 57 L.R.A. 132, 62 N. E. 746, holding owner of building liable for dangerous third-story wall, though third story had been conveyed to another "during life of building;" *Lauer v. Palms*, 129 Mich. 671, 58 L.R.A. 67, 89 N. W. 694, holding owner of building out of possession liable for dangerous walls, though he had contracted

for rebuilding, which was delayed by threats of injunction by tenants, who were salvaging contents.

Cited in reference notes in 101 A. S. R. 253, on liability of owner for leaving walls of building standing in dangerous condition after fire; 123 A. S. R. 569, on duty and liability of landowner towards adjoining proprietors as to wall standing after fire.

Cited in note in 34 L.R.A. 559, on individual liability for falling walls or buildings in possession of contractor.

Liability for negligence of contractor.

Cited in *Park v. Adams County*, 3 Ind. App. 536, 30 N. E. 147, holding county not liable for negligence of contractor in repairing bridge; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 A. R. 696, 12 N. E. 296, holding employer not liable for negligence of independent contractor; *Evansville v. Senhenn*, 151 Ind. 42, 68 A. S. R. 218, 41 L.R.A. 728, 51 N. E. 88, holding municipal corporation not liable for negligence of contractor in piling lumber in street, when without notice actual or implied; *Bohrer v. Dienhart Harness Co.* 19 Ind. App. 489, 49 N. E. 296 (dissenting opinion), to point that landowner is not liable for negligence of independent contractor in making excavations; *Missouri, K. & O. R. Co. v. Ferguson*, 21 Okla. 266, 96 Pac. 755, on liability of railroad company for injury to animal through negligence of contractor erecting fence for it.

Cited in reference note in 60 A. R. 701, on liability of employer for act of contractor claimed to be nuisance.

Cited in notes in 76 A. S. R. 427, on liability for negligence of independent contractors concerning walls; 66 L.R.A. 948, on employer's liability for injuries occurring in performance of contract by independent contractor through employer's failure to remedy a nuisance.

Distinguished in *Bloomfield R. Co. v. Van Slike*, 107 Ind. 480, 8 N. E. 269, holding that wrongful appropriation of land by receiver of railroad will not be considered as act of independent contractor so as to relieve company from liability upon receiver's discharge.

Exhibits as part of complaint.

Cited in *Cassaday v. American Ins. Co.* 72 Ind. 95, holding exhibits not foundation of cause of action and cannot be looked to for purpose of determining sufficiency of complaint.

Statement of evidence in bill of exceptions.

Cited in *Barley v. Dunn*, 85 Ind. 338; *Central U. Teleph. Co. v. State*, 110 Ind. 203, 12 N. E. 136,—holding statement in bill that it "contains all testimony" insufficient showing that it contains all evidence; *Ohio & M. R. Co. v. Nickless*, 73 Ind. 382; *Mattinger v. Lake Shore & M. S. R. Co.* 117 Ind. 136, 19 N. E. 733,—holding that bill of exceptions which fails to state that it contains all evidence will not be considered.

"Testimony" as synonymous with "evidence."

Cited in *Ingel v. Scott*, 86 Ind. 518; *Kleyla v. State*, 112 Ind. 146, 13 N. E. 255; *Sanford Tool & Fork Co. v. Mullen*, 1 Ind. App. 204, 27 N. E. 448; *Miller v. Fuller*, 21 Ind. App. 254, 52 N. E. 101,—holding word testimony not synonymous with word evidence.

Nonprejudicial error as ground for reversal.

Cited in *American Car & Foundry Co. v. Clark*, 32 Ind. App. 644, 70 N. E. Am. Rep. Vol. XVII.—38.

828, holding error which does not affect appellant's substantial rights not ground for reversal.

33 AM. REP. 102, PARKE v. ROSER, 67 IND. 500.

Effect of certification of check by bank.

Cited in *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 96 A. S. R. 169, 63 L.R.A. 245, 73 Pac. 456; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 52 A. S. R. 450, 34 N. E. 608,—to point that certifying bank does not guaranty genuineness of body of check.

Cited in notes in 17 A. S. R. 899, on effect of certification on rights of bank paying forged check; 128 Am. St. Rep. 703, on certified checks; 19 L. ed. U. S. 1010, on liability of bank on certified check.

Payment as certification of raised check.

Cited in note in 39 A. D. 523, on effect of payment as certification of raised check.

Right to recover money paid on forged or altered check.

Cited in reference note in 3 A. S. R. 298, on recovery by bank of money paid on forged check.

Cited in notes in 17 A. S. R. 896, on right of drawee to recover back money paid on raised or altered check or draft; 86 A. S. R. 124, on right to recover money paid on altered instrument.

33 AM. REP. 104, OHIO & M. R. CO. v. SWARTHOUT, 67 IND. 567.

Right to eject passenger with ticket for station at which train does not stop.

Cited in *Noble v. Atchison, T. & S. F. R. Co.* 4 Okla. 534, 46 Pac. 483, holding that where statute does not require that trains stop at all stations, passenger who has ticket for station at which train does not stop and will not pay fare to first stopping place beyond such station may be removed in proper manner. **Power of carriers to adopt rules for passengers.**

Cited in reference note in 10 A. S. R. 521, on power of carriers of passengers to adopt rules for passengers.

—As to where trains will stop.

Cited in *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 5 A. S. R. 780, 17 Pac. 54, holding that railway company may adopt regulation that one of its through or fast trains running regularly on road shall stop only at certain designated stations or places; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333, holding that in absence of statutory provisions to contrary, railroad company may adopt regulation that certain passenger trains running regularly shall not stop at designated stations.

Cited in reference notes in 5 A. S. R. 794; 37 A. S. R. 393,—on right to regulate stops of railroad trains; 37 A. S. R. 776, on right of railroad company to refuse to stop train at station.

Duty of passengers to know stopping places of trains.

Cited in *Louisville, N. A. & C. R. Co. v. Wright*, 18 Ind. App. 125, 47 N. E. 491, holding passenger bound to know whether train on which he takes passage would stop at station for which ticket purchased; *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611, holding that passenger has no right on train which under company's rules does not stop at station for which ticket

purchased; *O'Connor v. Halifax Electric Tramway Co.* 38 N. S. 212, on duty of passenger to inquire if train will take him to certain place.

Construction and effect of conditions on ticket.

Cited in reference note in 4 A. S. R. 542, on construction of notices and conditions in passage tickets.

Cited in note in 5 L.R.A. 819, on binding effect of terms and conditions on ticket.

Sufficiency of complaint in action for refusing passage on freight trains.

Cited in *Indianapolis & St. L. R. Co. v. Kennedy*, 77 Ind. 507, holding that complaint in action for refusal to carry passenger on freight trains must allege strict compliance or attempted compliance with terms and conditions imposed by company.

33 AM. REP. 107, HUSBAND v. HUSBAND, 67 IND. 583.

Followed without discussion in *Jonas v. Jonas*, 73 Ind. 601.

Liability for failure to support child awarded to mother by divorce decree.

Cited in *Ramsey v. Ramsey*, 121 Ind. 215, 6 L.R.A. 682, 23 N. E. 69, holding that rights to custody and services of child, and obligation to support and educate, are reciprocal rights and obligations, unless otherwise fixed by judicial decree; *Miller v. Morrison*, 43 Kan. 446, 23 Pac. 612, holding that right to custody and services of child carries with it duty and obligation to support and maintain him; *Alvey v. Hartwig*, 106 Md. 254, 11 L.R.A.(N.S.) 678, 67 Atl. 132, 14 A. & E. Ann. Cas. 250, holding father not released from obligation to support child by fact that child was awarded to mother's custody under decree by which she obtained divorce from him, as nonresident not personally served; *Meyers v. Meyers*, 91 Mo. App. 151, holding father liable for children's support where decree awarding custody says nothing about maintenance; *Johnson v. Onsted*, 74 Mich. 437, 42 N. W. 62; *Brown v. Smith*, 19 R. I. 319, 30 L.R.A. 680, 33 Atl. 466, holding that award of custody of minor children to mother releases father from duty to support them; *Demonet v. Burkart*, 23 App. D. C. 308; *Chester v. Chester*, 17 Mo. App. 657,—to point that mother should obtain allowance for children's support in decree of divorce; *Gussman v. Gussman*, 140 Ind. 433, 39 N. E. 918; *Tobin v. Tobin*, 29 Ind. App. 382, 64 N. E. 624; *Hyde v. Leisenring*, 107 Mich. 490, 65 N. W. 536; *Shannon v. Shannon*, 97 Mo. App. 119, 71 S. W. 104,—to point that award of custody of minor children to mother frees father from liability for their support and maintenance.

Cited in notes in 47 A. S. R. 316, 317, on father's obligation to support child, as affected by award of custody to mother; 2 L.R.A.(N.S.) 851, on effect of divorce on liability for support of children.

Disapproved in *Gibson v. Gibson*, 18 Wash. 489, 40 L.R.A. 587, 51 Pac. 1041, holding that award of custody of child to mother does not release father from obligation to support such child.

Power of court, to provide for children in decree for divorce.

Cited in *Hedrick v. Hedrick*, 128 Ind. 522, 26 N. E. 768, on power of court to provide for children on decree of divorce.

Explained in *Logan v. Logan*, 90 Ind. 107, holding that court in granting divorce has full authority to provide for support of children.

Allowance for attorney's fees in divorce action.

Cited in *McCabe v. Britton*, 79 Ind. 224, holding that allowance made by court for wife's reasonable expenses in divorce action includes her attorney's fees.

33 AM. REP. 110, EDGERTON v. STATE, 67 IND. 588.

What is work of necessity within meaning of Sunday law.

Cited in *Turner v. State*, 67 Ind. 595, holding harvesting of dead ripe wheat which might be spoiled by rain if left until later day, work of necessity; *Carver v. State*, 69 Ind. 61, 35 A. R. 205, holding selling cigars at hotel on Sunday to guests, boarders and customers a work of necessity; *Yonoski v. State*, 79 Ind. 393, 41 A. R. 614, holding necessary repairs of railroad track which can be done only on Sunday without delay of trains, a work of necessity; *Western U. Tele. Co. v. Yopst*, 118 Ind. 248, 3 L.R.A. 224, 20 N. E. 222, holding telegraph message which will prevent serious loss or injury, a necessity; *Dugan v. State*, 125 Ind. 130, 9 L.R.A. 321, 25 N. E. 171, holding pilot of excursion steamer not engaged in work of necessity or charity; *State v. McBee*, 52 W. Va. 257, 60 L.R.A. 638, 43 S. E. 121, holding pumping of oil well on Sunday work of necessity if permanent loss and injury would otherwise result; *Shipley v. State*, 61 Ark. 216, 32 S. W. 489, to point that necessity must be economic and moral necessity.

Cited in notes in 14 L.R.A. 193; 5 L.R.A.(N.S.) 321,—on agricultural operations on Sunday as works of necessity.

—Barbering on Sunday.

Cited in *Ungericht v. State*, 119 Ind. 379, 12 A. S. R. 419, 21 N. E. 1082, holding question whether shaving of customer by barber on Sunday is work of necessity, one for jury; *State v. Schatt*, 128 Mo. App. 622, 107 S. W. 10, holding that whether particular act of barbering on Sunday was one of necessity is question of fact.

Cited in reference note in 12 A. S. R. 422, on judicial notice that labor of barber on Sunday is unnecessary.

33 AM. REP. 114, LOWRY v. POLK COUNTY, 51 IOWA, 50, 49 N. W. 1049.

Responsibility of public officers or surety for custody of public moneys.

Cited in *Thomssen v. Hall County*, 63 Neb. 777, 57 L.R.A. 303, 89 N. W. 389, holding that county treasurer is insurer of funds which come into his hands ex officio; *People ex rel. Nash v. Faulkner*, 107 N. Y. 477, 14 N. E. 415, holding that surrogate who as such receives money of private individuals is not absolutely responsible therefore; *Tillinghast v. Merrill*, 151 N. Y. 135, 56 A. S. R. 612, 34 L.R.A. 678, 45 N. E. 375, holding supervisor liable for public school moneys in his hands, though lost without his fault or negligence; *Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832, 17 A. & E. Ann. Cas. 926, holding custodian of public money is liable for same as debtor or insurer.

Cited in reference note in 3 A. S. R. 881, on liability of public treasurer or collector on official bond for money stolen without his fault.

Cited in notes 67 A. D. 368, 369, on extent of liability of officers having custody of public moneys; 91 A. S. R. 524, on liability of sureties on official bonds for loss of funds without fault; 91 A. S. R. 562, on liability of securities on bonds of treasurers for loss of bank deposits.

— **Liability for loss by failure of bank.**

Cited in *Alston v. State*, 92 Ala. 124, 13 L.R.A. 659, 9 So. 732, holding probate judge who makes general deposit of public moneys is liable for their loss by bank's subsequent failure; *Lamb v. Dart*, 108 Ga. 602, 34 S. E. 160, holding county treasurer who makes general deposit of public funds liable for their loss by subsequent failure of bank; *Swift v. Trustees of Schools*, 91 Ill. App. 221, holding sureties upon county treasurer's bonds liable for loss of public funds through failure of bank in which deposited, though reasonable care exercised in depositing.

Cited in reference note in 35 A. R. 477, on liability of public treasurer for loss of money by failure of depository.

Cited in note in 22 L.R.A. 451, on liability on official bond for loss by theft or bank failure.

— **Liability for embezzlement by civil service appointee.**

Cited in *United States v. Bryan*, 82 Fed. 290, holding postmaster liable for public moneys embezzled by clerk appointed under civil service laws.

Authority of custodian of public money to deposit it in bank.

Cited in *Long v. Emsley*, 57 Iowa, 11, 10 N. W. 280, holding that deposits of public funds in bank, by town clerk, amounts to conversion; *State v. Hutchinson*, 60 Iowa, 478, 15 N. W. 298; *Webster County v. Hutchinson*, 60 Iowa, 721, 9 N. W. 901,—holding that county treasurer is not authorized to make deposits; *Cadwell v. King*, 84 Iowa, 228, 50 N. W. 975, holding that county treasurer may make "general deposit" of county funds; *State ex rel. Roberts v. Lawrence*, 80 Kan. 707, 103 Pac. 839, holding county treasurer is not authorized to place funds on general deposit.

Nature of deposit in bank.

Cited in *Mereness v. First Nat. Bank*, 112 Iowa, 11, 84 A. S. R. 318, 51 L.R.A. 410, 83 N. W. 711, holding that deposit in bank constitutes loan to bank; *Officer v. Officer*, 120 Iowa, 389, 98 A. S. R. 365, 94 N. W. 947, holding in cases of general deposit relation of debtor and creditor is created; *Elliott v. Capital City State Bank*, 128 Iowa, 275, 111 A. S. R. 198, 1 L.R.A. (N.S.) 1130, 103 N. W. 777, holding that deposit in bank does not constitute loan to bank; *State Bank v. Bartley*, 39 Neb. 353, 23 L.R.A. 67, 58 N. W. 172, holding that money deposited in bank, though called "deposit" is in legal effect, loan though payable on demand; *Independent Dist. v. King*, 80 Iowa, 497, 45 N. W. 908, to point that deposits of public funds by officers is in effect loan to bank, where bank does not know that deposits are public funds; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 20 A. S. R. 442, 45 N. W. 1049, to point that deposit in bank constitutes loan to bank.

Overruled in *Hunt v. Hopley*, 120 Iowa, 695, 95 N. W. 205, holding that deposit in bank does not constitute loan of money to bank.

33 AM. REP. 116, CHARNOCK v. DISTRICT TWP. 51 IOWA, 70, 50 N. W. 286.

Liability of public property to mechanics' lien.

Cited in *Arrison v. Company D. North Dakota Nat. Guard*, 12 N. D. 554, 98 N. W. 83, 1 A. & E. Ann. Cas. 650, holding that armory building erected by corporation formed by ex-members of national guard, subject to mechanic's lien; *Parke County v. O'Connor*, 86 Ind. 531, 44 A. R. 338, holding that mechanics' lien will not attach against public square or county court house.

Cited in reference notes in 78 A. D. 696, on liability of public buildings to mechanics' liens; 23 A. S. R. 455, on nonliability of public property to mechanics' lien.

— School house.

Cited in *Fluty v. School Dist.* 49 Ark. 94, 4 S. W. 278; *Independent School Dist. v. Mardis*, 106 Iowa, 295, 76 N. W. 794; *Morganton Hardware Co. v. Morganton Graded Schools*, 151 N. C. 507, 66 S. E. 583; *Portland Lumbering & Mfg. Co. v. School Dist. No. 1*, 13 Or. 283, 10 Pac. 350,—holding that mechanics' lien will not attach to public school property; *Lessard v. Revere*, 171 Mass. 294, 50 N. E. 533, holding that general words of public statutes c. 191 sec. 1 do not give mechanics' lien for labor upon public school house; *Baker v. Bryan*, 64 Iowa, 561, 21 N. W. 83; *Green Bay Lumber Co. v. Independent School Dist.* 121 Iowa, 663, 97 N. W. 72,—to point that mechanics' lien cannot attach to public school house.

Cited in note in 35 L.R.A. 143, on mechanics' lien on school-houses.

33 AM. REP. 117, NUGENT v. BATES, 51 IOWA, 77, 50 N. W. 76.

Residence with respect to taxation.

Cited in note in 56 A. D. 532, on domicile or residence with respect to taxation.

When change of residence is presumed.

Cited in *Botna Valley State Bank v. Silver City Bank*, 87 Iowa, 479, 54 N. W. 472, holding that head of family who left home for day with expressed intention of returning but failed to return and was never afterward heard from, did not thereby become non-resident so as to defeat substituted service; *State ex rel. Killpack v. Hemsworth*, 112 Iowa, 1, holding that one who removed his family and affects to another township with intent to return as soon as job is completed, did not lose residence; *Cover v. Hatten*, 136 Iowa, 63, 113 N. W. 470, holding mere intent to change not sufficient to effect change of residence; *Ludlow v. Szold*, 90 Iowa, 175, 57 N. W. 676 (dissenting opinion), on right to consider intent to change residence as abandonment thereof.

Remedy against erroneous assessment.

Cited in *Smith v. Marshalltown*, 86 Iowa, 516, 53 N. W. 286, holding that original action will not lie against city for correction of erroneous assessment of city taxes; *Harris v. Fremont County*, 63 Iowa, 639, 19 N. W. 826; *Wilson v. Cass County*, 69 Iowa, 147, 28 N. W. 483; *Smith v. McQuiston*, 108 Iowa, 363, 79 N. W. 130,—holding that remedy against excessive assessment is by application to board of equalization and by appeal therefrom to courts; *Reed v. Cedar Rapids*, 138 Iowa, 366, 116 N. W. 140, holding remedy against erroneous assessment is an application to board of review.

Distinguished in *Remey v. Board of Equalization*, 80 Iowa, 470, holding certiorari proper remedy where assessment made on personal property after owner removed from state.

— Injunction.

Cited in *Powers v. Bowman*, 53 Iowa, 359, 5 N. W. 566, holding that equity will not interfere to correct erroneous assessment; *Collins v. Keokuk*, 118 Iowa, 30, 91 N. W. 791, holding that injunction will not lie to correct error of over assessment; *Nixon v. Burlington*, 141 Iowa, 316, 115 N. W. 239, 18 A. & E. Ann. Cas. 1037, holding property owners objecting to proposed assessment, are entitled to enjoin its enforcement by failure to appeal.

When court has jurisdiction of appeal from assessment.

Cited in *Marion v. National Loan & Invest. Co.* 122 Iowa, 629, 98 N. W. 488, holding complaint filed with board of review essential to give court jurisdiction of appeal from assessment.

Power to change assessed valuation without notice.

Cited in *State ex rel. Jennings Bros. Invest. Co. v. Armstrong*, 19 Utah, 117, 56 Pac. 1076, holding that county board of equalization has power to charge assessed valuation of all property in particular district without notice to property owners individually.

33 AM. REP. 119, IRONS v. KENTNER, 51 IOWA, 88, 50 N. W. 73.**What constitutes bailment.**

Cited in reference note in 42 A. R. 474, on storing grain in warehouse as bailment.

Distinction between sale and bailment.

Cited in reference notes in 2 A. S. R. 711, on distinction between sale and bailment; 11 A. S. R. 179, as to whether contract is bailment or sale.

Cited in note in 94 A. S. R. 226, on effect of custom or usage as to whether transaction is an absolute sale or a bailment.

Liability of bailee for loss by fire.

Cited in note in 30 A. S. R. 507, on liability of bailee for loss by fire.

Liability of warehouseman for destruction of property in store.

Cited in *Dean v. Lammers*, 63 Wis. 331, 23 N. W. 892, holding warehouseman not liable for subsequent destruction by fire, of wheat left in store.

Cited in note in 136 A. S. R. 238, on duty of warehousemen in care of property.

33 AM. REP. 121, NYE v. IOWA CITY ALCOHOL WORKS, 51 IOWA, 129, 50 N. W. 988.**Measure of damages for breach of contract to deliver.**

Explained in *Brownell v. Chapman*, 84 Iowa, 504, 35 A. S. R. 326, 51 N. W. 249, holding that measure of damages for breach of contract to deliver boilers and machinery for boat used at summer resort, was rental value of boat during time owner was deprived of its use.

Duty of purchaser on breach of contract to minimize damages.

Cited in *Kimball Bros. Co. v. Citizens Gas & Electric Co.* 141 Iowa, 632, 118 N. W. 891, on duty of purchaser to protect himself from damages on breach of contract.

33 AM. REP. 124, NEILSON v. IOWA EASTERN R. CO. 51 IOWA, 184, 1 N. W. 434.**Right to mechanics' lien.**

Cited in notes in 79 A. D. 270, on what is necessary to give materialmen lien where statute gives lien to persons contracting with owner or his agent; 11 L.R.A. 740, on rights of laborers and materialmen in mechanics' liens.

Implied or oral contract as basis of mechanics' lien.

Cited in *Foerder v. Wesner*, 56 Iowa, 157, 9 N. W. 100, holding implied contract for labor sufficient basis for mechanics' lien; *Carney v. Cook*, 80 Iowa, 747, 45 N. W. 919, holding implied contract for materials sufficient basis for mechanics' lien; *Chase v. Garver Coal Co.* 90 Iowa, 25, 57 N. W. 648, holding un-

necessary that agreement for labor and material be expressed, it may be sufficient if implied.

Cited in reference note in 65 A. S. R. 179, on oral contract as foundation for mechanics' lien.

What property is subject to mechanics' lien.

Cited in *Hale v. Burlington*, C. R. & N. R. Co. 13 Fed. 203, to point that rolling stock of railroad is not subject to mechanics' lien.

Cited in reference notes in 1 A. S. R. 697, as to what mechanics' lien is given for; 9 A. S. R. 538, as to what estate mechanics' lien attaches to; 34 A. S. R. 123, on what lien of materialmen attaches to.

Cited in notes in 45 A. D. 679, on estates and liens affected by mechanics' liens; 8 L.R.A. 702, on mechanics' lien law as applicable to railroads; 64 A. D. 679; 31 L.R.A. (N.S.) 749, 751,—on materials furnished for structure, but not actually used, as basis of mechanics' lien.

Actual use of materials as essential to mechanics' lien.

Cited in *Scott v. Goldinghorst*, 123 Ind. 268, 24 N. E. 333, holding that right to mechanics' lien cannot be defeated by owners failure to complete work; *Leé v. Hoyt*, 101 Iowa, 101, 70 N. W. 95, holding that materialman's lien cannot be defeated by evidence that material furnished was not actually used for purpose intended; *Westinghouse Air Brake Co. v. Kansas City S. R. Co.* 171 C. C. A. 1, 137 Fed. 26; *Frudden Lumber Co. v. Kinnan*, 117 Iowa, 93, 90 N. W. 515,—holding that actual use of furnished material need not be shown; *Hobson Bros. v. Townsend*, 126 Iowa, 453, 102 N. W. 413, holding not essential that materials furnished were actually used in building; *Trammell v. Mount*, 68 Tex. 210, 2 A. S. R. 479, 4 S. W. 377, holding mechanics' lien not defeated, though material not delivered at or near building, if delivery there prevented by owner's act or direction.

Necessity for filing statement of mechanics' lien.

Cited in *Hill v. Alliance Bldg. Co.* 6 S. Dak. 160, 55 A. S. R. 819, 60 N. W. 752, holding that failure to file required statement will not defeat mechanics' lien except as against bona fide encumbrances or purchasers; *Bissell v. Lewis*, 56 Iowa, 231, 9 N. W. 177, holding filing of statement not essential to validity of mechanic's lien against holders of other existing liens; *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa, 25, 65 N. W. 1017, holding that filing of insufficient statement, or failure to file any statement will not defeat lien as against owner; *Squier v. Parks*, 56 Iowa, 407, 9 N. W. 324, to point that as between contractor and owner lien exists without filing of statement; *Peatman v. Centerville Light, Heat & P. Co.* 105 Iowa, 1, 67 A. S. R. 276, 74 N. W. 689, to point that filing of verified statement of claim is unnecessary in order to perfect lien as against owner.

Railroad property as real or personal.

Cited in *Kirkpatrick v. Cornwall Electric Street R. Co.* 2 Ont. L. Rep. 113, as to whether rolling stock of railroad is real or personal.

Cited in notes in 66 L.R.A. 59, as to whether railroad property is real estate or personal property; 66 L.R.A. 55, as to whether railroad rolling stock and construction materials are real estate or personal property for purposes of taxation; 66 L.R.A. 51, as to whether railroad rolling stock is real estate or personal property; 66 L.R.A. 38, as to whether railroad right of way is real estate or personal property.

33 AM. REP. 129, KNOXVILLE NAT. BANK v. CLARKE, 51 IOWA, 264, 1 N. W. 491.

Effect of alteration of instrument.

Cited in *Lehman v. Central R. & Bkg. Co.* 12 Fed. 595, holding common carriers not liable for loss occasioned by forgery of shipper in raising bill of lading; *Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949, holding that promissory note, altered in material particular without sureties knowledge or consent becomes void as to surety; *Porter v. Hardy*, 10 N. D. 551, 88 N. W. 458; *Scofield v. Ford*, 56 Iowa, 370, 9 N. W. 309,—holding severance of contract, leaving one portion in form negotiable promissory note, material alteration; *Conger v. Crabtree*, 88 Iowa, 536, 45 A. S. R. 249, 55 N. W. 335, holding that unauthorized material alteration of negotiable note makes same void in hands of innocent purchaser; *First Nat. Bank v. Zeims*, 93 Iowa, 140, 61 N. W. 483, holding instrument, not in form promissory note, altered and forged so as to make promissory note, void in all hands.

Cited in notes in 86 A. S. R. 121, on effect upon rights of parties of alteration of instrument facilitated by negligence of maker; 31 L.R.A. (N.S.) 650, 653, on alteration of note by inserting place of payment; 2 E. R. C. 695, on effect of alteration of written instrument.

— Effect of raising of note upon rights of innocent holder.

Cited in *Exchange Nat. Bank v. Bank of Little Rock*, 22 L.R.A. 686, 7 C. C. A. 111, 19 U. S. App. 152, 58 Fed. 140, holding bank not liable to innocent purchaser from one of its own clerks, for draft raised by him; *Walsh v. Hunt*, 120 Cal. 46, 39 L.R.A. 697, 52 Pac. 115, holding mortgage note raised by stranger after execution good as to original amount; *Fordyce v. Kosminski*, 49 Ark. 40, 4 A. S. R. 18, 3 S. W. 892; *Searles v. Seipp*, 6 S. D. 412, 61 N. W. 804, holding note raised in amount after delivery and without maker's consent, void as to such maker; *Merritt v. Boyden*, 191 Ill. 136, 85 A. S. R. 246, 60 N. E. 907, holding that fraudulent alteration of note after delivery by raising amount, invalidates note in hand, of innocent holder; *Bank of Herington v. Wangerin*, 65 Kan. 423, 59 L.R.A. 717, 70 Pac. 330, holding note fraudulently raised unenforceable by innocent holder; *Burrows v. Klunk*, 70 Md. 451, 14 A. S. R. 371, 3 L.R.A. 576, 17 Atl. 378, holding note fraudulently raised by inserting amount in blank spaces, void in hands of innocent purchaser.

Cited in note in 22 L.R.A. 686, on liability of maker or drawer on raised negotiable paper.

— Effect of alteration which changes place of payment.

Cited in *Charlton v. Reed*, 61 Iowa, 166, 47 A. R. 808, 16 N. W. 64, holding alteration of promissory note which changes place of payment material alteration; *Simmons v. Atkinson & L. Co.* 69 Miss. 862, 23 L.R.A. 599, 12 So. 263, holding insertion of words "or bearer" and place of payment material alteration which avoids note in hands of bona fide purchaser.

— Effect of inserting provision for interest.

Cited in *First Nat. Bank v. Hall*, 83 Iowa, 645, 50 N. W. 944, holding that insertion of rate of interest in blank space, by payee after delivery, renders note invalid; *Derr v. Keaough*, 96 Iowa, 397, 65 N. W. 339, holding note altered by fraudulently inserting provision for interest, void in all hands.

Effect of leaving spaces or blanks in note.

Cited in *National Exch. Bank v. Lester*, 194 N. Y. 461, 21 L.R.A. (N.S.) 402, 87 N. E. 779, 16 A. & E. Ann. Cas. 770, holding indorser not liable for fraud-

ulent raising of promissory note after indorsement because spaces in note rendered forgery easy.

Cited in reference note in 42 A. R. 135, on negligence in leaving blank in negotiable instrument.

Cited in notes in 35 L.R.A. 469, on filling blanks in note as affecting bona fide holders; 21 L.R.A.(N.S.) 403, on duty to see spaces on commercial paper are filled so as to prevent raising; 4 E. R. C. 647, on liability to bona fide holder of party issuing negotiable paper left blank in material part.

Defenses to note, generally.

Cited in *First Nat. Bank v. Johns*, 22 W. Va. 520, 46 A. R. 506, holding maker of negotiable note liable thereon to bona fide holder, though induced to execute note by fraud.

Distinguished in *Graff v. Logue*, 61 Iowa, 704, 17 N. W. 171, holding not defense to note as against innocent holder that it was put in circulation in violation of agreement to hold same.

33 AM. REP. 139, STATE v. LINDLEY, 51 IOWA, 343, 1 N. W. 484.

Character as evidence in criminal action.

Cited in *State v. House*, 108 Iowa, 68, 78 N. W. 859, holding that good character is not defense, but should be considered, in connection with all other facts, in determining guilt; *Com. v. Leonard*, 140 Mass. 473, 54 A. R. 485, 4 N. E. 96; *State v. Blue*, 17 Utah, 175, 53 Pac. 978,—holding that accused may introduce evidence of his good character without reference to apparently conclusive or inconclusive character of other evidence.

Cited in reference note in 25 A. S. R. 730, on admissibility of evidence of good moral character as defense.

Cited in notes in 103 A. S. R. 891, on admissibility of evidence of defendant's good character for purpose of creating doubt as to his guilt; 103 A. S. R. 908, on weight to be given evidence of defendant's good character when criminating evidence is positive, direct, or very strong; 8 L.R.A. 302, on good character as defense in criminal law; 20 L.R.A. 619, on weight and effect of evidence as to character of accused.

33 AM. REP. 140, BRIGHAM v. MYERS, 51 IOWA, 397, 1 N. W. 613.

Reservation of excessive bonus by lender's agent as usury.

Cited in *Greenfield v. Monaghan*, 85 Iowa, 211, 52 N. W. 193, holding that agent's unauthorized and unratified reservation of excessive bonus does not make loan usurious; *Call v. Palmer*, 116 U. S. 98, 29 L. ed. 559, 6 Sup. Ct. Rep. 301; *Scruggs v. Scottish Mortg. Co.* 54 Ark. 566, 16 S. W. 563; *Acheson v. Chase*, 28 Minn. 211, 9 N. W. 734,—holding that reservation of excessive bonus by lender's agent, without lender's knowledge, does not make loan usurious; *Brown v. Brown*, 38 S. C. 173, 17 S. E. 452, holding loan vitiated for usury where lender had knowledge that its agent took commission for himself beyond legal rate of interest; *Barger v. Taylor*, 30 Or. 228, 47 Pac. 618, to point that reservation of commission in excess of lawful interest, by agent, without principals knowledge or consent, does not make loan usurious.

Cited in reference note in 39 A. R. 69, on effect of agent charging commission beside lawful interest on loan with knowledge of principal.

Cited in note in 19 L.R.A.(N.S.) 392, on commissions charged borrower by lender's agent as usury.

33 AM. REP. 143, SHEPARD v. WHETSTONE, 51 IOWA, 457, 1 N. W. 753.**Effect of alteration of note.**

Cited in *Light v. Killinger*, 16 Ind. App. 102, 59 A. S. R. 313, 44 N. E. 760, holding that insertion, by legal holder, of name of bank in blank space after words "payable at," will not invalidate note, where made in pencil as memorandum, merely, and action is on note in its original form.

Cited in note in 28 A. R. 259, on validity of altered note in hands of bona fide holder.

— Which is restored to original condition.

Cited in notes in 86 A. S. R. 119, on effect upon rights of parties of alteration of instrument which is restored to its original condition; 35 L.R.A. 467, on effect of restoration of altered bill on rights of bona fide holders.

Materiality of alterations of negotiable instrument.

Cited in note in 4 L.R.A. 197, on materiality of alterations of negotiable instruments.

Presumption as to time of apparent alteration of instrument.

Cited in note in 86 A. S. R. 130, on presumption as to time of apparent alteration of instrument.

33 AM. REP. 146, LONGUEVILLE v. WESTERN ASSUR. CO. 51 IOWA, 553, 2 N. W. 394.**Construction of insurance contract.**

Cited in notes in 43 A. R. 35, on construction of words "contained in" as used in insurance policy on furniture or other chattels; 14 E. R. C. 20, on rules of construction of contracts of insurance.

Effect of removal of insured property.

Cited in *Benton v. Farmers' Mut. F. Ins. Co.* 102 Mich. 281, 26 L.R.A. 237, 60 N. W. 691, holding insurer not liable for loss of goods in new barn where old barn on same property was one insured; *Eddy v. Farmers' Mut. Ins. Co.* 20 App. Div. 109, 46 N. Y. Supp. 695 (affirming 18 Misc. 297; 41 N. Y. Supp. 854), holding that policy issued by co-operative insurance company, authorized to do business in certain place, only, covers loss to stallion insured thereunder while temporarily in training outside of company's territory; *Niagara F. Ins. Co. v. Elliott*, 85 Va. 962, 17 A. S. R. 115, 9 S. E. 694, holding that policy on vehicle "contained in" livery stable, covers loss while at repair shop, elsewhere; *Noyes v. Northwestern Nat. Ins. Co.* 64 Wis. 415, 54 A. R. 631, 25 N. W. 419, holding that policy covering wearing apparel "contained in" certain dwelling covers loss to cloak while at furriers for repairs; *Boyd v. Mississippi Home Ins. Co.* 75 Miss. 47, 21 So. 708, on construction of policy as to words "contained in."

Cited in reference note in 8 A. S. R. 689, on construction of insurance policy with reference to situation of property.

Cited in notes in 95 A. D. 762, on effect of temporary removal on insurance on movable property; 26 L.R.A. 240, on location of household goods and wearing apparel as affecting fire insurance thereon.

Distinguished in *Green v. Liverpool & L. & G. Ins. Co.* 91 Iowa, 615, 60 N. W. 189, holding that policy insuring property "while contained in" certain building will not cover loss elsewhere though in its ordinary necessary and convenient use when burned; *Lakings v. Phoenix Ins. Co.* 94 Iowa, 476, 28 L.R.A. 70, 62 N. W. 783, holding that policy describing property as "located in" certain building

will not cover loss to such property while temporarily in another place, where application was for insurance thereon "while on premises only;" *Bradbury v. Fire Ins. Asso.* 80 Me. 396, 15 Atl. 34, holding that policy covering hack "contained in" certain stable did not cover loss while temporarily at another place for repairs.

33 AM. REP. 148, *STATE v. KAUFMAN*, 51 IOWA, 578, 2 N. W. 275.

Right to jury trial in criminal cases.

Cited in reference note in 15 A. S. R. 158, on right to jury trial in criminal cases.

Right of accused to waive statutory provisions.

Cited in *State v. Smith*, 132 Iowa, 645, 109 N. W. 115, holding that misconduct of counsel in argument to jury may be waived by accused in criminal case by failure to object.

— **Of trial by jury generally.**

Cited in *Brewster v. People*, 183 Ill. 143, 55 N. E. 640, holding trial by jury may be waived on misdemeanor prosecution; *Re Staff*, 63 Wis. 285, 53 A. R. 285, 23 N. W. 587, holding statute permitting accused in criminal action to waive jury trial, not unconstitutional; *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428, to point whether defendant under indictment for illegally selling liquor may waive jury trial; *State v. Carman*, 63 Iowa, 130, 50 A. R. 741, 18 N. W. 691 (dissenting opinion), on right of accused in criminal action to waive jury trial.

Cited in reference note in 50 A. R. 741, on validity of waiver of trial by jury in criminal case.

Cited in notes in 31 A. R. 38; 36 L. ed. U. S. 988; 5 L.R.A. 836,—on right to waive trial by jury in criminal cases.

— **Trial by full jury.**

Cited in *United States v. Shaw*, 59 Fed. 110, holding that one charged with misdemeanor may waive full jury; *Schick v. United States*, 195 U. S. 65, 49 L. ed. 99, 24 Sup. Ct. Rep. 826, 1 A. & E. Ann. Cas. 585, holding that defendant in action by United States to recover penalty, may waive jury trial; *Busse v. Barr*, 132 Iowa, 463, 109 N. W. 920, holding that constitutional right for benefit of accused may be waived; *State v. Crossheim*, 79 Iowa, 75, 44 N. W. 541; *State v. Sackett*, 39 Minn. 69, 38 N. W. 773,—holding that accused in criminal action may when permitted by court and state does not object consent to trial before eleven jurors; *Dickinson v. United States*, 86 C. C. A. 625, 159 Fed. 801 (dissenting opinion), on right to waive trial by full jury in misdemeanor case; *State v. Cody*, 18 Or. 506, 24 Pac. 895 (dissenting opinion), to point that accused may waive trial by full number of twelve jurors; *Jennings v. State*, 134 Wis. 307, 14 L.R.A.(N.S.) 862, 114 N. W. 402 (dissenting opinion), on right of accused in criminal action to waive trial by full number of twelve jurors.

Cited in notes in 43 L.R.A. 60, on consent and waiver as to number and agreement of jurors; 43 L.R.A. 63, 64, on consent and waiver as to number and agreement of jurors in felony cases; 14 L.R.A.(N.S.) 864, on right to waive absence of jurymen in criminal case.

Distinguished in *Territory v. Ah Wah*, 4 Mont. 149, 47 A. R. 341, 1 Pac. 732, holding that accused in felony case cannot waive trial by full number of twelve jurors.

Disapproved in *Territory v. Ortiz*, 8 N. M. 154, 42 Pac. 87, holding that accused

in felony case cannot waive constitutional right to trial by common lay jury of twelve men.

— As to incompetency of juror.

Cited in *State v. Pickett*, 103 Iowa, 714, 39 L.R.A. 302, 73 N. W. 346, holding that accused may waive incompetency of juror.

— As to separation of jury.

Cited in *State v. McMahon*, 17 Nev. 365, 30 Pac. 100, holding that defendant in felony case may waive objection to separation of jury.

— Presentment or indictment by grand jury.

Cited in *Edwards v. State*, 45 N. J. L. 419, holding that accused may waive presentment or indictment by grand jury.

— Finding of indictment by less than full grand jury.

Cited in *State v. Belvel*, 89 Iowa, 405, 27 L.R.A. 846, 56 N. W. 545, holding that accused in criminal action may waive objection that indictment was found by grand jury of less number than law required.

Right to jury trial to determine degree of murder upon plea of guilty.

Cited in *State v. Almy*, 67 N. H. 274, 22 L.R.A. 744, 28 Atl. 372, holding that one who has pleaded guilty to indictment for murder, upon which conviction either of first or second degree is warranted, has no constitutional right to jury trial to determine degree.

What is contemplated by right to trial by jury.

Cited in *Collins v. State*, 88 Ala. 212, 7 So. 260, holding that constitutional right of trial by jury, in all prosecution by indictment, contemplates common law jury of twelve men.

Number and agreement of jurors necessary to valid verdict.

Cited in notes in 43 L.R.A. 70, 71, on number and agreement of jurors necessary to constitute valid verdict in case of absent, sick, or unqualified juror; 43 L.R.A. 42, on construction of constitutional provisions as to number and agreement of jurors necessary to constitute valid verdict.

33 AM. REP. 152, ANGELL v. JOHNSON, 51 IOWA, 625, 2 N. W. 435.

Necessity of claiming exemption of property from execution.

Cited in reference note in 62 A. S. R. 116, on necessity of claiming exemption of property from execution.

Waiver of right to claim exempt property.

Cited in *Green v. Blunt*, 59 Iowa, 79, 12 N. W. 762; *Moffitt v. Adams*, 60 Iowa, 44, 14 N. W. 88,—holding that execution debtor who fails to object when exempt property is levied upon, waives right to claim such property as exempt; *Grover v. Younie*, 110 Iowa, 446, 81 N. W. 684, holding that giving of mortgage on one of three teams, any one of which might have been claimed as exempt, waives right to claim that one as exempt.

Cited in notes in 76 A. D. 224, on waiver of benefit of exemption statutes; 31 A. R. 44, on right of debtor to waive in advance benefit of exemption laws.

Distinguished in *Ellsworth v. Savre*, 67 Iowa, 449, 25 N. W. 699, holding that under code as amended execution debtor does not waive right to hold property exempt by failing to object when property seized, unless officer requires him to designate property claimed as exempt.

Estoppel of pledgee.

Distinguished in *Gunsell v. McDonnell*, 67 Iowa, 521, 25 N. W. 759, holding that pledgee of property seized under chattel mortgage did not waive rights thereto by failing to assert lien when property seized.

33 AM. REP. 154, CALWELL v. BOONE, 51 IOWA, 687, 2 N. W. 614.**Liability of municipal corporation for acts of its officers.**

Cited in *Kansas City v. Lemen*, 6 C. C. A. 627, 12 U. S. App. 640, 57 Fed. 905, holding city not liable for wrongful act of its mayor in closing without color of law, exhibition, with intent to injure and oppress owner thereof; *Greene County v. Boswell*, 4 Ind. App. 133, 30 N. E. 534, holding county not liable for failure of county commissioners to keep jail in healthy condition; *Ball v. Woodbine*, 61 Iowa, 83, 47 A. R. 805, 15 N. W. 846, holding town not liable for injuries sustained during unlawful discharge of fireworks, though its officers participate therein, and it makes no attempt to stop unlawful proceeding; *Lahner v. Williams*, 112 Iowa, 428, 84 N. W. 507, holding town not liable to one unlawfully arrested, for negligence of authorities in not keeping lockup in proper condition; *Gormly v. Mt. Vernon*, 134 Iowa, 394, 108 N. W. 465, holding town not liable for unauthorized acts of its officials; *Ulrich v. St. Louis*, 112 Mo. 138, 34 A. S. R. 372, 20 S. W. 466, holding city not liable for negligence of superintendent of workhouse in directing prisoner to harness known vicious mule; *Murray v. Omaha*, 66 Neb. 279, 103 A. S. R. 703, 92 N. W. 299, holding city not liable for torts of members of board for inspection of public buildings; *Condict v. Jersey City*, 46 N. J. L. 157, holding city not liable for negligence of ash cart driver employed by its board of public works, though driver at time driving horse and cart owned by city.

Cited in reference note in 100 A. D. 360, on liability of city for acts of its officers or agents within the scope of the powers of the corporation and of their employment.

Cited in note in 108 A. S. R. 167, on status of various boards, commissions, and bureaus as agents of municipality as affecting its liability for injuries from defective public places.

Distinguished in *Shinnick v. Marshalltown*, 137 Iowa, 72, 114 N. W. 542, holding city which directs police officer to place obstruction in street cannot escape liability on ground of nonliability for acts of officer; *Oklahoma City v. Hill Bros.* 6 Okla. 114, 50 Pac. 242, holding city for ratified trespass of its officers in acquiring possession of real estate, which might have been acquired by lawful means; *Eberg-Gunst Cigar Co. v. Portland*, 34 Or. 282, 75 A. S. R. 651, 43 L.R.A. 435, 55 Pac. 961, holding city liable for negligence of its servants in maintenance of waterworks system operated by it.

— Common council.

Cited in *Lerch v. Duluth*, 88 Minn. 295, 92 N. W. 1116, holding city not liable for common council's unlawful attempt to revoke permit to remove building; *Claussen v. Luverne*, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 A. & E. Ann. Cas. 673, holding municipality not liable in tort for mistaken action of city council in attempting to revoke liquor license.

— Police officers.

Cited in *Trescott v. Waterloo*, 26 Fed. 592, holding city not liable in action for false imprisonment for imprisonment under void ordinance; *Blake v. Pon-*

tiac, 49 Ill. App. 543, holding city not liable for unlawful detention in calaboose; *Culver v. Streator*, 130 Ill. 238, 6 L.R.A. 270, 22 N. E. 810, holding city not liable for accidental shooting by police officers while killing unlicensed dog; *Easterly v. Irwin*, 99 Iowa, 694, 68 N. W. 919, holding town not liable for arrest and imprisonment for alleged violation of ordinance, though party arrested innocent and ordinance invalid; *Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490, holding city not liable for unlawful arrest made by city marshall; *Carter v. Worcester County*, 94 Md. 621, 51 Atl. 830, holding municipal corporation not liable in action for false imprisonment for tort of its agent; *Worley v. Columbia*, 88 Mo. 106, holding city not liable for trespass of police officer committed while enforcing void ordinance; *Kelley v. Cook*, 21 R. I. 29, 41 Atl. 571, holding city not liable for unlawful acts or negligence of police officer while in performance of public service; *Royce v. Salt Lake City*, 15 Utah, 401, 49 Pac. 290, holding city not liable for unlawful arrest and commitment; *McCleave v. Moncton*, 35 N. B. 296, holding city is not liable for act of police officer in unlawfully breaking and entering premises and carrying away intoxicating liquors kept for sale.

Cited in reference note in 13 A. S. R. 686, on liability of municipal corporation for torts of its police officers and other agents.

Cited in notes in 30 A. S. R. 401, 402, on municipal liability for negligence or misconduct of police department; 15 L.R.A. 783, on liability of municipal corporation for acts of policemen; 44 L.R.A. 796, 797, 800, 801, on municipal liability for false imprisonment and unlawful arrest; 12 L.R.A.(N.S.) 539, on municipal liability for torts of police officers.

— Firemen.

Cited in *Saunders v. Ft. Madison*, 111 Iowa, 102, 82 N. W. 428, holding city not liable for acts of firemen in wantonly ringing bell attached to fire apparatus; *Gillespie v. Lincoln*, 35 Neb. 34, 16 L.R.A. 349, 52 N. W. 811, holding city not liable at common law for negligent acts of members of fire department.

— Health officers.

Cited in *Beeks v. Dickinson County*, 131 Iowa, 244, 6 L.R.A.(N.S.) 831, 108 N. W. 311, 9 A. & E. Ann. Cas. 812, holding county not liable for negligence of health officers in enforcement of quarantine regulations.

Municipal liability for injury by persons coasting in street.

Cited in note in 35 A. R. 781, on municipal liability for injury by persons coasting in street.

Distinction between private and public functions of municipalities.

Cited in note in 1 L.R.A.(N.S.) 666, on distinction between private and public functions of municipalities.

Arrest under void ordinance as false imprisonment.

Cited in note in 67 A. S. R. 424, on arrest under void ordinance as false imprisonment.

Liability of quasi corporation generally for tort of agent.

Cited in *Hern v. Iowa State Agri. Soc.* 91 Iowa, 97, 24 L.R.A. 655, 58 N. W. 1092, holding Iowa State Agricultural Society not liable for torts of its agents committed outside of scope of employment.

Nature of city title to fee of street.

Cited in *Waterloo v. Union Mill Co.* 72 Iowa, 437, 34 N. W. 197, holding that city holds fee of street, or easement thereon, in trust for public.

33 AM. REP. 156, THOMAS v. WOODMAN, 23 KAN. 217.

Estoppel by acquiescence or laches.

Cited in *Logansport v. Uhl*, 99 Ind. 531, 50 A. R. 109, holding that owner of water power who without objection stands by and permits city, without first assessing and paying damages, to erect water works which diminish his power, is estopped to restrain city by injunction; *Peters v. Griffie*, 108 Ind. 121, 8 N. E. 727, holding parties who have actual knowledge of petition in drainage proceedings and that money has been expended on faith that proceedings are valid, and make no objection, estoppel to set up want of notice; *Hutchinson & S. R. Co. v. Kingman County*, 48 Kan. 70, 30 A. S. R. 273, 15 L.R.A. 401, 28 Pac. 1078, holding town which votes bonds to aid in construction of railroad, makes subscription and receives and retains certificate of stock estopped after construction of road to assert invalidity of petition for election to vote bonds.

Cited in reference note in 50 A. R. 118, on laches as bar to plaintiff's right to enjoin city from injuring his water power.

33 AM. REP. 165, STATE v. THOMPSON, 23 KAN. 338.

Proof of corporate existence in criminal action.

Cited in *Miller v. People*, 13 Colo. 166, 21 Pac. 1025, holding that defacto existence of corporation is all that is necessary to be shown, in trial of indictment for receiving stolen goods from corporation; *State ex rel. Coleman v. International Harvester Co.* 79 Kan. 371, 99 Pac. 603, holding general reputation as to defendant being a corporation admissible to prove same in action on information; *Morse v. Com.* 129 Ky. 294, 111 S. W. 714, holding incorporation of complainant in prosecution for embezzlement may be proved by parol; *Murphy v. State*, 36 Ohio St. 628, holding that on trial for larceny from corporation direct proof of incorporation is unnecessary; *State v. Missio*, 105 Tenn. 218, 53 S. W. 216, holding that existence of foreign corporation, such as common carrier, may be proved by evidence that company was engaged in carrying on business of public carrier through its agents and employees.

Presumption as to incorporation in criminal cases.

Cited in note in 22 L.R.A. 278, on presumption as to incorporation in criminal cases.

33 AM. REP. 167, CENTRAL BRANCH UNION P. R. CO. v. HENIGH, 23 KAN. 347.

Duty and liability as to injury to trespassing children.

Cited in *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 54 L.R.A. 314, 39 S. E. 82, holding one who makes excavation upon his land not responsible for injuries to children induced to enter upon land by alluring attractiveness of excavation; *Ryan v. Towar*, 128 Mich. 463, 92 A. S. R. 481, 55 L.R.A. 310, 87 N. W. 644, holding owner of land not liable for injuries to trespassing child, injured by dangerous machinery naturally calculated to attract them to premises.

Cited in note in 19 L.R.A. (N.S.) 1137, on application of doctrine of attractive nuisance to attraction on private premises.

— Liability of railroad company.

Cited in *Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan. 541, holding railroad company not responsible for injuries to trespassing child of two where employees not shown guilty of culpable negligence; *O'Connor v. Illinois C. R. Co.* 44 La.

Ann. 339, 10 So. 678, holding railroad company not liable for injuries to trespassing child injured while playing with two-wheeled dump cars; *Missouri P. R. Co. v. Cooper*, 57 Kan. 185, 45 Pac. 587, to point that railroad company's liability for injuries to trespassing child is measured by conduct after knowledge of presence; *Atchison, T. & S. F. R. Co. v. Plaskett*, 47 Kan. 107, 26 Pac. 401, holding railroad company which stops its train on crossing not to exceed minute, not liable for injuries to seven year old boy sustained while endeavoring to climb over car; *Wilson v. Atchison, T. & S. F. R. Co.* 66 Kan. 183, 71 Pac. 282, holding railroad company not liable for injuries to trespassing boy of twelve, sustained while jumping on and off slow moving train; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069, holding railroad company not liable for injury to trespassing boy of tender years, injured while swinging on cars moving through yards.

Cited in reference note in 51 A. R. 386, on street railway company's duty to child trespassing on car; 38 A. S. R. 258, on liability of railroad for injuries to boys trespassing on trains.

Cited in note in 40 A. R. 668, on railroad's duty to children respecting turntables.

Necessity for negligence on defendant's part in infant's action for injury.

Cited in note in 49 A. S. R. 415, on necessity for negligence on part of defendant in infant's action for injury.

Proximate cause of injury from car set in motion by third person.

Cited in note in 26 L.R.A.(N.S.) 720, on proximate cause of injury from car or engine set in motion by third person.

General finding of jury as controlled by special finding.

Cited in *Barber v. Thomas*, 66 Kan. 463, 71 Pac. 845; *Chicago, B. & Q. R. Co. v. Laughlin*, 74 Kan. 567, 87 Pac. 749,—to point that general findings of jury are controlled by special findings.

Contributory negligence as affecting recovery.

Cited in *Union P. R. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529, one guilty of contributory negligence cannot recover for injury unless it was intentionally or wantonly caused by defendant.

Contributory negligence as question for jury.

Cited in *Missouri P. R. Co. v. Pillsbury*, 29 Kan. 654, holding that whether one was guilty of contributory negligence in not suitably protecting haystack, forty rods from track against fire from engine, is question for jury.

33 AM. REP. 167, HORDER v. HORDER, 23 KAN. 391.

Validity and effect of gift from husband to wife.

Cited in *Tootle v. Coldwell*, 30 Kan. 125, 1 Pac. 329, holding that bona fide gift to wife, by husband who is solvent, and not for purpose of hindering, delaying or defrauding creditors, is valid; *Munger v. Baldridge*, 41 Kan. 236, 13 A. S. R. 273, 21 Pac. 159, to point that conveyance of real estate directly from husband to wife will be upheld so far as equitable.

Cited in reference note in 12 A. S. R. 393, on deed from husband to wife.

Cited in notes in 88 A. D. 55, on direct conveyance from husband to wife; 69 L.R.A. 377, on right of wife in property conveyed to her by husband as against the latter's heirs.

Am. Rep. Vol XVII.—39.

Effect of contracts between husband and wife.

Cited in reference note in 15 A. S. R. 531, on effect of contracts between husband and wife.

33 AM. REP. 169, MORRIS v. KENNEDY, 23 KAN. 408.**Note as payment.**

Cited in *Webb v. National Bank*, 67 Kan. 62, 72 Pac. 520, holding that taking of note for pre-existing debt is not payment unless expressly agreed to accept such note as payment.

Effect of laches in presenting check.

Cited in *People's State Bank v. Brown*, 80 Kan. 520, 23 L.R.A.(N.S.) 824, 103 Pac. 102, holding failure of vendor to present check for goods for two weeks, during which time vendee fails, does not waive his right to reclaim wheat.

Cited in notes in 22 L.R.A. 786, on release of indorser of check by delay in presenting it; 53 L.R.A. 433, on necessity of loss to discharge of drawer by delay in presenting check; 10 L.R.A.(N.S.) 542, on effect of laches of one accepting without indorsement transfer of worthless check or note of third person.

33 AM. REP. 171, GRAFFENSTEIN v. EPSTEIN, 23 KAN. 443.**Misrepresentations or warranties entitling to relief on contract.**

Cited in *Burns v. Mahannah*, 39 Kan. 87, 17 Pac. 319, holding that misrepresentations as to market price of article of general commerce did not avoid contract; *Sowers v. Parker*, 59 Kan. 12, 51 Pac. 888, holding mere representation of vendor that land cost him more than it did in fact, not ground for rescission of contract; *Lilienthal v. Suffolk Brewing Co.* 154 Mass. 185, 26 A. S. R. 234, 12 L.R.A. 821, 28 N. E. 151, holding that false statements as to market value of hops made to experienced dealer therein will not avoid contract.

Cited in notes in 11 A. S. R. 350, on false representations which will not avoid or vitiate contract; 6 E. R. C. 501, as to what will constitute a warranty in sense of condition on failure of which other party may repudiate contract in toto.

Distinguished in *Cavender v. Roberson*, 33 Kan. 626, 7 Pac. 152, holding vendee entitled to relief where vendor fraudulently represented that he would ship first class goods at price below current rate for same; *Nairn v. Ewalt*, 51 Kan. 355, 32 Pac. 1110, holding that vendors fraudulent representations entitles relief when there is no opportunity for investigation and representations are relied upon; *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. 108, holding false representations in answer to specific question, that another was paying same price for stock as vendee, good defense to action for purchase price; *Smith, K. & F. Co. v. Smith*, 166 Pa. 563, 31 Atl. 343, 36 W. N. C. 124, holding that explicit positive false statement by purchaser to induce vendor to sell at lower price, that vendor's competitor offered same article at certain price, justifies rescission of contract.

Limited in *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496, holding that false representations as to material existing facts, made with intent to deceive and which are relied upon are actionable.

Representation of value as warranty.

Cited in reference note in 35 A. R. 662, on when representation of value is warranty.

What constitutes fraud.

Cited in reference note in 43 A. R. 166, on false representation of value as fraud.

Cited in notes in 35 L.R.A. 418, on statements as to value as fraud; 12 E. R. C. 297, on what constitutes fraud.

Real estate broker's liability for false representation.

Cited in *Ripy v. Cronan*, 131 Ky. 631, 21 L.R.A.(N.S.) 305, 115 S. W. 791, holding real estate broker cannot be held liable for falsely representing that vendor would not sell for less than certain sum where no confidential relations existed with vendor.

33 AM. REP. 175, STATE EX REL. MITCHELL v. STEVENS, 23 KAN. 456.**When mandamus lies.**

Cited in *Welsford v. Weidlein*, 23 Kan. 601; *State ex rel. McBride v. Phillips County*, 26 Kan. 419,—holding that court should not allow writ to compel technical compliance with letter of law, if spirit of law be violated; *Rice v. Coffey County*, 50 Kan. 149, 32 Pac. 134, to point that mandamus should never be granted when its enforcement would work injustice or accomplish wrong; *State ex rel. Hathorn v. United States Exp. Co.* 95 Minn. 442, 104 N. W. 556, to point that mandamus should not issue unless some sufficient legal purpose is to be subserved; *Vincent v. Ellis*, 116 Iowa, 609, 88 N. W. 836, holding that mandamus will not issue to compel granting of contract to lowest bidder; *State ex rel. Norman v. D'Alemberte*, 30 Fla. 545, 11 So. 905, holding that tax collector will not be compelled to issue liquor license on permit granted by county commissioners on petition signed by less than majority of voters.

Cited in reference note in 1 A. S. R. 116, as to when mandamus lies.

—To compel recanvass of election returns.

Cited in *Brown v. Rush County*, 38 Kan. 436, 17 Pac. 304, holding that canvassing board may be compelled by mandamus to recanvass returns erroneously excluded; *State ex rel. Leech v. Choteau County*, 13 Mont. 23, 31 Pac. 879, holding that canvassing board may be compelled by mandamus to canvass returns rejected because of alleged illegal voting; *State ex rel. Bradford v. Harper County*, 34 Kan. 302, 8 Pac. 417; *State ex rel. Bradford v. Hamilton County*, 35 Kan. 640, 11 Pac. 902; *Shull v. Gray County*, 54 Kan. 101, 37 Pac. 994,—to point that court may refuse to compel canvass of returns which are grossly and manifestly fraudulent; *Parker v. Hughes*, 64 Kan. 216, 91 A. S. R. 216, 56 L.R.A. 275, 67 Pac. 637; *State ex rel. Bradford v. Malo*, 42 Kan. 54, 22 Pac. 349 (dissenting opinion),—to point that court will refuse to order canvass of returns, where large fraudulent vote was polled.

Private action to enjoin removal of county seat.

Cited in *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 757 (dissenting opinion), on right of private citizen to contest removal of county seat because of fraud in election; *Pond Creek v. Haskell*, 21 Okla. 711, 97 Pac. 338, on restraining removal of county seat.

Effect of pre-election promises on right to office.

Cited in *People ex rel. Bush v. Thornton*, 25 Hun, 456 (reversing 60 How. Pr. 457), holding that pre-election pledge to perform duties of office, if elected, for less than statutory salary does not disqualify candidate from holding office.

33 AM. REP. 179, KELLEY v. CAPLICE, 23 KAN. 474, Later appeal in 27 Kan. 359.

What contracts are unconscionable.

Cited in *Ruppert v. Frauenknecht*, 146 Ill. App. 397, holding contract for transfer of benefit certificate in consideration of amount less than its face is valid and not unconscionable.

Cited in reference note in 41 A. R. 713, as to what contracts are unconscionable and unenforceable.

Cited in note in 81 A. S. R. 667, on unconscionable contracts.

Right to relief from unconscionable contract.

Cited in *Pindall v. Waterman*, 84 Ark. 575, 120 A. S. R. 87, 106 S. W. 964, holding that equity will grant relief against unreasonable, oppressive and exorbitant fee for attorney's services; *Brown v. Hall*, 14 R. I. 249, 51 A. R. 375, holding that relief will be granted where one avails himself of urgent necessity of another, applying for loan, to exact unconscionable bargain; *Gottlieb v. Thatcher*, 34 Fed. 435, to point that extortionate and unconscionable contract will not be enforced.

Cited in note in 18 E. R. C. 358, as to equitable relief against mortgage given for inadequate consideration to or for benefit of person in fiduciary relation toward borrower or who has exercised over him undue influence.

Right to specific performance.

Cited in reference note in 33 A. S. R. 837, as to when specific performance will be refused.

Cited in note in 6 E. R. C. 720, on necessity that contract should be fair or not impose unreasonable hardship to entitle one to specific performance.

33 AM. REP. 185, BEST v. ORALL, 23 KAN. 482.

Payment of promissory note as discharge.

Cited in *Weldon v. Tollman*, 15 C. C. A. 138, 32 U. S. App. 265, 67 Fed. 986, holding that one who pays note before maturity to another unauthorized to receive payment does so at own risk; *Bronson v. Ashlock*, 2 Kan. App. 255, 41 Pac. 1068, holding that payment of note before maturity, to holder's agent for collection of interest only, was at payer's risk.

Cited in note in 95 A. D. 587, on effect of payment of note by maker before maturity.

Pre-existing debt as valid consideration.

Cited in *National Bank v. Dakin*, 54 Kan. 656, 45 A. S. R. 299, 39 Pac. 180, holding that pre-existing debt affords sufficient consideration for transfer of collateral as security for its payment; *Birket v. Elward*, 68 Kan. 295, 104 A. S. R. 405, 64 L.R.A. 568, 74 Pac. 1100, 1 A. & E. Ann. Cas. 272, holding that endorsee of negotiable note taken as collateral security for pre-existing debt, is protected against claim of payment made to original payee.

Holder of bill or note as collateral as bona fide holder.

Cited in note in 31 L.R.A.(N.S.) 300, on holder of bill or note as collateral as bona fide holder.

When note payable on demand is overdue.

Cited in note in 4 E. R. C. 408, on treating note payable on demand as overdue if not presented in reasonable time.

33 AM. REP. 188, SMITH v. GORE, 23 KAN. 488.**Exempt character of proceeds from sale of homestead.**

Cited in *D. M. Osborne & Co. v. Evans*, 185 Mo. 509, 84 S. W. 867, holding proceeds from sale of homestead invested in lands not acquired for homestead not exempt from execution.

Cited in reference notes in 10 A. S. R. 804, as to when proceeds of sale of homestead are liable to execution; 32 A. S. R. 316; 76 A. S. R. 779,—on exemption of proceeds of homestead.

Cited in note in 19 L.R.A. 37, as to exemption of proceeds of homestead sold for reinvestment.

33 AM. REP. 191, COMSTOCK v. ADAMS, 23 KAN. 513.**Validity of divorce against nonresident not appearing.**

Cited in note in 19 L.R.A. 817, on validity of decree of divorce obtained on publication or service out of state where defendant did not appear.

Validity of collusive agreement between husband and wife for divorce.

Cited in note in 4 L.R.A. 313, on invalidity of collusive agreement between husband and wife in aid of divorce proceedings.

Right to attack validity of void or voidable divorce.

Cited in *Medina v. Medina*, 22 Colo. 146, 43 Pac. 1001, holding that fact that party to whom divorce has been granted has remarried and had child does not divest court of power to vacate decree; *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342, holding that decree of divorce obtained by fraud, will be set aside though party obtaining divorce has remarried; *Maher v. Title Guarantee & T. Co.* 95 Ill. App. 365 (dissenting opinion), on right to hold wife estopped by laches to attack fraudulent divorce decree.

Cited in note in 133 Am. St. R. 441, as to when estoppel exists against urging invalidity of void or voidable divorce.

Effect of reversal of divorce decree.

Cited in reference note in 74 A. S. R. 840, on annulment of decree of divorce.

Cited in note in 61 A. D. 467, on effect of setting aside or annulling divorce.

Distinguished in *Bailey v. Bailey*, 45 Hun, 278, holding one marrying in good faith after recovering judgment for divorce and before reversal on appeal, not guilty of adultery.

Validity of devise of entire homestead to wife.

Cited in *Martindale v. Smith*, 31 Kan. 270, 1 Pac. 569, holding that husband who has title to land occupied by himself and wife as homestead, may execute valid will giving entire property to wife.

Relation back of recording of will.

Cited in *Brooks v. McComb*, 38 Fed. 317, holding that conveyance made under power of sale in will, before will recorded, is made valid by subsequent recording of will.

Right of wife to devise her separate estate.

Cited in *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, holding that wife who has legal title to land occupied by herself and husband as homestead may devise one-half interest therein to third person without husband's consent.

33 AM. REP. 196, LAPIERE v. LUCKEY, 23 KAN. 534.

Present force of common law.

Cited in *Cooper v. Seaverns*, 81 Kan. 267, 135 A. S. R. 359, 25 L.R.A. (N.S.) 517, 105 Pac. 509, on present force of common law.

— Doctrine of ancient lights.

Cited in *Winn v. Abeles*, 35 Kan. 85, 57 A. R. 138, 10 Pac. 443; *Karasek v. Peier*, 22 Wash. 419, 50 L.R.A. 345, 61 Pac. 33,—to point that doctrine of ancient rights does not prevail.

Cited in reference note in 39 A. R. 777, on doctrine of ancient lights.

Easements in light, air, and prospect.

Cited in notes in 37 A. S. R. 184, on prescriptive easement of light and air; 22 L.R.A. 537, on American law as to easements of light, air, and prospect; 2 E. R. C. 567, on prescriptive right to light and air, not based on grant.

High board fence as nuisance.

Cited in *Triplett v. Jackson*, 5 Kan. App. 777, 48 Pac. 931, holding that high board fence on one's own land near or on line is not nuisance.

Liability for malicious erection of fence.

Cited in note in 40 L.R.A. 178, on liability for malicious erection of fence.

Effect of inadvertent omission of facts from pleadings.

Cited in *Reed v. Humphrey*, 69 Kan. 155, 76 Pac. 390, holding that inadvertent omission of facts are generally looked upon leniently by courts.

33 AM. REP. 199, HOGAN v. MANNERS, 23 KAN. 551.

Interest in land entitling to homestead rights.

Cited in *Chapman v. Tallant* (Merchants' Nat. Bank v. Kopplin), 1 Kan. App. 599, 42 Pac. 263, holding undivided one half of hotel constituted homestead of owner who resided there with family, and which was their only home; *Re Emerson*, 58 Minn. 450, 60 N. W. 23, holding that tenant for years is entitled to homestead on demised premises; *Birdwell v. Burleson* 31 Tex. Civ. App. 31, 72 S. W. 446, holding that interest of one claiming homestead exemption need not be such as is capable of assignment.

Cited in reference note in 7 A. S. R. 183, as to premises in which homestead may be acquired.

Cited in note in 70 A. D. 344, 345, as to what title is necessary to support homestead.

— Effect of using portion for business purposes.

Cited in notes in 87 A. D. 280, on effect upon homestead of part being used for business or rented; 12 L.R.A. 478, on effect upon homestead right of use by owner of portion of building for business purposes.

— Effect of leasing portion of premises.

Cited in *Rush v. Gordon*, 38 Kan. 535, 16 Pac. 700, holding homestead not destroyed because wife uses portion for retail grocery business; *Bebb v. Crowe*, 39 Kan. 342, 18 Pac. 223, holding homestead not destroyed though portion leased for business purposes; *Hoffman v. Hill*, 47 Kan. 611, 28 Pac. 623, holding that homestead rights will not necessarily be defeated by use for other purposes than homestead; *Layson v. Grange*, 48 Kan. 440, 29 Pac. 585, holding that house and three lots containing less than one acre within city homestead, though owner leased without any land small building thereon; *De Ford v. Painter*, 3 Okla. 80, 30 L.R.A. 722, 41 Pac. 96, holding that building partly used

as dwelling and partly leased to others for business purposes constitutes homestead; *Smith v. Guckenheimer*, 42 Fla. 1, 27 So. 900 (dissenting opinion), on right to hold homestead destroyed by leasing portion for business purposes.

Necessity, nature, and sufficiency of possession and occupation of homestead.

Cited in note in 70 A. D. 349, on necessity, nature and sufficiency of possession and occupation of homestead.

Mortgages on buildings upon leased premises.

Cited in note in 21 L.R.A. 348, on mortgages upon buildings upon leased premises.

33 AM. REP. 203, CENTRAL BRANCH UNION P. R. CO. v. TWINE, 23 KAN. 585.

Measure of damages for appropriation of street by railroad.

Cited in *Rockland & I. R. Co. v. Keyt*, 117 Ill. App. 32, holding that measure of damages for carrier's unauthorized maintenance of freight business in front of premises is depreciation in value of land; *Central Branch Union P. R. Co. v. Andrews*, 41 Kan. 370, 21 Pac. 276, holding that measure of damages is depreciation in value; *Blackwell, E. & S. W. R. Co. v. Gist*, 18 Okla. 516, 90 Pac. 889, holding railway company, which appropriates vacated street, liable in damages for depreciation of abutting land; *Anderson v. Atchison, T. & S. F. R. Co.* 71 Kan. 453, 80 Pac. 946, to point that railroad which appropriates street is liable for depreciation of abutting property; *Duychinck v. New York Elev. R. Co.* 3 Silv. Ct. App. 317, 26 N. E. 278, holding abutting owner entitled to compensation for injuries to air, light and access to street caused by construction and operation of elevated railway.

Recovery of prospective damages from permanent obstructions.

Cited in *Gulf, C. & S. F. R. Co. v. Moseley*, 20 L.R.A. (N.S.) 885, 88 C. C. A. 236, 161 Fed. 72, holding that landowner may recover in single action present and prospective damages caused by permanent dikes built along river; *St. Francis Levee Dist. v. Barton*, 92 Ark. 406, 135 A. S. R. 191, 25 L.R.A. (N.S.) 645, 123 S. W. 382, holding permanent injury to land caused by obstruction of drainage is caused at time of construction of obstruction, and subsequent tenant cannot recover; *Jacksonville, T. & K. W. R. Co. v. Lockwood*, 33 Fla. 573, 15 So. 327, holding that recovery should not be limited to damages suffered anterior to action; *Frankle v. Jackson*, 30 Fed. 398, to point that single recovery may be had for whole damage to result from permanent obstruction of street by railway.

Right to compensation, for property taken for public use.

Cited in *Kansas & A. Valley R. Co. v. Payne*, 1 C. C. A. 183, 4 U. S. App. 77, 49 Fed. 114, holding ferry company not entitled to injunction against granting of right to building of bridge for vehicles and foot passengers, from land to which ferry frontage is attached as action at law for proper compensation exists.

Right to access to street.

Cited in notes in 14 L.R.A. 381, on abutter's easement of access to street; 15 L.R.A. (N.S.) 54, on cutting off access to highway as a taking.

Liability of railway company to abutting owner, for obstructing street.

Cited in *Hedrick v. Olathe*, 30 Kan. 348, 1 Pac. 118, holding that author-

ized use of street by railway does not deprive lot owner of damages suffered from wrongful use and occupation; *Central Branch Union P. R. Co. v. Andrews*, 30 Kan. 590, 2 Pac. 677, holding railroad company which wholly obstructs street or alley liable therefor to abutting owners; *Ottawa, O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 2 L.R.A. 59, 19 Pac. 661, holding railroad company liable for wrongful and unnecessary obstruction of street; *Kansas, N. & D. R. Co. v. Cuykendall*, 42 Kan. 243, 16 A. S. R. 479, 21 Pac. 1051; *Ft. Scott, W. & W. R. Co. v. Fox*, 42 Kan. 490, 22 Pac. 583, holding railroad company liable for permanently obstructing street, though lot accessible from another street; *Wichita & C. R. Co. v. Smith*, 45 Kan. 264, 25 Pac. 623, holding railroad company not liable for obstructing street unless owner's access virtually destroyed; *Leavenworth, N. & S. R. Co. v. Curtan*, 51 Kan. 432, 33 Pac. 297, holding railroad liable to abutting owner if access to property cut off; *Chicago, K. & W. R. Co. v. Union Invest. Co.* 51 Kan. 603, 33 Pac. 378; *Ottawa, O. C. & C. G. R. Co. v. Peterson*, 15 Kan. 604, 33 Pac. 606,—holding that railroad which leaves sufficient space between roadbed and abutting land for ordinary vehicles and travel, is not liable to landowner; *Atchison, T. & S. F. R. Co. v. Davidson*, 52 Kan. 739, 35 Pac. 787, holding railroad company liable to abutting owner for complete obstruction of street; *Atchison, T. & S. F. R. Co. v. Anderson*, 65 Kan. 202, 69 Pac. 158, holding lessee of street railroad constructing same is not liable to lot owner for obstructing his access to street; *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 20 Okla. 583, 30 L.R.A.(N.S.) 231, 95 Pac. 224, holding abutter whose access to street has been cut off by building of railway track may recover damages therefor; *Knapp, S. & Co. v. St. Louis Transfer Co.* 126 Mo. 26, 28 S. W. 627, holding railroad liable for unreasonable interference with access to and from abutting property; *Trosper v. Saline County*, 27 Kan. 391, to point that right of landowner to have access to land is right special to owner; *Kansas City & O. R. Co. v. Hicks*, 30 Kan. 288, 1 Pac. 396, to point that railway is liable to lot owner for obstructing access to lot; *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 11 L.R.A. 640, 26 N. E. 278, to point that abutting owner has easements in street of which he cannot be deprived without compensation.

Distinguished in *Inter-State Consol. Rapid Transit R. Co. v. Early*, 46 Kan. 197, 26 Pac. 422, holding railway company not liable to abutting land owner for change of grade authorized by city.

Right of property owner to enjoin vacating of street.

Cited in *Chicago v. Union Bldg. Asso.* 102 Ill. 379, 40 A. R. 598, holding that property owner cannot enjoin vacating of street where injuries suffered are such only as general public suffers.

33 AM. REP. 211, *PIAZZEK v. WHITE*, 23 KAN. 621.

Parties plaintiff in replevin or claim and delivery.

Cited in note in 80 A. S. R. 751, on parties plaintiff in replevin or claim and delivery.

Replevin against cotenancy.

Cited in reference note in 69 A. S. R. 915, on replevin against cotenancy.

Right of co-owner to recover possession of personal property.

Cited in reference note in 4 A. S. R. 313, on right of one co-owner of chattel to maintain replevin.

Cited in note in 50 A. S. R. 841, on action by cotenant to recover possession of personal property.

Right to replevy portion of wheat in stack.

Cited in *Pitman v. Baumstark*, 63 Kan. 69, 64 Pac. 968, holding that replevin may be maintained for portion of wheat in stack.

Validity of chattel mortgage upon commingled grain.

Cited in *Burton v. Cochran*, 5 Kan. App. 508, 47 Pac. 569, holding chattel mortgage upon five hundred bushels of wheat in granary containing 1900 bushels of same kind and grade, valid; *Muse v. Lehman*, 30 Kan. 514, 1 Pac. 804, holding chattel mortgage upon portion of wheat in bin, of same kind, not void.

When separation of articles is not essential to pass title.

Cited in *Howell v. Pugh*, 25 Kan. 96, holding that sale of portion of wheat in stack, all of same quality, passes title, though not separated; *Kingman v. Holinquist*, 36 Kan. 735, 59 A. R. 604, 14 Pac. 168, holding separation not essential to pass title to certain number of articles sold from ascertained lot, identical in kind and value.

33 AM. REP. 215, STATE v. LANTZ, 23 KAN. 728.

Misconduct of jury authorizing new trial.

Cited in *State v. Clark*, 34 Kan. 289, 8 Pac. 528, holding jury's reading and considering, without authority of court, affidavits upon which information was based such misconduct as requires new trial; *State v. McCormick*, 57 Kan. 440, 57 A. S. R. 341, 46 Pac. 777, holding that statements of juror in jury room concerning unproved facts may be presumed to have improperly influenced verdict; *State v. Schaben*, 69 Kan. 421, 76 Pac. 823, holding that use by jury of almanac, or any document that might influence verdict, is misconduct from which prejudice will be presumed; *State v. Stevenson*, 74 Kan. 193, 85 Pac. 797, holding misconduct of jury not ground for new trial unless court may presume that prejudice resulted therefrom; *State v. Baker*, 23 Or. 441, 32 Pac. 161, holding permitting jury to consider papers not in evidence ground for new trial.

Cited in note in 134 Am. St. R. 1052, on misconduct of jurors other than their separation for which a verdict may be set aside.

33 AM. REP. 217, STATE EX REL. SOARES v. HEBREW CONGREGATION, 31 LA. ANN. 205.

Jurisdiction of ecclesiastical tribunals.

Cited in note in 49 L.R.A. 394, on jurisdiction of ecclesiastical tribunals.

Jurisdiction of civil courts over ecclesiastical matters.

Cited in *State ex rel. Hatfield v. Cummins*, 171 Ind. 112, — L.R.A.(N.S.) —, 85 N. E. 359, holding mandamus will not lie to restore minister in religious organization; *Landrith v. Hudgins*, 121 Tenn. 556, 120 S. W. 783, on civil courts not reviewing action of ecclesiastical courts in excommunication of members.

Cited in notes in 100 A. S. R. 737, on jurisdiction of civil courts over expulsion of church members; 100 A. S. R. 740, on jurisdiction of civil courts over expulsion of pastor; 15 L.R.A. 801, on civil power to review excommunication of church member.

Jurisdiction of Louisiana supreme court in damage actions.

Cited in *Newell v. Leathers*, 50 La. Ann. 162, 69 A. S. R. 395, 23 So. 243, holding that court has jurisdiction of suit in which plaintiff makes affidavit that damages at issue exceed two thousand dollars.

33 AM. REP. 222, HARVEY v. NELSON, 31 LA. ANN. 434.**Sufficiency and effect of waiver of protest.**

Cited in reference notes in 35 A. D. 604, on waiver of demand for payment of note as waiver of nonpayment; 43 A. R. 201, on effect of waiver of notice and protest of negotiable instrument; 51 A. R. 536, on sufficiency and effect of waiver of protest of negotiable instrument.

33 AM. REP. 224, STATE v. BOTT, 31 LA. ANN. 663.**Constitutionality of liquor laws.**

Cited in notes in 15 L.R.A.(N.S.) 930; 28 L. ed. U. S. 696,—on constitutionality of laws regulating sale of liquor.

Municipal regulation of sale of intoxicating liquor.

Cited in note in 114 A. S. R. 298, 290, on general nature of municipal power to regulate dealing in intoxicating liquors.

—State delegation of power.

Cited in note in 114 A. S. R. 299, on delegation of power from state to municipality to regulate dealing in intoxicating liquors.

Validity of statutes prohibiting transaction of business on Sunday.

Cited in *Beauvoir Club v. State*, 148 Ala. 643, 121 A. S. R. 82, 42 So. 1040, holding legitimate exercise of legislature's police powers, to enact laws prohibiting sale of vinous liquors on Sunday; *Minden v. Silverstein*, 36 La. Ann. 912, holding that municipal ordinance prohibiting sale of spirituous liquors on Sunday is constitutional; *State ex rel. Walker v. Section "A" Judge*, 39 La. Ann. 132, 1 So. 437, holding that act known as Sunday law does not violate either state or Federal Constitution.

Cited in notes in 49 A. D. 621, on constitutionality of Sunday laws under the police power; 22 L.R.A. 722, on constitutionality of Sunday laws.

Overruled in *State v. Baum*, 33 La. Ann. 981, holding that act of 1878 authorizing police juries to prohibit sale of liquors on Sundays is unconstitutional, because all objects of law not expressed in title.

Validity of ordinance defining offenses unknown to state laws.

Distinguished in *State v. Harper*, 42 La. Ann. 312, 7 So. 446, holding that police jury ordinance to prevent retailing of spirituous liquors, which defines offenses and imposes fines unknown to laws of state, is null and void.

Holidays designated by statute as nonjudicial days.

Cited in *State v. Duncan*, 10 L.R.A.(N.S.) 791, 43 So. 283 (dissenting opinion), on right to hold that statute designating certain days as legal holidays does not have effect of making them nonjudicial days.

33 AM. REP. 229, NEW IBERIA v. SERRETT, 31 LA. ANN. 719.**Estoppel in pais.**

Cited in note in 11 E. R. C. 101, on estoppel in pais by conduct deceiving another to his injury.

—By receiving benefits.

Cited in *State ex rel. Michener v. Scanlon*, 2 Ind. App. 320, 28 N. E. 426, holding sheriff who illegally accepts deposit in lieu of bail estopped to deny legality of transaction, as against state; *Jefferson School Twp. v. School Town*, 5 Ind. App. 586, 32 N. E. 807, holding that township which has received and used fund cannot controvert legality of tax imposed or regularity of assessment; *Campbell v. Woolfolk*, 37 La. Ann. 320, holding that one cannot judicially claim proceeds of judicial sale and afterwards attack sale for nullity.

Power of common council to determine what is a nuisance.

Cited in *Monroe v. Gerspach*, 33 La. Ann. 1011, holding that right exists in council of city to determine what, in its nature and use, it deems nuisance.

33 AM. REP. 232, DESOBRY v. TETE, 31 LA. ANN. 809.

What are fiduciary debts within meaning of bankruptcy act.

Cited in *Upshur v. Briscoe*, 37 La. Ann. 138, holding that according to decision of United States Supreme Court exemption from discharge in bankruptcy of debts contracted "while acting in fiduciary capacity" does not include trusts resulting from relation of agents, etc.

Cited in reference notes in 77 A. D. 385, 386, as to what are fiduciary debts within meaning of bankrupt and insolvency laws; 77 A. D. 387, on effect of reduction of fiduciary debt to judgment as to whether it will be discharged in bankruptcy; 33 A. R. 647, on conversion of securities for a loan as act in fiduciary capacity within bankruptcy act.

—Factor's debt to principal.

Cited in *Chipley v. Frierson*, 18 Fla. 639; *Du Pont v. Beck*, 81 Ind. 271; *Baines v. Adams*, 33 La. Ann. 46,—holding debt due by factor to principal not of fiduciary character, and is discharged by his bankruptcy.

Cited in note in 39 A. R. 722, on "fiduciary character" of relation of factor to principal within bankruptcy act.

33 AM. REP. 239, BALTIMORE v. RADECKE, 49 MD. 217.

Validity of ordinance granting discretion to officials.

Cited in *Pacific States Supply Co. v. San Francisco*, 171 Fed. 727, holding city ordinance prohibiting blasting within certain portions of city except under permit from supervisors, is valid; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 68 A. S. R. 155, 42 L.R.A. 696, 51 N. E. 758, holding ordinance vesting arbitrary power in board of trustees to grant or refuse permission to draw heavy vehicles on "pleasure drive" invalid; *Richmond v. Dudley*, 129 Ind. 112, 28 A. S. R. 180, 13 L.R.A. 587, 28 N. E. 312, holding ordinance which gives municipal authorities arbitrary discretion in granting permission to store explosives, invalid; *Elkhart v. Murray*, 165 Ind. 304, 112 A. S. R. 228, 1 L.R.A.(N.S.) 940, 75 N. E. 593, 6 A. & E. Ann. Cas. 748, holding ordinance giving to common council discretion to approve fenders to be used by street railroad, invalid; *Baltimore v. Scharf*, 54 Md. 499, holding ordinance granting to city commission discretion to assess costs of improvement pro rata, void; *Hagerstown v. Baltimore & O. R. Co.* 107 Md. 178, 126 A. S. R. 382, 68 Atl. 490, holding ordinance granting to municipal officers arbitrary power in granting or refusing permit to keep cattle other than in enclosed struc-

tures, invalid; *Com. v. Maletsky*, 203 Mass. 241, 24 L.R.A.(N.S.) 1168, 89 N. E. 245, holding ordinance forbidding any person to occupy, use or maintain building for picking, storing, or sorting rags without a permit from fire chief, is invalid; *State ex rel. Omaha Gas Co. v. Withnell*, 78 Neb. 33, 126 A. S. R. 586, 8 L.R.A.(N.S.) 978, 110 N. W. 680, holding ordinance requiring written consent of property owners within certain radius for erection of gas tank, void; *Buffalo Fertilizer Co. v. Cheektowaga*, 61 Misc. 404, 113 N. Y. Supp. 901, holding ordinance prohibiting carrying of refuse through streets without written consent of highway commissioner is invalid; *Newwbern v. McCann*, 105 Tenn. 159, 50 L.R.A. 476, 58 S. W. 114, holding that ordinance that requires mayor's permission for owner of saloon to enter same on Sunday in case of necessity or emergency, is void; *Corrigan v. Kansas City*, 211 Mo. 608, 111 S. W. 115 (dissenting opinion), on right to authorize common council to determine what property shall or shall not be assessed.

Cited in note in 1 L.R.A.(N.S.) 941, on validity of ordinance granting discretion to officials.

Distinguished in *Wilson v. Eureka City*, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317, holding city ordinance prohibiting removal of building into or upon public street without permission of municipal officer not unconstitutional; *Boehm v. Baltimore*, 61 Md. 259, holding ordinance requiring permit from bureau of health to clean out privies, valid; *State v. Yopp*, 97 N. C. 477, 2 A. S. R. 305, 2 S. E. 458, holding statute which forbids use of bicycles on certain road, unless permitted by superintendent of road, constitutional.

Disapproved in *Com. v. Parks*, 155 Mass. 531, 30 N. E. 174, holding ordinance prohibiting, under penalty, blasting rock with gun powder within city limits, without aldermen's written consent, valid.

—As to granting of license to engage in business.

Cited in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064 (reversing 26 Fed. 471), holding that municipal ordinance to regulate public laundries, which confers upon municipal authorities arbitrary power, at own will, to permit carrying on business, is unconstitutional; *Montgomery v. West*, 149 Ala. 311, 123 A. S. R. 33, 9 L.R.A.(N.S.) 659, 42 So. 1000, 13 A. & E. Ann. Cas. 651, holding ordinance giving to council discretion to permit operation of steam engines, planing mills, etc., within city limits, void; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458, holding ordinance giving to city council discretion to grant and revoke butchers' license, void; *Jacksonville v. Ledwith*, 26 Fla. 163, 23 A. S. R. 558, 9 L.R.A. 69, 7 So. 885, holding that ordinance granting authority to regulate sales of meat must require that it be done impartially; *Ex parte Theisen*, 30 Fla. 529, 32 A. S. R. 36, 11 So. 901, holding that ordinance giving to city council discretion to permit sale of liquor within certain distance of church or school, is void; *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469 (dissenting opinion), on right to leave to discretion of county commissioners fitness of applicant for liquor license; *Sherlock v. Stuart*, 96 Mich. 193, 21 L.R.A. 580, 55 N. W. 845 (dissenting opinion), on validity of ordinance requiring that all applications for liquor licenses shall be made to city council.

Cited in note in 9 L.R.A.(N.S.) 660, on power of municipal corporation to make right to transact certain business dependent on consent of municipal authorities.

Distinguished in *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144, holding conferring of discretionary power by state upon administrative board to grant or refuse license to sell milk, not unconstitutional.

— **As to building permits.**

Cited in *Bostock v. Sams*, 95 Md. 400, 93 A. S. R. 394, 59 L.R.A. 282, 52 Atl. 655, holding municipal ordinance authorizing permit for new building to be refused at discretion of appeal tax court, invalid; *State v. Tenant*, 110 N. C. 609, 28 A. S. R. 715, 15 L.R.A. 423, 14 S. E. 387, holding ordinance requiring permission of aldermen to erect, improve or alter any home or building within city limits, void.

Distinguished in *Easton v. Covey*, 74 Md. 262, 22 Atl. 266, holding ordinance giving commissioners discretion to grant or refuse permit to erect new building, valid.

Disapproved in *Fischer v. St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673, holding city ordinance giving municipal assembly discretion to permit erection of dairy or cow stable within city, constitutional.

— **As to street parades.**

Cited in *Trotter v. Chicago*, 33 Ill. App. 206, holding ordinance giving to chief of police discretion to permit street parades, invalid; *State ex rel. Garrabad v. Dering*, 84 Wis. 585, 36 A. S. R. 948, 179 L.R.A. 858, 54 N. W. 1104, holding that ordinance giving mayor arbitrary power to grant or refuse permit for street parade is void; *Re Flaherty*, 105 Cal. 558, 27 L.R.A. 529, 38 Pac. 981 (dissenting opinion), on right to vest in president of board of trustees discretion to permit beating of drums in street.

Cited in note in 19 L.R.A. 858, on validity of ordinances as to street parades.

Distinguished in *Chariton v. Frazier*, 87 Iowa, 226, 54 N. W. 146, holding ordinance giving mayor discretion to grant permit for street processions, valid.

Validity of ordinances generally.

Cited in reference notes in 28 A. S. R. 184, on validity of municipal ordinances; 123 A. S. R. 45, on test of validity of municipal ordinances as denying equal protection of law; 34 A. D. 433, on validity of unreasonable municipal ordinances.

Distinguished in *St. Louis v. Meyrose Lamp Mfg. Co.* 139 Mo. 560, 61 A. S. R. 474, 41 S. W. 244, holding ordinance requiring engineer to have license from city, to operate boilers and engines within city limits, valid.

— **Ordinance granting monopoly.**

Cited in *Iler v. Ross*, 64 Neb. 710, 97 A. S. R. 676, 57 L.R.A. 895, 90 N. W. 869, holding that ordinance granting one individual monopoly to enter upon private premises and remove its noxious substances is void; *State v. Hill*, 126 N. C. 1139, 50 L.R.A. 473, 36 S. E. 326, holding ordinance which prohibits hiring of one other than city scavenger, to do scavenger work is void.

Reasonableness of municipal ordinances.

Cited in notes in 7 E. R. C. 282; 41 L. ed. U. S. 520,—on reasonableness of municipal ordinances.

Validity of statutes.

Cited in *Hubbard v. Hubbard*, 77 Vt. 73, 107 A. S. R. 749, 67 L.R.A. 969, 58 Atl. 969, 2 A. & E. Ann. Cas. 315, holding that act which authorizes equity court "in its discretion" to empower wife to convey real estate by her separate deed is unconstitutional.

Jurisdiction of equity over ordinance — To enjoin enforcement.

Cited in *Glucose Ref. Co. v. Chicago*, 138 Fed. 209, holding that equity may enjoin enforcement of void ordinance, to prevent multiplicity of suits; *Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 5 A. S. R. 342, 4 So. 106, holding that equity will interfere to prevent enforcement of ordinance which attempts unlawfully to destroy railroad's franchise; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726, holding that equity will interfere to prevent enforcement of void ordinance at suit of and injuriously affected thereby; *Platte & D. Canal & Mill Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036; *Stevens v. Muskegon*, 111 Mich. 72, 36 L.R.A. 777, 69 N. W. 227,—holding that equity will restrain enforcement of ordinance that unlawfully interferes with vested rights; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 A. S. R. 566, 32 S. W. 649, holding that equity will enjoin enforcement of invalid ordinance making it misdemeanor to buy or sell certain articles, unless in manner provided therein; *Lynchburg & R. Street R. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951, holding that equity has jurisdiction of suit by one or more taxpayers to enjoin municipality from levying illegal tax; *Champer v. Greencastle*, 138 Ind. 339, 46 A. S. R. 390, 24 L.R.A. 768, 35 N. E. 14, to point that equity will interfere to prevent enforcement of ordinance which is plain abuse of authority; *Frantz v. Autry*, 18 Okla. 561, 91 Pac. 193; *Block v. Crockett*, 61 W. Va. 421, 56 S. E. 826,—to point that equity will enjoin enforcement of void ordinance; *State ex rel. Kenamore v. Wood*, 155 Mo. 425, 48 L.R.A. 596, 56 S. W. 474 (dissenting opinion), on jurisdiction of equity to sustain collection of illegal liquor tax.

Cited in notes in 35 A. S. R. 678, on equitable interference with enforcement of penal statutes and ordinances; 118 A. S. R. 373; 41 L. ed. U. S. 521,—on injunction against enforcement of void ordinance; 21 L.R.A. 88, on injunction against prosecution under city ordinance affecting personal right.

— To enjoin passage.

Distinguished in *Missouri & K. I. R. Co. v. Olathe*, 156 Fed. 624, holding that court of equity of United States has no power to enjoin passage of ordinance though it impair obligation of contract; *New Orleans Waterworks Co. v. New* 164 N. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 166, holding that court of equity cannot interfere to restrain passage of ordinance by municipal body; *Albright v. Fisher*, 164 Mo. 56, 64 S. W. 106, holding that courts cannot interfere to prevent city council from passing ordinance giving railway rights in streets.

Equity interference in criminal proceedings.

Disapproved in *Davis & F. Mfg. Co. v. Los Angeles*, 115 Fed. 537, holding that court of equity is without jurisdiction to enjoin criminal prosecution under alleged void ordinance, though such prosecution will injure complainant's property rights; *Kansas City Cable R. Co. v. Kansas City*, 29 Mo. App. 89, holding that courts of equity never interfere to stay proceedings of criminal character.

Right of taxpayer to maintain bill to enjoin unlawful assessment of property of corporation.

Cited in *Schley v. Lee*, 106 Md. 390, 67 Atl. 252, holding tax payer entitled to maintain bill to enjoin tax commissioner from making illegal assessment of shares of stock of corporation where there is no direct appeal from commissioner's act.

Power of Federal courts to declare municipal ordinance void.

Explained in *Southern Bell Teleph. & Teleg. Co. v. Richmond*, 44 C. C. A. 147, 103 Fed. 31, holding that federal courts have no power to declare void,

because unreasonable, municipal ordinance, when no federal question is involved.

Power of legislature to enact laws for preservation of public health.

Distinguished in *State v. Hyman*, 98 Md. 596, 64 L.R.A. 637, 57 Atl. 6, 1 A. & E. Ann. Cas. 742, holding legislature has power to regulate manner in which manufacture of clothing may be carried on in dwelling houses.

Constitutionality of act requiring mine inspections.

Distinguished in *Consolidated Coal Co. v. People*, 186 Ill. 134, 56 L.R.A. 266, 57 N. E. 880, holding act requiring mine inspection and making mine owner liable for inspection fees not unconstitutional.

Power of municipality to declare nuisances.

Cited in *Hewett v. Western U. Teleg. Co.* 4 Mackey, 424, holding erection of telegraph poles and stringing wires thereon, along public street not nuisance per se; *State v. Mott*, 61 Md. 297, 48 A. R. 105, holding that city has no power to declare lime kilns nuisances per se; *Patapsco Electric Co. v. Baltimore City*, 110 Md. 306, 72 Atl. 1039, holding city may enjoin as nuisance use of streets to transmit electricity without its authority; *Ex parte Wygant*, 39 Or. 29, 87 A. S. R. 673, 54 L.R.A. 636, 64 Pac. 867, holding municipality, under charter power to declare nuisances, cannot declare generally that burial of dead body in any portion of city shall constitute nuisance, where certain section are sparsely settled.

Cited in notes in 36 L.R.A. 601, on extent of municipal power to prevent or abate nuisances; 36 L.R.A. 608, on discrimination by municipality in defining, preventing, and abating nuisance; 39 L.R.A. 621; 38 L.R.A. 307,—on municipal power over nuisances as to electricity, steam, and explosives; 2 L.R.A. (N.S.) 632, on injunction against prosecution of criminal or quasi-criminal nature.

Power to abolish under act entitled "to regulate."

Cited in *Whitman v. State*, 80 Md. 410, 31 Atl. 325, holding that act, title of which is to regulate liquor traffic cannot include provision to abolish it.

When courts will declare statute unconstitutional.

Cited in *Lansburgh v. District of Columbia*, 11 App. D. C. 512, holding that courts will declare statute in purported exercise of police power void, only when it has no real or substantial relation to protection of public health, safety, peace or morals, or is a palpable invasion of constitutional rights.

33 AM. REP. 246, LAMM v. PORT DEPOSIT HOMESTEAD ASSO. 49 MD. 233.

Liability of principal for acts of agent.

Cited in note in 88 A. S. R. 789, on nonliability of principal for acts of agent outside of scope of employment.

— For fraud of agent.

Cited in *Phelps v. George's Creek & C. R. Co.* 60 Md. 536, holding misrepresentation of president of railroad company as to having secured right of way not ground of recovery by contractor for loss sustained by rise in price of rails while awaiting for company to secure right of way; *New England Mut. L. Ins. Co. v. Swain*, 100 Md. 558, 60 Atl. 469, to point that corporations are liable for fraud of its agents, same as natural persons.

Cited in notes in 88 A. S. R. 795, on liability of principal in tort for fraud

of agent; 12 E. R. C. 307, on imputing servant's or agent's fraud to master or principal.

—Basis of liability.

Cited in note in 2 L.R.A. 811, on basis of principal's liability for agent's act. **Knowledge of falsity in action for false representations.**

Cited in note in 18 A. S. R. 560, on knowledge of falsity in action for false representations.

Liability of servant or agent for tort committed under employer's orders.

Cited in note in 50 L.R.A. 647, on liability of servant or agent for assault, fraud, or other wrongful act against third party under orders of employer.

What contracts are within statute of frauds.

Cited in *Ehlen v. Selden*, 99 Md. 699, 59 Atl. 120, holding agreement whereby one party holds himself ready to loan certain sum upon security of mortgage of land, if requested, and whereby other party agrees to pay interest on said sum until loan was made, not within statute; *Horner v. Frazier*, 65 Md. 1, 4 Atl. 133, holding agreement for valuable consideration to advance certain sum to enable purchase of land, not contract for interest in land within meaning of statute.

Agreements collateral to sale of land within statute of frauds.

Cited in note in 102 A. S. R. 234, on agreements collateral to sale of land within statute of frauds.

33 AM. REP. 249, EYLER v. ALLEGANY COUNTY, 49 MD. 257.

Liability for acts of independent contractor.

Cited in notes in 76 A. S. R. 409, on employer's liability for acts of independent contractor in violation of duty imposed by contractor by statute; 66 L.R.A. 131, on liability of municipality for acts of independent contractor employed on municipal duties resulting from municipality's nonperformance of absolute duties.

Liability of counties in actions for torts or negligence.

Cited in note in 39 L.R.A. 81, on liabilities of counties in actions for torts and negligence.

Duty and liability as to highway—Of county commissioners.

Cited in *State ex rel. Garrison v. Putnam County*, 23 Fla. 632, 3 So. 164, holding that failure of railroad, using public road, to repair same, does not relieve county commissioner from performance of own statutory duties on premises; *Baltimore County v. Wilson*, 97 Md. 207, 54 Atl. 71, holding county commissioners not liable for defective highway after enactment of statute depriving them of control over roads.

—Of municipality generally.

Cited in *Baltimore v. Beck*, 96 Md. 183, 53 Atl. 976, holding city liable for injuries resulting from failure of electric company to light streets according to contract; *Rowe v. Baltimore & O. R. Co.* 82 Md. 493, 33 Atl. 761, holding that one injured by defect in highway due to negligence of railway company in constructing same, may sue either county commissioners or railway company; *Zanesville v. Fannan*, 53 Ohio St. 605, 53 A. S. R. 664, 42 N. E. 703, holding municipality liable for damages resulting from obstructed drainage, caused by railway tracks in street, after notice and refusal to act.

— **Of municipality for defects due to contractor's negligence.**

Cited in *Jacksonville v. Drew*, 19 Fla. 106, 45 A. R. 5, holding city liable for defective streets though it had contracted with another to repair same; *Baltimore v. O'Donnell*, 53 Md. 110, 36 A. R. 395, holding city liable for injuries due to neglect of contractor's agent to place light to give warning of rope stretched across street.

— **Duty of railroad company as to public highway crossings.**

Cited in *People ex rel. Denver v. Union P. R. Co.* 20 Colo. 186, 37 Pac. 610, holding that railroad companies which cross public streets may be required to bridge their tracks over streets whenever reasonable necessity therefor exists; *Cleveland v. Augusta*, 102 Ga. 233, 43 L.R.A. 638, 29 S. E. 584, holding that railway company which constructs its tracks across existing highway must make such alteration in grade of crossing as will conform with any grade of highway thereafter established; *Whitby v. Baltimore, C. & A. R. Co.* 96 Md. 700, 54 Atl. 674, holding that it is duty of railway company to maintain safe approaches to crossings; *Maltby v. Chicago & W. M. R. Co.* 52 Mich. 108, 17 N. W. 717, holding railway company crossing highway bound to keep approaches to crossing in safe condition for travelers on highway; *Dyer County v. Chesapeake, O. & S. W. R. Co.* 87 Tenn. 712, 11 S. W. 943, holding that railway company unless relieved by statute must keep up all necessary repairs at crossings; *Moundsville v. Ohio River R. Co.* 37 W. Va. 92, 20 L.R.A. 161, 16 S. E. 514, holding that it is continuous and permanent duty of railroads to maintain crossings over public roads; *Chicago v. Pittsburg, C. C. & St. L. R. Co.* 146 Ill. App. 403, on duty of railroad to maintain crossings.

Cited in reference note in 38 A. R. 510, on railroad's duty to repair crossings.

— **Duty and liability of municipality as to railroad crossings.**

Cited in *Baltimore & O. R. Co. v. Baltimore*, 98 Md. 535, 56 Atl. 790, holding city has duty of maintaining crossing where new street is opened across railway tracks; *Sides v. Portsmouth*, 59 N. H. 24, holding town liable, if railroad, having right to cross highway, does not leave it reasonably safe, and injury is sustained thereby.

— **Duty of street railway company maintaining roadbed.**

Cited in *Groves v. Louisville R. Co.* 109 Ky. 76, 52 L.R.A. 448, 58 S. W. 508, holding that it is duty of street railway company to keep its track from becoming obstruction to public travel; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 35 Minn. 131, 59 A. R. 313, 28 N. W. 3; *Memphis, P. P. & Belt R. Co. v. State*, 87 Tenn. 746, 11 S. W. 946,—holding that it is continuing duty of street railway to keep its entire roadbed in repair.

Duty and liability as to bridges.

Cited in *Lewiston v. Booth*, 3 Idaho, 692, 34 Pac. 809, to point that one cutting ditch across highway is bound to maintain bridge over same.

— **Liability of county.**

Cited in *Kirtley v. Spokane County*, 20 Wash. 111, 54 Pac. 936, holding that under statute county is liable for injuries resulting from defective bridges; *Anne Arundel County v. Carr*, 111 Md. 141, 73 Atl. 668, holding county liable for defective condition of bridge; *Shelby County v. Deprez*, 87 Ind. 509, on responsibility of county for bridge within incorporated city.

Am. Rep. Vol. XVII.—40.

Cited in reference note in 2 A. S. R. 591, on liability of county for damages received on defective bridge.

Cited in notes in 39 L.R.A. 45, on implied liability of counties for injuries to travelers and vehicles by bridges and approaches being out of repair.

Disapproved in *Heigel v. Wichita County*, 84 Tex. 392, 31 A. S. R. 63, 19 S. W. 562, holding that county is not liable for injuries caused by defective bridge.

— **Liability over to county.**

Cited in *Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 201, 40 A. R. 430, holding that county commissioners against whom damages were recovered for defective bridge, have right of action over against bridge company, bound to maintain bridge; *Baltimore & O. R. Co. v. Howard County*, 111 Md. 176, 73 Atl. 656, holding county has remedy over against railway company, where it has been held liable for injury to traveler due to company's change of approach to bridge.

Bridges as adjuncts to canal.

Cited in note in 61 L.R.A. 865, on bridges as adjuncts to canal.

33 AM. REP. 258, CROMWELL v. ROYAL CANADIAN INS. CO. 49 MD. 366.

Conflict of laws as to insurance.

Cited in reference note in 39 A. S. R. 320, on conflict of laws as to insurance.

Place of contract.

Cited in reference note in 34 A. S. R. 771, on place where contract is deemed to have been made.

Cited in notes in 55 A. S. R. 45, on place of contract; 63 L.R.A. 840, as to where insurance contract is deemed to have been made when local agent has no authority to accept application but is required to countersign policy.

Acquiring jurisdiction over foreign corporation.

Cited in note in 70 L.R.A. 536, on acquiring jurisdiction over foreign corporations by appearance and consent.

Jurisdiction of action on foreign contract, between nonresident parties.

Cited in *Carstairs v. Mechanics' & T. Ins. Co.* 13 Fed. 823, holding that though foreign corporations waive question of service of process, state court would have no jurisdiction of action, of which, by law, they have no jurisdiction; *Hodgson v. Southern Bldg. & Loan Asso.* 91 Md. 439, 46 Atl. 971, holding that court has jurisdiction of attachment suit by nonresident against foreign corporation to affect property of corporation in this state; *Universal L. Ins. Co. v. Bachus*, 51 Md. 28, to point that court has no jurisdiction of action by nonresident against foreign insurance company exercising franchise here, upon insurance contract executed in another state.

Distinguished in *Fairfax Forrest Min. & Mfg. Co. v. Chambers*, 75 Md. 604, 23 Atl. 1024, holding that court has jurisdiction in action on foreign contract, between nonresident parties, if defendant voluntarily appears.

33 AM. REP. 264, SANTA CLARA MIN. ASSO. v. MEREDITH, 49 MD. 389.

Right of corporate officers to compensation for services rendered.

Cited in *Bassett v. Fairchild*, 132 Cal. 637, 52 L.R.A. 611, 61 Pac. 791, holding

corporate officer is entitled to recover on implied promise for services rendered as manager; *Greensboro & N. C. Junction Turnp. Co. v. Stratton*, 120 Ind. 294, 22 N. E. 247, holding director of turnpike is entitled to recover for services rendered in construction of turnpike by agreement with codirectors; *Huffaker v. Krieger*, 107 Ky. 200, 46 L.R.A. 384, 53 S. W. 288, holding that minority directors will not be permitted to appeal to courts to annul action of directors, in voting compensation to director for extraordinary services rendered; *Waters v. American Finance Co.* 102 Md. 212, 62 Atl. 357, holding that vicepresident may recover upon implied promise for services performed outside scope of duties; *Pfeiffer v. Lansberg Brake Co.* 44 Mo. App. 59, holding that one who is both secretary and director cannot recover for services as secretary, in absence of express agreement; *Taussig v. St. Louis & K. R. Co.* 166 Mo. 28, 89 A. S. R. 674, 65 S. W. 969, holding that one who is director, and secretary and treasurer, may recover for professional services rendered as attorney, at instance of general manager and directors; *Bell v. Peper Tobacco Warehouse Co.* 205 Mo. 475, 103 S. W. 1014, holding that vicepresident and director may recover for services rendered outside scope of duties with understanding that he was to be compensated; *Severson v. Bi-Metallic Extension Min. & Mill. Co.* 18 Mont. 13, 44 Pac. 79, holding that vicepresident may recover for services performed as superintendent, without express contract; *Smith v. Putnam*, 61 N. H. 632, holding that directors of corporations are presumed to perform duties of their trust gratuitously; *Flynn v. Columbus Club*, 21 R. I. 534, 45 Atl. 551, holding that corporate officers may recover for services rendered outside scope of duties, where not shown that they were to be gratuitous; *Francis v. Brigham-Hopkins Co.* 108 Ind. 233, 70 Atl. 95, holding action of director in voting himself certain salary at board meeting will be closely scrutinized by court; *Crumlish v. Central Improv. Co.* 38 W. Va. 390, 45 A. S. R. 872, 23 L.R.A. 120, 18 S. E. 456, holding officer of private corporation cannot recover on quantum meruit for his official services in absence of bylaw or resolution allowing same; *Toponace v. Corinne Mill Canal & Stock Co.* 6 Utah, 439, 24 Pac. 534, on right of officer of corporation to recover for services rendered; *Wagner v. Edison Electric Illuminating Co.* 177 Mo. 44, 75 S. W. 966, to point that officer of corporation may recover for services rendered outside of scope of duties, upon implied promise; *Greathouse v. Martin*, 100 Tex. 99, 94 S. W. 322, to point that officer may recover for services on quantum meruit where resolution fixing salary is invalid.

Cited in reference note in 39 A. R. 169, on right of corporate officer to compensation for extraordinary services.

Cited in notes in 37 A. S. R. 655; 7 E. R. C. 610, 611,—on right of director of corporation to recover compensation for services; 3 L.R.A. 378, on right of corporate directors to compensation for official services; 3 L.R.A. 379, on rule that when corporate director is entitled to compensation, it is to be fixed by law. **Estoppel of corporation to deny authority of its officers.**

Cited in *Cox v. Robinson*, 27 C. C. A. 120, 48 U. S. App. 388, 82 Fed. 277; *Carington v. Turner*, 101 Md. 437, 61 Atl. 324,—holding that corporation may confer upon its officers power to make contract by holding them out to public as possessing such powers and by habitually permitting them to exercise same.

33 AM. REP. 266, MARBURG v. COLE, 49 MD. 402.

Estates by entirety.

Cited in reference note in 36 A. S. R. 67, on nonabolition of tenancy by entireties by abolition of joint tenancies.

Cited in notes in 30 L.R.A. 314, as to where and to what extent entirety estates exist; 30 L.R.A. 316, 317, on construction of statutes affecting question where and to what extent entirety estates exist.

— **How created.**

Cited in *Brewer v. Bowersox*, 92 Md. 567, 48 Atl. 1060, holding that conveyance to husband and wife without any qualifying words, creates tenancy by entirety; *Stieff Co. v. Ullrich*, 110 Ind. 629, 73 Atl. 874, holding wife is seized of whole property on conveyance to husband and wife; *Pray v. Stebbins*, 141 Mass. 219, 55 A. R. 462, 4 N. E. 824, holding that conveyance of land in fee to husband and wife, prior to statute of 1885 conveyed estate by entirety; *Baker v. Stewart*, 40 Kan. 442, 10 A. S. R. 213, 2 L.R.A. 434, 19 Pac. 904; *Noblitt v. Beebe*, 23 Or. 4, 35 Pac. 248,—holding that conveyance to husband and wife creates estate by entirety.

Cited in reference note in 10 A. S. R. 99, as to how estate by entirety arises and effect of statutes.

Cited in notes in 2 L.R.A. 434, on estate created by conveyance to husband and wife; 12 L.R.A. 514; 30 L.R.A. 306,—on definition of tenancy by entirety.

— **Married woman's acts as abolishing.**

Cited in *Roulston v. Hall*, 66 Ark. 305, 74 A. S. R. 97, 50 S. W. 690; *Kunz v. Kurtz*, 8 Del. Ch. 404, 68 Atl. 450; *Loughran v. Lemmon*, 19 App. D. C. 141; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 A. R. 52, 9 Atl. 695; *Bertles v. Nunan*, 92 N. Y. 152, 44 A. R. 361, 12 Abb. N. C. 283; *McNeeley v. South Penn Oil Co.* 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508,—holding that married woman's act does not abolish estates by entirety.

Cited in note in 84 A. S. R. 442, on effect of married women's statutes on estates by the entirety.

— **Right of husband to control.**

Cited in note in 12 L.R.A. 515, on right of husband to control estate by the entirety.

— **Judgment against husband as lien upon.**

Cited in *Jordan v. Reynolds*, 105 Md. 288, 121 A. S. R. 578, 9 L.R.A. (N.S.) 1027, 66 Atl. 37, 12 A. & E. Ann. Cas. 51, holding that judgment against husband is not lien upon land held by husband and wife as tenants by entirety.

Cited in reference note in 34 A. R. 254, on liability of crops raised on land owned by husband and wife to execution against husband.

— **Effect against wife, of husband's mortgage.**

Cited in *McCubbin v. Stamford*, 85 Md. 378, 60 A. S. R. 329, 37 Atl. 214, holding that mortgage by husband of his interest in estate by entirety does not affect rights of wife.

— **Rights of wife as survivor.**

Cited in reference note in 30 A. S. R. 763, on rights of wife as survivor under conveyance to husband and wife.

— **Right of husband and wife to take as joint tenants.**

Cited in *Fladuing v. Rose*, 58 Md. 12, holding that husband and wife are capable of taking as joint tenants, where intention is manifest and apt words are employed to create it.

33 AM. REP. 271, HILL v. HILL, 49 MD. 450.**Custody of infant on separation of parents.**

Cited in note in 34 A. S. R. 700, on custody of infant on separation of parents.

Right of divorced father to appoint testamentary guardian.

Cited in *Slack v. Perrine*, 9 App. D. C. 128 (dissenting opinion), on right of father after decree of divorce giving him custody of children to appoint testamentary guardian.

Cited in note in 13 L.R.A.(N.S.) 293, on effect of attempt by father to appoint guardian for his child against surviving mother.

Right of divorced wife to have access to child.

Cited in *Kremelberg v. Kremelberg*, 52 Md. 553 (dissenting opinion), on right of wife, divorced for adultery to restricted access to child.

Power of court of equity to remove guardian.

Cited in *Re Klein*, 95 Wis. 246, 70 N. W. 64, holding that court of equity has power to remove guardians or custodians of infants.

33 AM. REP. 277, NOLAN v. TRABER, 49 MD. 460.**Liability of married woman for her torts.**

Cited in reference note in 2 A. S. R. 580, on personal liability of married woman for her torts.

Responsibility of married woman for harboring vicious dog.

Cited in *Strouse v. Leif*, 101 Ala. 433, 46 A. S. R. 122, 23 L.R.A. 622, 14 So. 667, holding that wife, who lives with her husband is not liable for harboring vicious dog on her own premises.

Right to punitive damages in action for libel or slander.

Cited in *Childers v. San Jose Mercury Printing & Pub. Co.* 105 Cal. 284, 45 A. S. R. 40, 38 Pac. 903, holding that exemplary damages may be recovered in action for libel when malice in fact established; *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266, holding that jury might award punitive damages in action of slander where words are actionable per se; *Gambrill v. Schooley*, 93 Md. 48, 86 A. S. R. 414, 52 L.R.A. 87, 48 Atl. 730, holding that punitive damages are within discretion of jury, where words are actionable per se; *Coffin v. Brown*, 94 Md. 190, 89 A. S. R. 422, 55 L.R.A. 732, 50 Atl. 567, holding that punitive damages may be allowed, without proof of malice for publication of nonprivileged libel.

33 AM. REP. 280, FRANKLIN COAL CO. v. McMILLAN, 49 MD. 549.**Measure of damages in trespass or trover.**

Cited in reference notes in 36 A. R. 770, on measure of damages for trover for property taken by mistake; 64 A. S. R. 246, on measure of damages in trover.

Cited in note in 17 E. R. C. 882, on right of innocent trespasser to allowance for his labor and expense.

— For mining and removing coal.

Cited in *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 A. R. 560, holding that measure of damages is value of coal immediately upon its severance from freehold, without abatement of cost of severance.

Cited in reference note in 28 A. S. R. 567, on measure of damages for mining coal on another's land.

Cited in note in 33 A. R. 69, on measure of damages for unintentionally taking minerals from land of another.

— For cutting and removing timber.

Cited in *Dartmouth v. International Paper Co.* 132 Fed. 92, holding that measure of damages where trespass unintentional is value of timber before cutting; *Parker v. Waycross & F. R. Co.* 81 Ga. 387, 8 S. E. 871, holding that measure where trespass unintentional is value at time of trespass less added value; *Beede v. Lamprey*, 64 N. H. 510, 10 A. S. R. 426, 15 Atl. 133, holding measure of damages for cutting trees by mistake on another's land is value at time of severance; *Gaskins v. Davis*, 115 N. C. 85, 44 A. S. R. 439, 25 L.R.A. 813, 20 S. E. 188, holding that measure of damages where one honestly thought trees were his timber is value in woods from which taken together with injury incident to removal.

Cited in reference note in 1 A. S. R. 498, on measure of damages in trespass or trover for timber cut on another's land.

Right to punitive damages for trespass.

Cited in *Atlantic & G. Creek Consol. Coal Co. v. Maryland Coal Co.* 62 Md. 135, holding that punitive damages may be recovered, if trespass was committed, through negligence or design.

Cited in note in 27 A. D. 689, on allowance of exemplary damages for trespass upon realty.

Presumption of negligence from trespass.

Cited in *Durant Min. Co. v. Percy Consol. Min. Co.* 35 C. C. A. 252, 93 Fed. 166, holding that every trespass upon another's land, that is not wilful and intentional necessarily implies some degree of negligence.

Right to impeach life tenant for waste.

Cited in *Swayne v. Lone Acre Oil Co.* 98 Tex. 597, 69 L.R.A. 986, 86 S. W. 740, 8 A. & E. Ann. Cas. 1117, holding that life tenant in real estate is impeachable for waste.

Right to join different trespasses in one count.

Cited in *Medairy v. McAllister*, 97 Md. 488, 55 Atl. 461, holding that trespass *quare clausum fregit* may be combined with trespass *de bonis asportatis*.

Admission of evidence given on former trial.

Cited in note in 91 A. S. R. 203, on evidence preliminary to admission of evidence given on former trial.

33 AM. REP. 286, WILLIAMS v. WORTHINGTON, 49 MD. 572.

When precatory trust arises.

Cited in *Mills v. Newberry*, 112 Ill. 123, 54 A. R. 213, 1 N. E. 156, holding that devise upon express condition that devisee, by will executed before receiving bequest, shall devise remainder undisposed of at her death to some charitable institution for women as she may select, creates constructive trust; *Elliott v. Elliott*, 117 Ind. 380, 10 A. S. R. 54, 20 N. E. 264, holding that devise to wife "to use and dispose of as she may think best for herself and my children" creates implied trust for benefit of herself and children; *Handley v. Wrightson*, 60 Md. 198, holding that devise to wife "with special request that at her death she give said lands equally to her near relatives and mine" creates precatory trust for benefit of such relatives; *McClernan v. McClernan*, 73 Md. 283, 20 Atl. 908, holding that words "I solemnly enjoin her to hold this as trust and at once, etc.,

by her will properly executed so to arrange her affairs that my wishes indicated herein may be carried out" creates precatory trust; *Pratt v. Sheppard & E. P. Hospital*, 88 Md. 610, 42 Atl. 51, holding use of precatory words after absolute gift not of itself sufficient to create trust; *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659; *Bills v. Bills*, 80 Iowa, 269, 20 A. S. R. 418, 8 L.R.A. 696, 45 N. W. 748; *Nunn v. O'Brien*, 83 Md. 108, 34 Atl. 244; *Blackshere v. Samuel Ready School for Female Orphans*, 94 Md. 773, 51 Atl. 1056,—holding that precatory words after absolute gift are not restraint upon alienation; *Baker v. Baker*, 53 W. Va. 165, 44 S. E. 174, holding that precatory words did not create trust when whole matter was left to discretion of legatee; *Ensley v. Ensley*, 105 Tenn. 107, 58 S. W. 288, as to when trust arises upon precatory words.

Cited in reference notes in 37 A. R. 572; 2 A. S. R. 662,—on precatory words in will; 3 A. S. R. 548, on what words raise precatory trust; 10 A. S. R. 533, on construction of precatory words in wills.

Cited in notes in 106 A. S. R. 513, on construction to be given to various precatory terms in common use; 106 A. S. R. 519, on effect of precatory words following absolute bequest or devise.

What words in will pass fee.

Cited in reference note in 20 A. S. R. 420, on what words in will pass a fee.

33 AM. REP. 293, MERCHANTS & M. TRANSP. CO. v. STORY, 50 MD. 4.

Duty and liability of bailee as to care of property.

Cited in *Wilson v. Wyckoff, Church & Partridge*, 133 App. Div. 92, 117 N. Y. Supp. 783, holding owner of garage liable for loss of motor car taken without owner's authority.

Cited in note in 136 Am. St. R. 224, on duty of warehousemen in care of property.

What constitutes inevitable accident.

Cited in note in 1 E. R. C. 215, on what constitutes inevitable accident.

Effect of instruction ignoring proofs in case.

Cited in *Baltimore, C. & A. R. Co. v. Kirby*, 88 Md. 409, 41 Atl. 777, holding that granted prayer instructing jury, which entirely ignores defendant's proof is defective.

33 AM. REP. 298, SHORT v. BALTIMORE CITY PASS R. CO. 50 MD. 73.

Street railroad company's duty to remove snow from track.

Cited in note in 25 A. S. R. 481, on street railroad company's duty to remove snow from tracks.

Liability of railroad company for consequential injuries.

Cited in note in 52 L.R.A. 449, on grounds of street railway company's liability for defect in track or street.

Distinguished in *Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654, 3 A. & E. Ann. Cas. 660, holding railroad company liable for injury to property adjacent to mouth of tunnel from smoke and gases when it has not complied with municipal ordinances providing safeguards against such damage, though authorized by statute to operate road through open cuts between tunnels.

33 AM. REP. 304, CUMBERLAND v. WILLISON, 50 MD. 138.**Liability of municipality for consequential damages.**

Cited in *Hitchins Bros. v. Frostburg*, 68 Md. 100, 6 A. S. R. 422, 11 Atl. 826, holding city liable for injuries resulting from overflow of surface water due to negligence in construction of sewer; *A. L. Lakey Co. v. Kalamazoo*, 138 Mich. 644, 110 A. S. R. 338, 67 L.R.A. 931, 101 N. W. 841, holding city not liable for damages caused by obstructions in creek flowing through it, not used as outlet for its sewers, caused by accumulations washed into it from streets and buildings within natural drainage area of creek; *Miles v. Worcester*, 154 Mass. 511, 26 A. S. R. 264, 13 L.R.A. 841, 28 N. E. 676, holding that city which maintains nuisance on its property is responsible therefor to adjoining landowner; *Whitfield v. Carrollton*, 50 Mo. App. 98, holding that city is liable for negligent management or use of its property for private emolument.

Cited in reference note in 20 A. S. R. 792, on liability of city for damages resulting from overflow of surface water.

Cited in notes in 66 A. D. 437, on municipal liability for consequential damages resulting from act done under authority of valid statute or charter; 35 A. R. 542, on municipal liability for flowing private lands; 61 L.R.A. 693, on municipal liability for increasing flow of stream by use as outlet for drains.

— From change of street grade.

Cited in *Guest v. Church Hill*, 90 Md. 689, 45 Atl. 882, holding city responsible for damages resulting from diverted surface water, caused by change in grade of street and construction of drains; *De Lauder v. Baltimore County*, 94 Md. 1, 50 Atl. 427, holding municipal corporation liable for destruction of private right of way by change in grade of public road; *Offutt v. Montgomery*, 94 Md. 115, 50 Atl. 419; *Kent County v. Godwin*, 98 Md. 84, 56 Atl. 478, holding municipal corporation not liable for consequential injury to adjoining owner, in changing grade of public road, unless work done negligently; *Parke v. Seattle*, 5 Wash. 1, 34 A. S. R. 839, 20 L.R.A. 68, 32 Pac. 82 (dissenting opinion), on right to hold city liable for removal of lateral support of abutting land, in grading of street.

Cited in reference note in 32 A. R. 274, on municipal liability for casting surface water on private lands by raising grade of street.

Distinguished in *Gregg v. Baltimore*, 56 Md. 256, holding city changing grade of street under ordinance permitting it to do so without first securing assent of abutting owners, is liable for consequential damages to such owners.

— For nuisance maintained in highway by railroad company.

Cited in *Torpey v. Independence*, 24 Mo. App. 288, holding that city which permits railroad company to erect nuisance in public highway is liable for injuries occasioned thereby to adjacent lot owner.

Liability of railroad changing grade of street, for injuries to abutting owner.

Distinguished in *Dana v. Rock Creek R. Co.* 7 App. D. C. 482, holding that railroad, which, under authority granted by municipality, so changes grade of street as to render access to abutting land, difficult or impossible, is liable to owner for injury.

What amounts to taking of private property for public purpose.

Cited in *O'Brien v. Baltimore Belt R. Co.* 74 Md. 363, 13 L.R.A. 126, 22 Atl. 141, holding depreciation of property abutting on street, due to construction of

railroad along street, which does not prevent access to property, is not such taking of private property for public use as requires prior compensation; *Garrett v. Lake Roland Elev. R. Co.* 79 Md. 277, 24 L.R.A. 396, 29 Atl. 830, holding erection in center of street of stone abutment for elevated railroad not taking of property of abutting owner for public purposes within meaning of constitution; *Vanderlip v. Grand Rapids*, 73 Mich. 522, 16 A. S. R. 597, 3 L.R.A. 247, 41 N. W. 677, holding that depositing of earth upon adjoining lot in grading a street, so as to bury portion of dwelling house, amounts to taking of public property for private purpose.

Flowage as element of damages in eminent domain.

Cited in note in 85 A. S. R. 303, on flowage or overflow as element of damages allowable in eminent domain proceedings.

Right to cast surface water into natural stream.

Cited in note in 21 L.R.A. 606, on right to cast surface water into natural streams.

Basis of municipal liability for acts of officers or agents.

Cited in note in 4 L.R.A. 327, on basis of liability of municipal corporation for acts of its officers or agents.

33 AM. REP. 317, STIGERS v. BRENT, 50 MD. 214.

Validity of judgment rendered against insane person.

Cited in *Woods v. Brown*, 93 Ind. 164, 47 A. R. 369, holding fact that one was of unsound mind when judgment rendered against him, not of itself sufficient to vacate same; *Heard v. Sack*, 81 Mo. 610, holding that process and judgment go against insane persons as against sane, but they should be defended by attorney or guardian; *Maloney v. Dewey*, 127 Ill. 395, 11 A. S. R. 131, 19 N. E. 848; *Gressly v. Hamilton County*, 136 Iowa, 722, 114 N. W. 191, 15 A. & E. Ann. Cas. 354; *Ewing v. Wilson*, 63 Tex. 88,—holding that judgment rendered against one non compos mentis is binding upon him; *Withrow v. Smithson*, 37 W. Va. 757, 19 L.R.A. 762, 17 S. E. 316, holding that judgment against person insane at its rendition is not for that cause void and is lien upon land.

Cited in reference note in 11 A. S. R. 136, on validity of judgment against lunatic.

Cited in note in 39 L.R.A. 775, on validity and effect of judgments against insane persons.

Mode of obtaining relief from judgment against insane person.

Cited in note in 39 L.R.A. 783, on mode of obtaining relief from judgments against insane persons.

Right of action by or against insane person.

Cited in *Speck v. Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213, holding that judgment at law is neither void nor voidable because plaintiff is insane person; *Royston v. Horner*, 75 Md. 557, 24 Atl. 25, holding that lunatic, before declared such may employ attorney whose conduct of case will bind him; *Atwood v. Lester*, 20 R. I. 660, 40 Atl. 866, holding that insane person may be sued and jurisdiction over him acquired by like process as if he were sane; *Wiesmann v. Donald*, 125 Wis. 600, 2 L.R.A. (N.S.) 961, 104 N. W. 916, holding that insane person may maintain action; *McKenna v. McArdle*, 191 Mass. 96, 77 N. E. 782, to point that insane person may appear and prosecute or defend by attorney any ordinary common law action.

Cited in note in 130 Am. St. R. 842, 843, 845, 850, on judgments for or against insane persons.

Validity of deed by insane person.

Cited in *Luhrs v. Hancock*, 181 U. S. 567, 45 L. ed. 1005, 21 Sup. Ct. Rep. 726, holding that deed of person alleged to be insane is not absolutely void.

33 AM. REP. 320, BLACK v. BALTIMORE, 50 MD. 235.

What constitutes commencement of condemnation proceedings.

Cited in *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263, holding street commissioner's notice of intended condemnation not sufficient to require one to stop intended improvements; *Shanfelter v. Baltimore*, 80 Md. 483, 27 L.R.A. 648, 31 Atl. 439, holding passage of ordinance directing that certain square be acquired as site for court house not such commencement of condemnation proceedings as gives right of action for delay to institute such proceedings.

33 AM. REP. 325, DITTMAN v. REPP, 50 MD. 516.

What constitutes nuisance.

Cited in *Bonaparte v. Denmead*, 108 Md. 174, 69 Atl. 697, holding livery or private stable is not nuisance per se.

Cited in reference note in 1 A. S. R. 54, on what constitutes nuisance and right to enjoin same.

Cited in notes in 42 A. R. 542, on acts constituting nuisance; 124 A. S. R. 593, on definition and classification of public nuisances; 17 L.R.A.(N.S.) 287, on noise with or without vibration incident to lawful business, as a nuisance.

Right to injunction against nuisance.

Cited in *Woodyear v. Schaefer*, 57 Md. 1, 40 A. R. 419, holding that injunction will issue to restrain owner of slaughter house from polluting stream with blood, offal and other matter from slaughtered animals; *Chappell v. Funk*, 57 Md. 465, holding manufacture of vitrol and sulphuric acid properly enjoined, where shown injurious to adjoining property; *Baltimore v. Fairfield Improv. Co.* 87 Md. 352, 67 A. S. R. 344, 40 L.R.A. 494, 39 Atl. 1081, holding that use of city property as place for keeping leper may be enjoined where private property nearby would be injured; *Herring v. Wilton*, 106 Va. 171, 117 A. S. R. 997, 7 L.R.A.(N.S.) 349, 55 S. E. 546, 10 A. & E. Ann. Cas. 66, holding that nuisance created by barking of dogs and whining of puppies may be enjoined; *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241, holding skating rink, noise from which materially interfered with comfort and enjoyment of inmates of nearby dwelling properly enjoined.

Cited in reference note in 3 A. S. R. 23, on injunction against business so conducted as to constitute nuisance.

Cited in note in 118 A. S. R. 884, on offensive character of nuisance against which equitable relief is sought.

Right to damages for injuries from smoke or noxious gases.

Cited in *Euler v. Sullivan*, 75 Md. 616, 32 A. S. R. 420, 23 Atl. 845, holding that injury from smoke and cinders to entitle recovery of damages must be such as materially diminishes value of property or seriously interferes with ordinary comfort and enjoyment thereof; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 63 A. S. R. 533, 39 Atl. 270, holding owner of fertilizer factory situated in manufacturing district liable for injury to residence property by noxious gases therefrom; *Lurssen v. Lloyd*, 76 Md. 360, 25 Atl. 294, on law of nuisances.

33 AM. REP. 328, ROBERTSON v. BERRY, 50 MD. 591.**What subject of trademark.**

Cited in *Wenham v. Mallin*, 103 Ill. App. 609, holding name of play "Sherlock Holmes" will be protected.

Cited in reference notes in 37 A. R. 594, on letters and figures as trademarks; 85 A. S. R. 83, on matters as to trademarks.

Cited in notes in 47 A. D. 287, on what trademark may be applied to; 85 A. S. R. 113, on trademark in names of publications.

Property rights in trademark.

Cited in reference note in 24 A. S. R. 519, on property rights in trademark.

What constitutes infringement of trademark.

Cited in notes in 47 A. D. 295, 296; 24 A. S. R. 316,—on what is infringement of trademark.

Injunction to protect trademark.

Cited in *Siebert v. Abbott*, 61 Md. 276, 48 A. R. 101,—holding that equity will not interpose by injunction to protect claim to trade-mark which contains misrepresentation; *Smith Dixon Co. v. Stevens*, 100 Md. 110, 59 Atl. 401, holding that injunction to restrain imitation of label should not be granted, where exclusive right to use thereof not shown.

Cited in reference notes in 47 A. R. 648, on injunction against infringement of trademark; 1 A. S. R. 421, as to when right to use trademark is protected.

Cited in note in 9 L.R.A. 150, on protection of right to sole use of trademark.

— Geographical name.

Cited in *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608, holding that use of geographical name on flour made elsewhere from wheat of different grade will be enjoined.

Cited in note in 26 L.R.A.(N.S.) 91, on right to protection in use of geographical name.

Right to enjoin use of tradename.

Cited in *Gruber Almanack Co. v. Swingley*, 103 Md. 362, 63 Atl. 684, holding that imitation of trade name will be restrained when calculated to deceive public; *Rickard v. Caton College Co.* 88 Minn. 242, 92 N. W. 958, holding that use of name, "Minnesota's School of business" will be enjoined where another educational institution has been long established and known as "Minnesota School of business," though latter name not subject of strict right as trade mark; *Duniway Pub. Co. v. Northwestern Printing & Pub. Co.* 11 Or. 322, 8 Pac. 283, holding exclusive right to title "The new northwest" not infringed by title "The northwest news" adopted by rival newspaper owner.

Cited in note in 38 A. R. 83, on right to enjoin use of name as applied to article of sale, which is same as applied to plaintiff's goods.

— Of patented article.

Cited in *Dover Stamp Co. v. Fellows*, 163 Mass. 191, 47 A. S. R. 448, 28 L.R.A. 448, 40 N. E. 105, holding that right to exclusive use of trade name of patented article ceases with termination of exclusive right to make and sell article; *Brill v. Singer Mfg. Co.* 41 Ohio St. 12, 52 A. R. 74, holding that incorporation in trade mark of known distinct name of machine, will not entitle exclusive right thereto, after expiration of patent.

— Proprietor's name.

Cited in *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 23 A. S. R. 537, 6

L.R.A. 823, 7 So. 23, holding that one will not be allowed to use own name so as to deceive public as to business rightfully engaged in by another.

Right of successor to firm to use its name.

Cited in reference note in 35 A. R. 550, on right of successor to firm to use its name.

33 AM. REP. 340, RINDSKOPF v. DE RUYTER, 39 MICH. 1.

Conflict of laws.

Cited in McGarry v. Nicklin, 110 Ala. 559, 55 A. S. R. 40, 17 So. 726,—holding promissory note executed and payable in certain state is governed by laws of such state though maker resident of another state.

Cited in notes in 61 L.R.A. 423, on conflict of laws as to where executed contract for sale of intoxicating liquor is consummated; 61 L.R.A. 424, on conflict of laws as to sale of intoxicating liquors when executory contract is consummated in one state and executed contract in another.

Place of sale.

Cited in reference note in 42 A. R. 550, on locality of sale under liquor law.

Cited in note in 22 L.R.A. 426, on place where sale is consummated where property is delivered to carrier for transportation to consignee or purchaser.

Delivery as taking parcel sale out of statute of frauds.

Cited in Dinnie v. Johnson, 8 N. D. 153, 77 N. W. 612, holding mere delivery insufficient to validate parcel contract for purchase of goods, where no part of purchase price has been paid.

—Delivery to carrier.

Cited in notes in 23 E. R. C. 229, 96 A. S. R. 221,—on delivery to carrier as satisfaction of statute of frauds; 2 L.R.A. (N.S.) 385, on effect of delivery to carrier as passing title.

Distinguished in Kuppenheimer v. Wertheimer, 107 Mich. 77, 61 A. S. R. 317, 64 N. W. 952, holding parcel contract for sale of goods complete upon delivery to carrier, though purchaser to have privilege of inspection, where inspection merely to see whether goods correspond to sample.

Shipping liquor into another state C. O. D. as interstate commerce.

Cited in note in 5 L.R.A. (N.S.) 631, on shipping liquor from one state into another C. O. D. without previous order as interstate commerce.

33 AM. REP. 344, PEOPLE v. BRINGARD, 39 MICH. 22.

What constitutes embezzlement.

Cited in State v. Disbrow, 130 Iowa, 19, 106 N. W. 263, 8 A. & E. Ann. Cas. 190, holding that proof that guardian received ward's money and loaned it upon note which he afterwards converted to own use, will support indictment charging embezzlement of money.

—By municipal treasurer.

Cited in Monroe Twp. v. Whipple, 56 Mich. 516, 23 N. W. 202, holding that township treasurer's refusal to pay over to successor public money in his hands upon proper demand, is conversion with element of criminality; People v. Seeley, 117 Mich. 263, 75 N. W. 609, holding that treasurer's unlawful appropriation of money received for logs accepted in payment of taxes, constitutes embezzlement; Bartley v. State, 53 Neb. 310, 73 N. W. 744, holding that state treasurer, who for unauthorized purpose draws check on state funds in state

depository bank and delivers same to payee with intent to defraud state, and amount of check is credited to payee and charged against state, is guilty of embezzlement; *Lansing v. Wood*, 57 Mich. 201, 23 N. W. 769, to point that municipal treasurer who deposits public money in other than legally designated depository does not as to public become absolute owner of funds; *Fire & Water Comrs. v. Wilkinson*, 119 Mich. 655, 44 L.R.A. 493, 78 N. W. 893, 6 Det. L. N. 11, to point that municipal treasurer who appropriates trust funds to private purposes and refuses to account for them is guilty of embezzlement.

Cited in reference note in 4 A. S. R. 570, on embezzlement by town treasurer.

Cited in note in 87 A. S. R. 47, on embezzlement by public officers.

Proof of similar offenses.

Cited in *People v. Messer*, 148 Mich. 168, 111 N. W. 854, holding that on prosecution for embezzlement it is proper to admit evidence of any embezzlement committed within six months after time stated in information.

Township treasurer as agent of township.

Cited in *Byles v. Golden Twp.* 52 Mich. 612, 18 N. W. 383, holding that township treasurer in Michigan is officer and agent of township in collecting and paying over taxes.

33 AM. REP. 346, McFARLANE v. CLARK, 39 MICH. 44.

Interest disqualifying probate judge.

Cited in *Re Leonard*, 95 Mich. 295, 54 N. W. 1082, holding that fact that petition for appointment of guardian prays for appointment of corporation in which probate judge is stockholder does not disqualify him from issuing citation.

Validity of oath administered by interested party.

Distinguished in *Judd v. Tryon*, 131 Mass. 345, holding that certificate of entry of mortgage, for purpose of foreclosure, under statute, sworn to before himself as justice of peace is invalid.

33 AM. REP. 348, BROCKWAY v. INNES, 39 MICH. 47.

Who are laborers.

Cited in *Silver Flagstaff Min. Co. v. Cullins*, 104 U. S. 176, 26 L. ed. 704, holding that overseer of miners, who does some manual labor is entitled to lien for services conferred by statute; *Blanchard v. Portland & R. F. R. Co.* 87 Me. 241, 32 Atl. 890, holding superintendent of bridge construction not "laborer" within meaning of statute giving laborers lien for services; *Meands v. Park*, 95 Me. 527, 50 Atl. 706, holding foreman not a "laborer" within meaning of statute giving lien for services to those who "labor" at cutting or hauling logs; *Henderson v. Nott*, 36 Neb. 154, 38 A. S. R. 720, 54 N. W. 87, holding one who contracts for and furnishes labor and services of himself and others for stipulated price for joint labor of all, not within privilege of statute providing that no property shall be exempt from execution for laborer's services; *Moore v. American Industrial Co.* 138 N. C. 304, 50 S. E. 687, holding superintendent not within privilege of statute providing that no property shall be exempt from execution for laborer's services; *Re George T. Smith Middlings Purifier Co.* 83 Mich. 513, holding that practical miller at monthly salary and expenses a laborer within meaning of statute which prefers labor debts due from insolvent debts; *Pullis Bros. Iron Co. v. Boemler*, 91 Mo. App. 85, holding superintendent of iron company not within statute according employers of insolvent corpo-

ration priority of payment; *Viele v. Wells*, 9 Abb. N. C. 277, holding secretary of corporation, though he act as bookkeeper not within privilege of statute rendering stockholders liable for labor performed for company; *Hand v. Cole*, 88 Tenn. 400, 7 L.R.A. 96, 12 S. W. 922, holding traveling salesman is within statute according employees of insolvent corporation priority of payment; *Poland v. Lamoille Valley R. Co.* 52 Vt. 144, holding superintendent of railroad not within privilege of statute according priority of payment for services rendered.

Cited in note in 18 L.R.A. 309, on who are laborers, servants, or employees under the statutes making stockholders individually liable.

Stockholders' liability for corporate debts.

Cited in notes in 3 A. S. R. 842, on stockholders' liability for debts due corporate laborers or servants and for other special debts; 25 L. ed. U. S. 885. on individual liability of stockholders for corporate debts.

33 AM. REP. 351, GIBSON v. CRANAGE, 39 MICH. 49.

Optional and alternative contracts.

Cited in reference note in 35 A. S. R. 899, on optional and alternative contracts.

Meaning of "to satisfaction" or "satisfaction of purchaser."

Cited in reference notes in 14 A. S. R. 424, on meaning of such words as "to satisfaction" used in contracts; 45 A. S. R. 871, on "sale on trial" or to "satisfaction of purchaser."

Right to exercise option — Where article purchased is to be satisfactory.

Cited in *Campbell Printing Press Co. v. Thorp*, 1 L.R.A. 645, 36 Fed. 414, holding that vendor who agrees to furnish article, satisfactory to vendee, constitutes latter sole judge of his own satisfaction, provided dissatisfaction not feigned; *Church v. Cheape*, 64 Fed. 961, holding that capricious dissatisfaction on purchaser's part will not be allowed to avoid payment of money he contracted to pay; *Michigan Stone & Supply Co. v. Harris*, 27 C. C. A. 6, 54 U. S. App. 137, 81 Fed. 928, holding that contract for sale of bonds, legality thereof to be satisfactory to purchaser's counsel, requires counsel to pass thereon in good faith and not capriciously; *Silsby Mfg. Co. v. Chico*, 11 Sawy. 183. 24 Fed. 893; *Buford v. Ward*, 108 Ala. 307, 19 So. 357, holding that contract to furnish article satisfactory to purchaser, gives latter right to reject arbitrarily; *Haney-Campbell Co. v. Preston Creamery Asso.* 119 Iowa, 188, 93 N. W. 297, holding that, in sale on approval, fair and honest objection on buyer's part, defeats sale; *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 45 A. R. 57, 15 N. W. 906, holding that stipulation that goods must be satisfactory gives purchaser absolute right to reject without giving reason; *Sherrod v. Duffy*, 160 Mich. 488, 136 A. S. R. 451, 125 N. W. 366, holding one who subscribes to stock on condition that proposed company shall be satisfactory, is not liable where he is not satisfied; *McCormick v. Finch*, 100 Mo. App. 641, 75 S. W. 373, holding sale of corn binder on approval defeated when not satisfactory to vendee, who offered to return it; *Thurman v. Omaha*, 64 Neb. 490. 90 N. W. 253, holding that where contract of sale of bonds is subject to attorney's approval of title, honest opinion is unavailable; *Haehnel v. Trostler*. 54 Misc. 262, 104 N. Y. Supp. 533, holding that agreement for coat "to be satisfactory," permits arbitrary rejection; *Singerly v. Thayer*, 108 Pa. 291, 56 A. R. 207, 2 Atl. 230, 43 Phila. Leg. Int. 38, 16 Pittsb. L. J. N. S. 379, holding that

sale of elevator, to be satisfactory to purchaser, entitles bona fide rejection; *Pennington v. Howland*, 21 R. I. 65, 79 A. S. R. 774, 41 Atl. 891, holding that in sale, to satisfaction of purchaser, vendee is sole judge whether article satisfactory; *Osborne v. Francis*, 38 W. Va. 312, 45 A. S. R. 859, 18 S. E. 591, holding that sale of binder upon condition that it might be returned if not satisfactory, gives absolute right to reject; *Exhaust Ventilator Co. v. Chicago, M. & St. P. R. Co.* 66 Wis. 218, 57 A. R. 257, 28 N. W. 343, holding sale of machinery on approval defeated where purchaser notifies vendor within reasonable time that it is unsatisfactory; *Livesley v. Johnston*, 45 Or. 30, 106 A. S. R. 647, 65 L.R.A. 783, 76 Pac. 946, to point that sale with approval or satisfaction of vendee as condition precedent to right to receive compensation, is valid.

Cited in reference notes in 45 A. R. 57, on right of vendee to reject arbitrarily goods which are to be "satisfactory" to him; 57 A. R. 318, on effect of sale of goods to be satisfactory and to be delivered in instalments.

Cited in notes in 54 A. R. 711, 716, on effect of contract for goods or services to be satisfactory; 17 L.R.A. 207, 208, on right of purchaser to reject article guaranteed to give satisfaction.

Distinguished in *Buckstaff v. Russell*, 151 U. S. 626, 38 L. ed. 292, 14 Sup. Ct. Rep. 448; *Flint v. Cook*, 102 Ind. 391, 1 N. E. 633,—holding that stipulation in sale of article that same may be rejected, if after notice, any defect is not remedied, does not give vendee right to arbitrarily say he is not suited and rejected; *Dickey v. Coffeyville Vitriified Brick & Tile Co.* 69 Kan. 106, 76 Pac. 398, holding that option to terminate gas and oil well lease, if leasee is satisfied that it is not paying cannot be exercised after production of gas or oil.

—Where title to land purchased is to be satisfactory.

Cited in *Liberman v. Beckwith*, 79 Conn. 317, 65 Atl. 153, 8 A. & E. Ann. Cas. 271, holding that express and unqualified stipulation that executory agreement for sale of land should not bind purchaser unless title "satisfactory to him," gives purchaser right to arbitrarily rescind; *Magic Packing Co. v. Stone-Ordean Wells Co.* 158 Ind. 538, 64 N. E. 11, holding that optional agreement to sell property, without obligation to purchase or accept, may be enforced, if made upon proper consideration; *Sanger v. Slayden*, 7 Tex. Civ. App. 605, 26 S. W. 847, holding option to rescind sale of land if dissatisfied with title gives absolute right without privilege of questioning dissatisfaction.

Distinguished in *Latrobe v. Winans*, 89 Md. 636, 43 Atl. 829, holding that contract for purchase of land, title to be satisfactory, cannot be arbitrarily rescinded.

—To terminate contract of employment.

Cited in *Allen v. Mutual Compress Co.* 101 Ala. 574, 14 So. 362, holding that contract of hiring by which employee guarantees satisfaction, gives employer full power to determine whether service satisfactory; *Koll v. Bush*, 6 Colo. App. 294, 40 Pac. 579, holding that employer who reserves right to discharge if employee's services are unsatisfactory, need give no reason for discharge; *Mullally v. Greenwood*, 127 Mo. 138, 48 A. S. R. 613, 29 S. W. 1001, holding that one agreeing to pay commissions for procuring satisfactory lease cannot arbitrarily reject lease negotiated; *Blaine v. Publishers George Knapp & Co.* 140 Mo. 241, 41 S. W. 787, holding that employer has right to determine for himself whether employee's services were worth more than clear stipulated sum; *Johnson v. Bindseil*, 15 Daly, 492, 8 N. Y. Supp. 485; *Gwynne v. Hitchner*, 66 N. J. L. 97, 48 Atl. 571,—holding that employer had right to judge whether employee's work sat-

isfactory; *Crawford v. Mail & Exp. Pub. Co.* 163 N. Y. 404, 57 N. E. 616, holding that option to terminate contract of employment if services not satisfactory, gives employer right to terminate employment whenever they may elect; *Watkins v. Napier*, 44 Tex. Civ. App. 432, 98 S. W. 904, holding employer sole judge, under contract of employment with agreement that employer may end employment if dissatisfied; *Mobile, J. & K. C. R. Co. v. Hayden*, 116 Tenn. 672, 94 S. W. 940, to point that grounds of dissatisfaction cannot be inquired into, where stipulated that employer may end employment if dissatisfied.

Cited in reference note in 44 A. S. R. 309, on contract to work to "satisfaction" of employer.

Cited in notes in 12 L.R.A.(N.S.) 404, 405, on termination of contracts of employment which contain stipulations permitting rescission by employer if the work is not satisfactorily performed; 12 L.R.A.(N.S.) 409, as to when employer's judgment as to quality of work is conclusive on right to terminate contract of employment if work is not satisfactorily performed.

Recovery on contract, where work is to be satisfactory.

Distinguished in *Parlin & O. Co. v. Greenville*, 61 C. C. A. 591, 127 Fed. 55, holding that contract for garbage furnace, to be satisfactory to town committee, cannot, if fully performed, be defeated by committee's unreasonable refusal to express satisfaction; *Hawkins v. Graham*, 149 Mass. 284, 14 A. S. R. 422, 21 N. E. 312, holding that satisfactoriness of heating system installed under contract for "satisfactory completion," is to be determined by mind of reasonable man and by means afforded by contract; *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700, holding that substantial compliance with contract for erection of wall, defeats right to arbitrarily reject work; *O'Dea v. Winona*, 41 Minn. 424, 43 N. W. 97, holding that substantial compliance with terms of contract, whereby one's property has been materially benefited by improvements which must necessarily be retained entitles recovery; *Hummel v. Stern*, 21 App. Div. 544, 48 N. Y. Supp. 528, holding that guaranty that ventilating apparatus will be satisfactory does not allow mere arbitrary rejection; *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 54 A. R. 709, 4 N. E. 749, holding that contract to alter boilers, to be paid for when satisfied boilers as change are success, will not permit expression of dissatisfaction without good reason.

Effect of right to use one's own judgment generally.

Distinguished in *Sullivan v. Ross*, 124 Mich. 287, 82 N. W. 1071, holding that contract giving one right to manage business according to his own judgment, does not defeat liability for negligence.

33 AM. REP. 355, *WHEELER v. CONSTANTINE*, 39 MICH. 62.

Conflict of laws.

Cited in note in 57 L.R.A. 513, on conflict of laws as to capacity of married woman to contract.

—Presumption.

Cited in note in 37 A. R. 586, on presumption of conflict of laws.

Presumption as to validity of foreign contract or record.

Cited in *O'Rourke v. O'Rourke*, 43 Mich. 58, 4 N. W. 531, holding that foreign note will be presumed valid where made, if valid where sought to be enforced.

Cited in reference note in 37 A. S. R. 190, on presumptive validity of contract made with reference to law of foreign state.

Cited in note in 67 L.R.A. 55, on effect of presumption in favor of validity of contract or judicial record where proper foreign law is not proved.

33 AM. REP. 356, BULLOCK v. TAYLOR, 39 MICH. 137.

Uncertainty as to time and amount as affecting negotiability of note.

Cited in reference note in 37 A. R. 604, on negotiability of instrument uncertain as to time and amount.

Stipulation affecting negotiability of note.

Cited in *Clark v. Skeen*, 61 Kan. 526, 78 A. S. R. 337, 49 L.R.A. 190, 60 Pac. 327, holding that stipulation that whole amount of note shall become due, at holder's option, upon default on interest, does not render note non-negotiable; *Walker v. Thompson*, 108 Mich. 686, 66 N. W. 584, holding note stipulating for payment of taxes on certain real estate, non-negotiable.

— For "exchange."

Cited in *First Nat. Bank v. Nordstrom*, 70 Kan. 485, 78 Pac. 804, holding that insertion of words "with exchange" by payee, without makers knowledge does not make note non-negotiable.

Cited in note in 27 L.R.A. 223, on provision for exchange as affecting negotiability.

— For attorney's fees.

Cited in *Chase v. Whitmore*, 68 Cal. 545, 9 Pac. 942; *First Nat. Bank v. Larsen*, 60 Wis. 206, 50 A. R. 365, 19 N. W. 67,—holding that stipulation in note, for attorney's fees in case of suit, renders note non-negotiable.

Cited in note in 1 L.R.A. 547, on effect of stipulation for attorneys' fees on negotiability of note.

Distinguished in *Lockwood v. Lindsey*, 6 App. D. C. 396, upholding negotiability of note stipulating for collection fees, where note is negotiable when payable.

Disapproved in *Lauferty v. Johnson*, 17 Ill. App. 549, holding that stipulation in note for attorney's fees does not destroy its negotiability; *Nicely v. Commercial Bank*, 15 Ind. App. 563, 57 A. S. R. 245, 44 N. E. 572, holding note not non-negotiable because it stipulated for "cost of collection;" *Trader v. Chidester*, 41 Ark. 242, 48 A. R. 38; *Oppenheimer v. Farmers' & M. Bank*, 97 Tenn. 19, 56 A. S. R. 778, 33 L.R.A. 767, 36 S. W. 705,—holding note providing for attorney's fees for its collection, negotiable.

Validity of provision for expenses and attorney's fees.

Cited in reference note in 37 A. R. 677, on effect of stipulations for attorneys' fees in contract.

Cited in note in 55 A. S. R. 444, on validity of stipulation for attorneys' fees.

— In note.

Cited in *Witherspoon v. Musselman*, 14 Bush, 214, 29 A. R. 404, holding agreement in promissory note to pay reasonable attorneys fees in case of suit void; *Myer v. Hart*, 40 Mich. 517, 29 A. R. 553, holding that provision for attorney's fee in promissory note is void; *Merchants' Nat. Bank v. Sevier*, 14 Fed. 662; *Boozar v. Anderson*, 42 Ark. 167; *Wright v. Traver*, 73 Mich. 403, 3 L.R.A. 60, 41 N. W. 517; *Dow v. Updike*, 11 Neb. 95, 7 N. W. 857; *Tinsley v. Hoskins*, 111 N. C. 340, 32 A. S. R. 801, 16 S. E. 325; *Exchange Bank v. Apalachian Land & Lumber Co.* 128 N. C. 193, 38 S. E. 813,—holding provision in promissory note, for attorney's fees, in case of suit, invalid; *Maryland Fertilizing & Am. Rep. Vol. XVII.—41.*

Mfg. Co. v. Newman, 60 Md. 584, 45 A. R. 750; *Rixey v. Pearre Bros.* 89 Va. 113, 15 S. E. 498,—holding agreement in note to pay attorney's fees for collection, unenforceable; *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755, to point that stipulation in note for attorney's fees is invalid.

Cited in note in 29 A. R. 406, on effect of provision in note for attorney's fee.

Disapproved in *Farmers' & M. Nat. Bank v. Barton*, 21 Ill. App. 403, holding stipulation in note for attorney's fees not void; *Bowie v. Hall*, 69 Md. 433, 9 A. S. R. 433, 1 L.R.A. 546, 16 Atl. 64, holding stipulation in promissory note to pay cost for collection, including attorney's commissions, valid; *Peyser v. Cole*, 11 Or. 39, 50 A. R. 451, 4 Pac. 520, holding stipulation for reasonable attorney's fees in case of suit, enforceable against maker.

—In mortgage.

Cited in *Bendey v. Townsend*, 109 U. S. 665, 27 L. ed. 1065, 3 Sup. Ct. Rep. 482, holding stipulation in mortgage for attorney's fees in case of foreclosure void by law of Michigan; *Louder v. Burch*, 47 Mich. 109, 10 N. W. 129; *Millard v. Truax*, 47 Mich. 251, 10 N. W. 358; *Kittermaster v. Brossard*, 105 Mich. 219, 53 A. S. R. 437, 63 N. W. 75,—holding provision for attorney's fees in mortgages, except where expressly sanctioned by statute void; *Northwestern Mut. L. Ins. Co. v. Butler*, 57 Neb. 198, 7 N. W. 667, holding stipulations in bond and mortgage for expenses of abstract, in case of foreclosure, invalid.

When contract usurious.

Cited in *Green v. Grant*, 134 Mich. 462, 96 N. W. 583, holding agreement by mortgagor to pay taxes assessed upon mortgage not usurious where lender did not believe aggregate of taxes and interest would exceed legal rate, though it did in fact exceed it; *Rosen v. Rosen*, 159 Mich. 72, 134 A. S. R. 713, 123 N. W. 559, holding contract to pay certain sum for interest in partnership and sum greater than 7% of principal if payment not made by certain date, is usurious.

Extent of surety's liability.

Cited in *Detroit Sav. Bank v. Zeigler*, 49 Mich. 157, 43 A. R. 456, 13 N. W. 496, holding sureties only liable within terms of their contract; *Bolton v. Nitz*, 88 Mich. 354, 50 N. W. 291, holding amendment of writ of replevin after execution of statutory bond by which other property is inserted without sureties' knowledge, releases sureties; *Grasser & B. Brewing Co. v. Rogers*, 112 Mich. 112, 67 A. S. R. 389, 70 N. W. 445, holding that sureties' liability cannot be extended beyond scope of written agreement; *Dudley v. Conely*, 125 Mich. 300, 84 N. W. 286, to point that surety on promissory note is not bound by makers agreement to pay attorney's fees.

Cited in notes in 42 A. R. 404, on surety's liability for default of principal while engaged in additional employment; 42 L. ed. U. S. 991, on liability of sureties on official bonds.

When liability of surety attaches.

Distinguished in *Brockway v. Petted*, 79 Mich. 620, 7 L.R.A. 740, 45 N. W. 61, holding that liability of sureties upon liquor dealers' bond executed and How. Stat. Sec. 2278, attaches upon its acceptance and approval by approving board.

33 AM. REP. 359, LIDDLE v. NEEDHAM, 39 MICH. 147.

Contracts for sale of land within statute of frauds.

Cited in note in 102 A. S. R. 235, on contracts for sale of land in which third person participates within statute of frauds.

Validity of oral agreements relating to interest in land.

Cited in *Ducett v. Wolf*, 81 Mich. 311, 45 N. W. 829, holding that oral agreement to convey land, furnishes no consideration for proposed grantee's promise to pay therefor; *McLennan v. Boutell*, 117 Mich. 544, 76 N. W. 75, holding that oral agreement between individuals, about to form corporation, that if one would purchase site, build factory thereon, equip it with machinery and turn property over to corporation, he should be paid in capital stock, is void under statute of frauds; *Re Williams*, 106 Mich. 490, 64 N. W. 490, to point that mother's verbal contract to convey land to adopted daughter in return for services to be rendered is void.

What will take oral agreement out of statute of frauds.

Distinguished in *Waldron v. Laird*, 65 Mich. 237, 32 N. W. 29, holding that acceptance of possession by grantees; takes without statute, third parties' oral agreement to pay therefor; *Niland v. Murphy*, 73 Wis. 326, 41 N. W. 335, holding that acceptance of deed takes oral contract for sale of land without statute.

—Tender of deed.

Cited in *Kroll v. Diamond Match Co.* 113 Mich. 196, 71 N. W. 630, holding that tender of deed pursuant to named grantee's written offer to purchase, not such completion of contract as avoids requirement that acceptance of offer should be in writing.

Validity of oral contract extending over year.

Cited in *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 A. R. 708, 26 N. W. 139, holding that contract, not to be performed within year, must be signed by both parties, where mutual promises are consideration; *Bristol v. Sutton*, 115 Mich. 365, 73 N. W. 424, holding that verbal agreement by one to pay specified sum to another, if latter performed certain services for third person, extending over period of more than one year, is void under statute of funds.

Surrender of contract for sale of land as part performance of oral rescission.

Distinguished in *Proctor v. Thompson*, 13 Abb. N. C. 340, holding surrender of contract to render such part performance of oral rescission of contract for sale of land as entitles recovery of purchase money.

Original promise to pay another's debt as affected by statute of frauds.

Cited in note in 95 A. D. 259, on original promise to pay another's debt not being within statute.

33 AM. REP. 362, KERR v. KINGSBURY, 39 MICH. 150.**Right of tenant to remove trade fixtures—Effect of new lease generally.**

Cited in *Thomas v. J. W. Gayle & Co.* 134 Ky. 330, 135 A. S. R. 412, 28 L.R.A. (N.S.) 767, 120 S. W. 290; *Ogden v. Garrison*, 82 Neb. 302, 17 L.R.A. (N.S.) 1135, 117 N. W. 714,—holding that execution of new lease in which tenant does not expressly reserve fixtures erected under preceding lease, does not deprive him of right to remove them; *Smusch v. Kohn*, 22 Misc. 344, 49 N. Y. Supp. 176, holding that tenant who renews lease without reservation of right to remove fixtures does not lose right; *Radey v. McCurdy*, 209 Pa. 306, 103 A. S. R. 1009, 67 L.R.A. 359, 58 Atl. 558, holding that tenant who secures new lease, in nature of extension, in which right to fixtures not reserved is not precluded from removing same; *Young v. Consolidated Implement Co.* 23 Utah, 586,

65 Pac. 720, holding that extension of terms and conditions of lease included right to remove improvements placed thereon by him.

Cited in notes in 1 L.R.A. (N.S.) 1198, on new lease as implied surrender of rights under old tenancy to remove fixtures; 1 L.R.A. (N.S.) 1200, on effect of special covenants in new lease on tenant's right to remove fixtures; 1 L.R.A. (N.S.) 1201, on construction of leases and agreements, and intention of parties as to effect of renewal of tenancy without reserving right to remove fixtures.

Disapproved in *Sanitary Dist. v. Cook*, 169 Ill. 184, 61 A. R. 161, 39 L.R.A. 369, 48 N. E. 461 (affirming 67 Ill. App. 286), holding that tenant waives right to remove trade fixtures by entering into new lease in which right to remove fixtures not reserved, but covenants that he will deliver up premises in as good condition as received; *Carlin v. Ritter*, 68 Md. 478, 6 A. S. R. 467, 13 Atl. 370, holding that tenant from year to year who accepts new lease for five years, without reservation of right to remove fixtures, loses right; *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907, holding that tenant loses privilege of removal by entering into new lease in which right to fixtures is not reserved; *Spencer v. Commercial Co.* 30 Wash. 520, 71 Pac. 53, holding tenant divested of right to fixtures when he enters into new lease, making no mention of former lease or tenancy and with no reservation for removal of fixtures placed under former lease.

— Effect of new lease with grantee of premises.

Cited in *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 34 N. W. 514, holding that grantee of premises, with knowledge that title to trade fixtures did not pass, cannot by making new lease with tenant, which does not refer to fixtures, defeat lessee's right to remove same.

Distinguished in *Anthony v. Rockefeller*, 102 Mo. App. 326, 76 S. W. 491, holding that new lease, with new landlord, without reserving right of removal, precludes tenant from removing fixtures.

— Effect of holding over, without new lease.

Cited in *Lewis v. Ocean Nav. & Pier Co.* 125 N. Y. 341, 26 N. E. 301, holding that tenant who holds over, without accepting new lease, retains right to remove fixtures.

— Effect of subtenant's contract with landlord.

Cited in *Podlech v. Phelan*, 13 Utah, 333, 44 Pac. 838, holding that lessee's right to remove trade fixtures put in by sub-tenant, and under agreement to become lessee's, cannot be divested by sub-tenant contract with landlord as to property.

Right of tenant to remove buildings.

Cited in *Hayward v. School Dist. No. 9*, 139 Mich. 539, 102 N. W. 999, holding that tenant owns buildings erected by him on leased land in furtherance of purposes for which premises were leased; *Osborn v. Potter*, 101 Mich. 300, 59 N. W. 606, as to when building erected upon leased land is removal.

— Effect of new lease generally.

Cited in *McCarthy v. Trumacher*, 108 Iowa, 284, 78 N. W. 1104, holding that execution of new lease, providing that tenant should deliver premises in as good condition as then in, does not deprive him of right granted under prior lease to remove improvements.

Disapproved in *Marks v. Ryan*, 63 Cal. 107, holding that tenant loses right to remove buildings erected by him, by taking new lease without reserving right to remove.

— Effect of new lease with grantee of premises.

Cited in *Daly v. Simonson*, 126 Iowa, 716, 102 N. W. 780, holding tenant not deprived of right to remove improvements, by taking lease from subsequent purchaser, while in possession, which failed to reserve same; *Hertzberg v. Witte*, 22 Tex. Civ. App. 320, 54 S. W. 921, holding lessor under lease providing that he may remove buildings put up by him, not divested of that right by taking new lease, without mention of such agreement, with one purchasing premises subject to such agreement.

What constitutes a fixture.

Cited in *Schellenberg v. Detroit Heating & Lighting Co.* 130 Mich. 439, 97 A. S. R. 489, 57 L.R.A. 632, 90 N. W. 47, holding that to constitute fixture, there must be not only annexation to realty, but also unity of title and ownership of realty and thing annexed.

Priority of liens or claims on buildings upon leased premises.

Cited in note in 21 L.R.A. 349, on priority of liens or claims on buildings upon leased premises.

Erections by lessee as within subsequent mortgage.

Cited in reference note in 53 A. R. 341, on erections by lessee as within subsequent mortgage.

What constitutes notice of title.

Cited in notes in 13 L.R.A.(N.S.) 117, on possession of land by grantor after conveyance as notice of title; 113 L.R.A.(N.S.) 126, on use of land by cotenants for partnership purposes as notice of title.

Notice of partnership ownership of real estate as affecting rights therein.

Cited in note in 28 L.R.A. 175, on notice that real estate belongs to partnership as affecting rights therein.

Powers of partners over partnership real estate.

Cited in note in 28 L.R.A. 90, on powers of partners over partnership real estate.

33 AM. REP. 367, BAY COUNTY v. BRADLEY, 39 MICH. 163.**When ejectment maintainable.**

Cited in note in 1 L.R.A. 309, on nature of action of ejectment, and when and when not, maintainable.

Ejectment to recover easement.

Cited in *Taylor v. Gladwin*, 40 Mich. 232, holding that ejectment does not lie to recover easement in alley.

Cited in reference notes in 51 A. R. 478, on municipal right to maintain ejectment for lands dedicated for street; 65 A. S. R. 158, on ejectment for street.

Cited in notes in 33 A. R. 499, on ejectment against municipal corporation for land taken for street; 116 A. S. R. 580, on maintenance of ejectment for right of way, street, or vault underneath street; 18 L.R.A. 786, on whether ejectment will lie by owner of an easement; 11 L.R.A.(N.S.) 130, on ejectment for a public easement.

Right of executory vendor to maintain ejectment against stranger ousting vendee.

Cited in *Kuite v. Lage*, 152 Mich. 638, 125 A. S. R. 421, 116 N. W. 467, holding

that vendee in possession under executory contract is person to maintain ejectment against stranger who ousts him from land.

Right to injunction.

Cited in *Detroit City R. Co.* 56 Fed. 867, holding that municipal corporation may enjoin use of streets by street railway company after expiration of its franchise.

33 AM. REP. 370, LEONARD v. PHILLIPS, 39 MICH. 182.

Effect of alteration of instrument.

Cited in *Prudden v. Nester*, 103 Mich. 540, 61 N. W. 777, holding that alteration which does not change effect of instrument will not preclude recovery thereon; *Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020, holding that alteration made by one party to instrument, will not vitiate it, if legal import and effect remains same after alteration.

Cited in notes in 86 A. S. R. 102, on materiality of alteration of subject-matter, etc., of written instrument; 6 L.R.A. 470, on effect of alteration of promissory note by filling in blanks.

33 AM. REP. 372, JOHNSTON v. KIMBALL TWP. 39 MICH. 187.

Liability of surety on bond.

Cited in *Fay v. Jenks*, 93 Mich. 130, 53 N. W. 163, holding violation of agreement which induces one to become surety without his consent, releases surety.

Cited in notes in 36 A. S. R. 774; 42 L. ed. U. S. 991,—on liability of sureties on official bonds.

—Effect of failure of principal to sign.

Cited in *Novak v. Pitlick*, 120 Iowa, 286, 98 A. S. R. 360, 94 N. W. 916, holding that bond unsigned by principal cannot be enforced against surety, in absence of proof that he consented.

Cited in notes in 35 A. R. 425; 90 A. S. R. 193,—on effect of omission of principal to sign official bond as to relieving sureties from liability; 12 L.R.A.(N.S.) 1107, on effect of delivery of bond unsigned by principal obligor when he is independently bound; 12 L.R.A.(N.S.) 1112, on effect of delivery of official bond unsigned by principal obligor where he is bound by operation of law; 12 L.R.A.(N.S.) 1120, on effect of unconditional delivery of bonds unsigned by principal obligor.

Distinguished in *Todd v. The Tulchen*, 2 Fed. 600, 14 Phila. 550, 37 Phila. Leg. Int. 237, holding sureties who gave bond, knowing that principal would not sign, cannot avoid liability.

Disapproved in *Trustees of Schools v. Sheik*, 119 Ill. 579, 59 A. R. 830, 8 N. E. 189, holding that sureties may be bound by bond not signed by principal.

—Failure to secure additional surety.

Cited in *People use of National Sewer-Pipe Co. v. Sharp*, 133 Mich. 378, 94 N. W. 1074, holding that failure to secure additional surety and delivery of bond with line drawn through name in body of bond, releases surety who signed on condition that such other also sign; *Woodin v. Durfee*, 46 Mich. 424, 9 N. W. 457, to point that surety is not bound where others named as cosureties did not sign.

Cited in reference notes in 40 A. S. R. 52, on liability on bonds not executed by some of the parties; 45 L.R.A. 330, on waiver and estoppel as to condition that bond was not to take effect until signed by others.

Distinguished in *Brown v. Probate Judge*, 42 Mich. 401, 4 N. W. 195, holding that surety, who signs on condition that cosurety be secured, is bound if bond is delivered without name of designated cosurety inserted in bond.

— Substitution of new cosurety.

Cited in *Hessell v. Johnson*, 63 Mich. 623, 6 A. S. R. 334, 30 N. W. 209, holding surety who signs bond with understanding that another named as cosurety, also sign, not bound, if such name erased and another signs.

— Failure to have bond approved.

Cited in *People use of J. E. Bartlett Co. v. Carroll*, 151 Mich. 233, 115 N. W. 42, holding that sureties on bond given for benefit of laborers and materialmen cannot avoid liability by showing failure of municipal authorities to approve bond.

— Forgery of principals' names.

Cited in *Sullivan v. William*, 43 S. C. 489, 21 S. E. 642 (dissenting opinion), on right to hold surety, who signs bond before obligors, estopped, as against innocent obligee, to show that signatures of such obligors were forged.

Extent of surety's liability.

Cited in *White Sewing Mach. Co. v. Hines*, 61 Mich. 423, 28 N. W. 157, holding surety for one as agent not liable for default of principal and subsequent partners; *Grasser & B. Brewing Co. v. Rogers*, 112 Mich. 112, 67 A. S. R. 389, 70 N. W. 445, holding that surety for purchase price of goods in car lots not liable for purchases made by principal in less quantities; *Union Trust Co. v. Detroit Motor Co.* 117 Mich. 631, 76 N. W. 112, holding that contract of surety is not to be extended beyond its express terms; *Baker County v. Huntington*, 48 Or. 593, 87 Pac. 1036, holding that liability of sureties on joint and several official bond not affected by memorandum opposite their signatures, limiting liability.

Distinguished in *Detroit Sav. Bank v. Ziegler*, 49 Mich. 157, 43 A. R. 456, 13 N. W. 496, holding surety on bond of receiving teller in savings department of bank liable for default of principal while temporarily acting as general teller.

Intent of signatory in executing bond.

Cited in note in 12 L.R.A. (N.S.) 1121, on presumption and burden of proof as to signatory's intent in excluding bond which is delivered unsigned by principal obligor.

33 AM. REP. 374, FAULKES v. PEOPLE, 39 MICH. 200.

Necessity of guilty intent to sustain indictment.

Cited in *State v. Brown*, 38 Kan. 390, holding that one charged with offense of drunkenness in public place may show as defense that he was without knowledge of intoxicating qualities of liquor drunk; *People v. Jewell*, 138 Mich. 620, 101 N. W. 835, holding that in order to constitute offense of carrying away public record act must be accompanied by criminal intent.

Cited in note in 8 E. R. C. 47, on necessity of guilty intent to make act crime.

Distinguished in *People v. Monk*, 8 Utah, 35, 28 Pac. 115, holding mine recorder's honest belief that he could charge certain fees, no defense to indictment for charging illegal fees.

—For sale of liquor to minor.

Cited in *People v. Welch*, 71 Mich. 548, 1 L.R.A. 385, 39 N. W. 747, holding illegal sale of liquor to minor excused by honest belief from appearance and statement that minor was of full age; *State v. Gulley*, 41 Or. 318, 70 Pac. 385, holding vendor's belief, however honestly entertained, that purchaser of intoxicants was of lawful age, no defense to charge of selling to minor.

Cited in reference note in 38 A. R. 24, on seller's liability for selling liquor to minors through mistakenly supposing them of age.

Cited in note in 25 L.R.A.(N.S.) 669, on ignorance of minority of purchaser of liquor as defense to prosecution for sale.

Distinguished in *People v. Curtis*, 129 Mich. 1, 95 A. S. R. 404, 87 N. W. 1040, holding illegal sale of liquor to minor not excused by honest belief that he was of full age.

Disapproved in *State v. Bruder*, 35 Mo. App. 475, holding seller's good faith or want of knowledge as to age of minor no defense for selling intoxicants to him in violation of statute.

—Responsibility for clerk's illegal sale of liquor.

Cited in *People v. Parks*, 49 Mich. 333, 13 N. W. 618, holding liquor dealer not criminally responsible for sale by clerk, and without his knowledge or concurrence, to habitual drunkards; *People v. Hughes*, 86 Mich. 180, 48 N. W. 945, holding saloon keeper not liable criminally for unknown violation of law by clerk.

Distinguished in *People v. Roby*, 52 Mich. 577, 50 A. R. 270, 18 N. W. 365, holding saloon keeper criminally responsible for clerk's illegal sale of liquor on Sunday; *People v. Longwell*, 120 Mich. 311, 79 N. W. 484, 6 Del. L. N. 151, holding druggist criminally liable for violation by clerk of local option law, providing for punishment of "any person, who himself or by his clerk, etc."

—For selling liquor without license.

Cited in *State v. Chastain*, 19 Or. 176, 23 Pac. 963, holding sale of spirituous liquor without license indictable irrespective of guilty knowledge.

Proof in prosecution for sale of liquor to minor.

Cited in reference note in 51 A. R. 322, on necessity for proof of knowledge of minority in prosecution for selling intoxicants to minor.

Effect of license on power of state to prohibit sale of liquors.

Cited in note in 35 A. D. 336, on effect of license on power of state to prohibit sale of liquors.

33 AM. REP. 375, *BROWN v. BARNES*, 39 MICH. 211.

Pecuniary standing as competent evidence.

Cited in reference notes in 33 A. R. 509, on admissibility of defendant's wealth in action for damages; 82 A. S. R. 129, on admissibility of pecuniary circumstances of parties.

—In action for libel or slander.

Cited in *Barkly v. Copeland*, 74 Cal. 1, 5 A. S. R. 413, 15 Pac. 307, holding evidence of wealth of defendant admissible in action for slander; *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628, holding not competent to enter into details of finances of defendant in slander suit; *Ellis v. Whitehead*, 95 Mich. 105, 54 N. W. 752, holding business standing of defendant may be shown to prove influence his word would have in community; *Botsford v. Chase*, 108 Mich. 432,

66 N. W. 325, holding evidence of defendant's financial standing admissible to show influence his word would have in community; *Rea v. Harrington*, 58 Vt. 181, 56 A. R. 561, 2 Atl. 475, holding error to exclude defendant's evidence showing he was man of no property, where exemplary damages are asked; *Kidder v. Bacon*, 74 Vt. 263, 52 Atl. 322, holding that evidence of defendant's pecuniary means and standing in community, admissible in aggravation of damages; *Randall v. Evening News Asso.* 97 Mich. 136, 56 N. W. 361, holding that evidence of reputed wealth of defendant corporation in suit for libel, is inadmissible.

Cited in reference note in 5 A. S. R. 418, on evidence of defendant's pecuniary condition in slander.

Cited in note in 67 A. D. 565, on admissibility of evidence of defendant's wealth in action for libel or slander.

— In action for breach of promise to marry.

Cited in note in 36 A. R. 445, on admissibility of evidence of pecuniary circumstances of defendant in action for breach of promise to marry.

— In action for alienation of affections.

Cited in *Derham v. Derham*, 125 Mich. 109, 83 N. W. 1005, holding evidence of reputed wealth of defendant inadmissible in divorced wife's action against husband's father for alienating affections.

— In action for malicious prosecution.

Cited in *Sexson v. Hoover*, 1 Ind. App. 65, 27 N. E. 105, holding evidence of defendant's financial condition admissible in action for malicious prosecution.

— In action for seduction.

Cited in *Wilson v. Shepler*, 86 Ind. 275, holding evidence of pecuniary circumstances of defendant admissible in action by woman for own seduction; *Watson v. Watson*, 53 Mich. 163, 51 A. R. 111, 18 N. W. 606, holding evidence of wealth of defendant inadmissible in seduction action.

Cited in reference note in 36 A. R. 793, on admissibility of evidence of defendant's wealth in action of seduction.

Admissibility of evidence.

Cited in *Willard v. Norcross*, 79 Vt. 546, 65 Atl. 755, holding subsequent manifestations of ill will inadmissible in action against physician for malpractice, to show intent.

— Of other slanders.

Cited in *Newman v. Stein*, 75 Mich. 402, 13 A. S. R. 447, 42 N. W. 956, holding proof of other slanderous words in same conversation admissible; *Cadwell v. Corey*, 91 Mich. 335, 51 N. W. 888, to point that in slander action, after proving words alleged, evidence of other slanderous words of like import are admissible.

33 AM. REP. 380, PEOPLE v. COOK, 39 MICH. 236.

Assault or homicide to prevent adultery.

Cited in note in 132 Am. St. Rep. 698, on assault or homicide to prevent adultery.

Prospective seduction as justification for homicide.

Cited in *Gossett v. State*, 123 Ga. 431, 51 S. E. 394, to point homicide not justified by fact that deceased was seeking to debauch accused's minor daughter.

Cited in reference note in 10 A. S. R. 295, on seduction by deceased as justification for killing him.

Proximate cause of death.

Cited in *Mella v. Northern S. S. Co.* 162 Fed. 499, holding improper administration of chloroform, during operation, proximate cause of death, where injury not of itself mortal; *People v. Lewis*, 124 Cal. 551, 45 L.R.A. 783, 57 Pac. 470, holding one who inflicts mortal wound not relieved from responsibility for death by fact that deceased accelerated death by self-inflicted wound; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 A. R. 168, holding injury, not fever, proximate cause of death, where injury so enfeebled system as to make it less able to resist disease; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163, 45 A. R. 30, 15 N. W. 65, holding that to sustain defense that injury received was secondary cause of death, it must be shown that death must have resulted if injury had not been done; *Scherer v. Schlager*, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000, to point that one whose negligence contributes to death is not relieved of responsibility by showing that other causes concurred in result.

Cited in note in 22 L.R.A.(N.S.) 842, 843, 847, on criminal responsibility for wound resulting in death as affected by negligence or lack of skill in treatment or care.

Limitation to necessity of justification of homicide to prevent forcible felonies.

Cited in note in 67 L.R.A. 530, on limitation to necessity of justification of homicide to prevent forcible felonies.

33 AM. REP. 384, LONG v. BATTLE CREEK, 39 MICH. 323.**Conveyance or promise for benefit of public work.**

Cited in *Danby Twp. v. Beebe*, 147 Mich. 312, 110 N. W. 1066, holding that gratuitous promise to township to pay certain sum if board of supervisors order certain bridge built cannot be sustained or enforced as subscription to object of public utility or necessity; *Scovel v. Detroit*, 159 Mich. 95, 123 N. W. 569, holding evidence to show deeding of property for boulevard under agreement that special assessments for improvements would not be made, is admissible to show consideration.

Power of city in opening streets.

Cited in *Goodell v. Kalamazoo*, 63 Mich. 416, 29 N. W. 880, holding that where city has unlimited power to open streets, it does not concern private persons what streets council open, where they have right of way.

When contract is void for uncertainty.

Cited in *First Nat. Bank v. Park*, 117 Iowa, 552, 91 N. W. 826, holding contract to procure assignment of corporate stock, not void for uncertainty because not specifying kind of assignment intended.

33 AM. REP. 390, GREGORY v. WENDELL, 39 MICH. 337, Later appeal in 40 Mich. 432.**Validity of contracts dealing in futures — Commodities.**

Cited in *Fortenbury v. State*, 47 Ark. 188, 1 S. W. 58, holding that validity of contracts dealing in fixtures depends upon whether parties intended actual bona fide sale; *Sondheim v. Gilbert*, 117 Ind. 71, 10 A. S. R. 23, 5 L.R.A. 432, 18 N. E. 687, holding contract for future delivery valid, where actual delivery intended, though margin deposited to cover loss; *Western U. Teleg. Co. v. State*, 165 Ind. 492, 3 L.R.A.(N.S.) 153, 76 N. E. 100, 6 A. & E. Ann. Cas. 880, holding that contracts for purchase and sale of commodities, to be performed only by ad-

vancing and paying difference are void at common law; *Clay v. Allen*, 63 Miss. 426, holding contract of sale for future delivery of cotton, binding, unless shown no actual delivery intended; *Cobb v. Prell*, 5 McCrary, 80, 15 Fed. 774; *Hawley v. Bibb*, 69 Ala. 52; *Whitesides v. Hunt*, 97 Ind. 191, 49 A. R. 441; *Seeligson v. Lewis*, 65 Tex. 215, 57 A. R. 593,—holding contract for future delivery of commodity invalid, where intent, not of delivering, but merely of settling difference between agreed and market price; *Barnard v. Backhaus*, 52 Wis. 593, 9 N. W. 595, holding written contract for future delivery of grain, for price certain, valid where made with actual view to delivery and receipt; *Gregory v. Wendell*, 40 Mich. 432, to point that contract for future delivery, which is purely gambling transaction, is unenforceable; *Carland v. Western U. Teleg. Co.* 118 Mich. 369, 74 A. S. R. 394, 43 L.R.A. 280, 76 N. W. 762; *Morrissey v. Broomal*, 37 Neb. 766, 56 N. W. 383,—to point that sale of grain for future delivery is valid contract; *Earl v. Howell*, 14 Abb. N. C. 474, to point that contract must not only be mere bet upon future and uncertain event to be invalid, but must be so understood by both parties; *De Mary v. Burtenshaw*, 131 Mich. 326, 91 N. W. 647, holding that question whether contract with broker for purchase of wheat on margins for future delivery was gambling contract, is for jury; *Douglas v. Smith*, 74 Iowa, 468, 38 N. W. 163, as to validity of sales of corn for future delivery.

Cited in notes in 81 A. S. R. 45, on sale of crops growing or to be grown; 1 A. S. R. 757, on necessity that vendor of personal property for future delivery own the property; 1 A. S. R. 761, 762, on intention of parties as criterion of validity of contract of sale for future delivery; 1 A. S. R. 763, on effect of form of contract of sale for future delivery.

—Stocks.

Cited in *Lewis v. Wilson*, 50 Hun, 166, 2 N. Y. Supp. 806, holding that contracts for purchase and sale of stock must be shown to have been entered into as gaming contracts, to render them void; *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. 1084; *Justh v. Holliday*, 2 Mackey, 346; *Allen v. Dunham*, 92 Tenn. 257, 21 S. W. 898,—holding contract for sale of stock invalid where real intent is merely to speculate in rise and fall of prices.

Cited in reference note in 73 A. S. R. 815, on validity of contract for future delivery of stocks.

What constitutes a gaming contract.

Cited in *Third Nat. Bank v. Harrison*, 3 McCrary, 316, 10 Fed. 243, holding that option deal is not "gaming or gambling device" within meaning of Missouri Statutes; *Cunningham v. National Bank*, 71 Ga. 400, 51 A. R. 266, holding that contracts for purchase and sale of cotton futures are gaming contracts; *Watte v. Costello*, 40 Ill. App. 307, holding that contract for sale and future delivery of grain, delivery optional, to be filled by adjusting differences in market value, is in nature of gambling transaction; *Jamieson v. Wallace*, 167 Ill. 388, 59 A. S. R. 302, 47 N. E. 762, holding that contract for purchase and sale of stocks to be settled by paying differences is gambling contract; *Lowe v. Young*, 59 Iowa, 364, 13 N. W. 329, holding transfer of grain to cover liability growing out of transactions on board of trade is without consideration; *Anderson v. State*, 2 Ga. App. 1, 58 S. C. 401, to point that contract to operate in grain options to be adjusted according to difference in market value, is gambling transaction; *People v. Weithoff*, 51 Mich. 203, 47 A. R. 557, 16 N. W. 442, to point that term gaming contracts may be applied to option contracts.

Cited in reference note in 48 A. R. 520, on margins as gambling contracts.

Cited in note in 28 L. ed. U. S. 226, on grain options and wager contracts.

Distinguished in *Shaw v. Clark*, 49 Mich. 384, 43 A. R. 474, 13 N. W. 786, holding dealing in options not gaming or betting within meaning of penal statute.

Validity of wagering and gambling contracts.

Cited in notes in 1 A. S. R. 759, 760, on invalidity of wagering contracts for sale; 1 L.R.A. 141, on validity of wagering contracts; 12 L.R.A. 121, on validity of gambling contracts.

Evidence admissible in determining validity of contract.

Cited in *Detroit Salt Co. v. National Salt Co.* 134 Mich. 103, 96 N. W. 1, holding competent, in determining validity of contract, to show circumstances attending execution, object, and construction parties placed upon it, as evidenced by their dealing under it.

When deposited margins can be recovered back.

Cited in *Mellott v. Downing*, 39 Or. 218, 64 Pac. 393, holding that money deposited with broker to cover margins on purchases can be recovered back where broker reports fictitious transactions.

What will be judicially noticed.

Cited in note in 49 A. R. 204, as to what will be judicially noticed.

33 AM. REP. 396, WOODS v. AYRES, 39 MICH. 345.

Assumpsit for voluntary act.

Cited in *Hough v. Comstock*, 97 Mich. 11, 55 N. W. 1011, holding that assumpsit will not lie to recover moneys voluntarily paid by son to sister-in-law without her request, as contributions toward support of his mother.

Cited in reference note in 28 A. S. R. 570, on assumpsit for voluntary service.

Implied contract arising from voluntary service.

Cited in reference note in 49 A. R. 51, as to whether contract is implied from the doing of an unasked service.

Right to compensation for services, upon implied promise.

Cited in *Snowden v. Clemons*, 5 Colo. App. 251, 38 Pac. 475, holding that action will lie to recover for services performed by one for another under implied contract that party receiving service will compensate in last will; *James v. Gillen*, 3 Ind. App. 472, 30 N. E. 7, holding that aunt is under no obligation to pay for services of niece who resides with her as one of family; *Cole v. Clark*, 85 Me. 336, 21 L.R.A. 714, 27 Atl. 186, holding that there is no implied promise of compensation in loan of tools for few minutes; *Cicotte v. St. Anne's Church*, 60 Mich. 552, 27 N. W. 682, holding that law will not imply promise of compensation by church for services rendered by trustee; *Harris v. Smith*, 79 Mich. 54, 6 L.R.A. 702, 44 N. W. 169, holding that there is no implied promise to pay for services rendered by step-daughter to step father; *Doyle v. Pelton*, 134 Mich. 398, 96 N. W. 483, holding assumpsit will not lie to recover expenses of one in merely moving another's logs to one side so as to make passage way for his own; *Michigan College v. Charlesworth*, 54 Mich. 522, 20 N. W. 566; *Van Buren Div. Toledo & S. H. R. Co. v. Lamphear*, 54 Mich. 575, 20 N. W. 590,—holding that contract cannot exist without competent parties to make it.

Right of set-off.

Cited in *Bradley v. Thompson Smith's Sons*, 98 Mich. 449, 39 A. S. R. 565, 23 L.R.A. 305, 57 N. W. 576, holding that where debtor contracts with creditor to

perform certain labor and before entering upon work assigns contract to one who guaranteed performance, creditor cannot set-off against same his demand against debtor which was due when assignment made; *Merchants' Bank v. Schulenberg*, 54 Mich. 49, 19 N. W. 741, to point that common law never recognized right of set-off.

33 AM. REP. 403, FOSTER v. SCRIPPS, 39 MICH. 376.

Privileged communications.

Cited in *Hocks v. Sprangers*, 113 Wis. 123, 87 N. W. 1101, holding that communications between members of same Catholic church relating chastity of priest's housekeeper, unmarried woman, are not conditionally privileged as against her.

— Newspaper publications.

Cited in *Republican Pub. Co. v. Conroy*, 5 Colo. App. 262, 38 Pac. 423, holding that newspaper publication charging one with being guilty of making assaults on little girls, published as matter of local news, is not privileged; *Jones v. Townsend*, 21 Fla. 431, holding newspaper publication stating that candidate for election office, is under indictment for certain crime, not privileged, when such person not under indictment; *Morse v. Times-Republican Printing Co.* 124 Iowa, 707, 100 N. W. 867, holding publication of defamatory matter concerning private citizen, in pursuit of lawful private business, is not privileged; *Wilman v. Mabee*, 45 Mich. 484, 40 A. R. 477, 8 N. W. 71, holding that publication charging school teacher with being of bad moral character, is privileged; *Bourreseau v. Detroit Evening Journal Co.* 63 Mich. 425, 6 A. S. R. 320, 30 N. W. 376, holding that newspaper article charging public officer with gross misconduct in office cannot be claimed to be privileged, on ground that its publication is public good; *Belknap v. Ball*, 83 Mich. 583, 21 A. S. R. 622, 11 L.R.A. 72, 47 N. W. 674, holding publications of falsehoods are never privileged; *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 8, holding publication of false charge of criminal offense, not privileged though publisher had reason to believe charge true and acted bona fide; *Mallory v. Pioneer-Press Co.* 34 Minn. 521, 26 N. W. 904, holding publication in newspaper of false and defamatory matter, not privileged because made bona fide and as item of news; *Shelby v. Dampman*, 4 Pa. Dist. R. 496, 1 Lack. L. News, 77, holding publication stating that house, at which one charged with adultery was arrested, was bawdy house, privileged unless express malice or want of reasonable care in ascertaining character of house is shown; *Neeb v. Hope*, 111 Pa. 145, 2 Atl. 568, 17 W. N. C. 93, 16 Pittsb. L. J. N. S. 271, 43 Phila. Leg. Int. 227, holding that publications which are false and groundless imputations of wicked motives or of crime are not privileged; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 760, holding newspaper article to the effect that plaintiff while sealer of weights and measure tampered with weights to swell fees of office, is not privileged; *Atkinson v. Detroit Free Press Co.* 46 Mich. 341, 9 N. W. 501 (dissenting opinion), on right to hold newspaper publication concerning lawyer as privileged communication; *Maclean v. Scripps*, 52 Mich. 214, 17 N. W. 815 (dissenting opinion), on privileged character of publication concerning surgeon connected with state university.

Cited in notes in 86 A. D. 92, on liability of newspapers for libel; 104 A. S. R. 137, on application of doctrine of privilege to statements by newspapers or periodicals relative to matters of public interest.

Elements of damage for newspaper libel.

Cited in note in 15 A. S. R. 350, on elements increasing or mitigating damages for newspaper libel.

When charge is slanderous or libelous.

Cited in *Dallavo v. Snider*, 143 Mich. 542, 114 A. S. R. 684, 4 L.R.A.(N.S.) 973, 107 N. W. 271, 8 A. & E. Ann. Cas. 212, holding that to say of business man "he is not worth a dollar; everything is in his wife's name," is not slanderous per se unless said of and concerning him in his business.

Cited in notes in 26 L.R.A. 327, on libel or slander in charging fault to physician in particular case; 4 L.R.A.(N.S.) 973, on oral charge of insolvency against merchant as slander.

33 AM. REP. 409, MARTUS v. HOUCK, 31 MICH. 431.**Right to recover on uncompleted contract.**

Cited in *Fildew v. Besley*, 42 Mich. 100, 36 A. R. 433, 3 N. W. 278, holding that one cannot recover on nonapportionable building contract where building was burned before contract fully performed, or before any part had been accepted or appropriated by owner; *Hanley v. Walker*, 79 Mich. 607, 8 L.R.A. 207, 45 N. W. 57; *Crawford v. Schneider*, 106 Mich. 199, 64 N. W. 39; *Eaton v. Gladwell*, 108 Mich. 678, 66 N. W. 598,—holding that no recovery can be had on contract where contractor has not complied with specifications.

Cited in note in 59 A. S. R. 286, as to when complete performance is essential to cause of action on building and analogous contracts.

—Acceptance of benefits as entitling to recovery on quantum meruit.

Cited in *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292, holding that one who takes possession of building which does not conform to specifications, though under no obligation to do so, may be held liable on quantum meruit; *Gross v. Croyts*, 130 Mich. 672, 90 N. W. 689, holding that one who accepts and makes use of work performed under express contract, is liable on quantum meruit count, though contract not conformed to; *Mosaic Tile Co. v. Chiera*, 133 Mich. 497, 95 N. W. 537, holding one who has failed fully to perform his contract may recover under quantum meruit, where owner appropriated work done, subject to latter's right of recoupment.

Right of builder to recover for extras.

Cited in reference note in 40 A. R. 152, on right of builder furnishing materials to recover for extras.

33 AM. REP. 414, CAMPAU v. LANGLEY, 39 MICH. 451.**What constitutes due process of law.**

Cited in *Newman v. People*, 23 Colo. 300, 47 Pac. 278, holding that statute providing that gambling devices kept and used for gambling purposes, may be seized by sheriff without notice to owner, is constitutional.

—As to sale of estrays.

Cited in *Greer v. Downey*, 8 Ariz. 164, 61 L.R.A. 408, 71 Pac. 900, holding statute which authorizes without judicial proceeding, sale of trespassing animals after specified notice is void; *Ft. Smith v. Dodson*, 46 Ark. 296, 55 A. R. 589, holding city ordinance authorizing impounding, and sale after public notice of hogs found running at large, valid; *Armstrong v. Traylor*, 87 Tex. 598, 30 S. W. 440, holding "hog law" unconstitutional because there is no trial, no right of appeal and rights of owner have no protection; *Krophy v. Hyatt*, 10 Colo.

223, 15 Pac. 399; *Paris v. Hale*, 13 Tex. Civ. App. 386, 35 S. W. 333; *Shook v. Sexton*, 37 Wash. 509, 79 Pac. 1093, holding ordinance providing for summary sale under reasonable notice of impounded animals, without judicial inquiry, valid; *Burdett v. Allen*, 35 W. Va. 347, 14 L.R.A. 337, 13 S. E. 1012, holding ordinance providing for impounding of estrays, and selling of them to pay charges without judicial inquiry or determination, upon notice to owner, valid; *Blanck v. Hitch*, 56 Mich. 330, 23 N. W. 31, to point that cattle must be running at large in highway to justify seizure.

Cited in reference note in 39 A. R. 208, on constitutionality or ordinance authorizing marshal to seize and sell stray hogs without notice to owner.

Cited in notes in 48 A. D. 276, on statutes authorizing summary seizure and sale of estrays or trespassing animals; 34 A. S. R. 862, on statutes and ordinances as to animals running at large; 58 A. S. R. 816, on distraint of animals damage feasant.

Legislative and municipal power over estrays.

Cited in notes in 97 A. D. 90, on power of legislature to provide for summary sale and seizure or destruction of animals; 90 A. S. R. 217, on power of municipalities as to animals at large in public places; 39 L.R.A. 676, on municipal power over animals running at large as nuisances.

33 AM. REP. 418, KELLY v. REYNOLDS, 39 MICH. 464.

Construction of bequest to widow.

Cited in *Barr v. Weaver*, 132 Ala. 212, 31 So. 488, holding that under devise to wife of such portion of estate as laws of state entitled her, wife takes as in cases of intestacy; *Murdoch v. Bilderback*, 125 Mich. 45, 83 N. W. 1007, holding that under bequest to widow "all statute of state of Michigan allows widow" widow is entitled to one-half of his real estate, which statute gives her; *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725, holding that under bequest of "amount now allowed her by law out of my estate" widow takes such share as if testator died intestate; *Gotzian's Estate*, 34 Minn. 159, 57 A. R. 43, 24 N. W. 920, holding widow not entitled to dower, in addition, where she takes under will as if testator died intestate; *Re Golder*, 30 Hun. 441, holding that provision in will giving widow "amount due her by law" entitles widow to share as in cases of intestacy; *Wilson v. Morris*, 94 Tenn. 547, 29 S. W. 966, on construction of will favorable to widow.

Election by widow.

Cited in note in 10 E. R. C. 350, on election by widow between testamentary provision and dower.

Jurisdiction of probate court to construe will.

Cited in *Reid's Estate*, 80 Mich. 228, 45 N. W. 91, holding that probate court has jurisdiction to construe will; *Parkinson v. Parkinson*, 139 Mich. 530, 102 N. W. 1002, holding that probate court may construe wills for certain purposes.

33 AM. REP. 421, SCHOOL DIST. v. GAGE, 39 MICH. 484.

Liability of municipal corporations to garnishment.

Cited in *Addyston Pipe & Steel Co. v. Chicago*, 170 Ill. 580, 44 L.R.A. 405, 48 N. E. 967, holding that creditor's bill will not lie against city to reach debt owing by city to third person; *Clinton County v. Davis*, 162 Ind. 60, 64 L.R.A. 780, 69 N. E. 680, 1 A. & E. Ann. Cas. 282, holding that to make municipal corporations subject to garnishment, act must so provide in express words; *Switzer v.*

Wellington, 40 Kan. 250, 10 A. S. R. 196, 19 Pac. 620, holding that city of second class cannot be required to answer as garnishee; *Kein v. Carthage School Dist.* 42 Mo. App. 460, holding school district not subject to process of garnishment, under statute; *State ex rel. Crawford v. Eberly*, 12 Neb. 616, 12 N. W. 96, holding county not subject to process of garnishment; *Chamberlain v. Watters*, 10 Utah, 298, 37 Pac. 566, holding board of education not liable to process of garnishment; *Van Cott v. Pratt*, 11 Utah, 209, 39 Pac. 827, holding that statutory exemption of municipal corporation from garnishment cannot be waived by municipality, by ordinance consenting thereto; *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 53 A. S. R. 878, 37 L.R.A. 207, 45 Pac. 31, holding county not liable to garnishment unless made so by express statutory provision; *Richardson v. Independent School Dist. No. 1*, 5 Dak. 277, 38 N. W. 553, on right to subject school district to garnishment.

Cited in reference notes in 12 A. S. R. 276, on liability of school district to garnishment for teacher's wages; 24 A. S. R. 73, on liability of county to garnishment.

Cited in note in 51 A. S. R. 120, on garnishment of municipalities.

School districts as municipal corporations.

Cited in *Belles v. Burr*, 76 Mich. 1, 43 N. W. 24, holding that school districts are regarded as municipal corporations; *Atty. Gen. ex rel. Kies v. Lowrey*, 131 Mich. 639, 92 N. W. 289 (dissenting opinion), to point that school district is municipal corporation.

Exemption of salaries of school teachers and superintendents.

Cited in notes in 96 A. S. R. 452, on exemption of salaries of school teachers and superintendents; 54 L.R.A. 573, on exemption of school teacher's salary from claims of creditors.

Law of holidays.

Cited in note in 19 L.R.A. 317, on how far the law of holidays extends to matters other than those relating to commercial paper.

Liability of school teacher's wages to deduction for holidays.

Cited in *Emporia Bd. of Edu. v. State*, 7 Kan. App. 620, 52 Pac. 466, holding that wages of school teachers should not be reduced because schools closed two days at Thanksgiving time; *Holloway v. School Dist. No. 9*, 62 Mich. 153, 28 N. W. 764, holding school teachers' wages not subject to deduction for recognized holidays.

Cited in notes in 50 L.R.A. 371, on right of teacher to salary during temporary interruption of school in term time; 50 L.R.A. 374, on right of teacher to salary for holidays.

33 AM. REP. 423, LAKE SUPERIOR IRON CO. v. ERICKSON, 39 MICH. 492.

What amounts to contributory negligence of employee.

Cited in *Burnside v. Novelty Mfg. Co.* 121 Mich. 115, 79 N. W. 1108, 6 Det. L. N. 382, holding one who relies upon assurances that machine is safe, given by his superior who has special duty to inspect and repair, not guilty of contributory negligence, though he had knowledge that machine had continuously made trouble in way which caused his injury; *Sipes v. Michigan Starch Co.* 137 Mich. 258, 100 N. W. 447, holding servant who obeys directions of fellow servant, given in presence of master, not guilty of contributory negligence where attending danger not apparent; *Graham v. Newburg Orrel Coal & Coke Co.* 38 W. Va.

273, 18 S. E. 584, holding that mere continuance in service with knowledge of defect in machinery or working place, not per se contributory negligence.

Effect of assurance of safety.

Cited in note in 48 L.R.A. 543, on effect of assurance of safety given by master or coservant.

When servant assumes risk of defective machine.

Cited in *Rohrabacher v. Woodward*, 124 Mich. 125, 82 N. W. 797, holding that experienced servant of mature years, who continues to use machine which he knows is dangerous, assumes risk, though employer assures him that it is safe.

Assumption of risk as question for jury.

Cited in *Michaud v. Grace Harbor Lumber Co.* 122 Mich. 305, 81 N. W. 93, 6 Det. L. N. 773, holding assumption of risk question for jury where not shown one must have known of attending danger; *Tomazin v. Shenango Furnace Co.* 103 Minn. 334, 114 N. W. 1128, holding that whether miner was guilty of contributory negligence, or assumed risk of making certain repairs, when assured by mining captain that place was safe, were proper questions for jury.

Liability for negligence in absence of contractual relations.

Cited in *McCall v. Pacific Mail S. S. Co.* 123 Cal. 42, 55 Pac. 706, holding that principal who undertakes to furnish contractor with appliances, is liable for defective appliances, to contractor's servant; *Crusselle v. Pugh*, 67 Ga. 430, 44 A. R. 724, holding lessor of quarry not liable to servant of lessee for latter's negligence; *Douglas v. Marsh*, 141 Mich. 209, 104 N. W. 624, holding that under certain circumstances owner of premises may be liable to servant of independent contractor for defective premises; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 24 A. S. R. 333, 12 L.R.A. 746, 15 S. W. 1112, holding railroad company which undertakes to furnish cars to quarry owner, not liable to latter's employees for defective brake.

Test as to relation of parties under employment contract.

Cited in reference note in 4 A. S. R. 264, on test as to whether relation of master and servant or contractor and contractee exists.

Who is independent contractor.

Cited in note in 65 L.R.A. 488, on specific terms of contract for work in mines negating independence of contractor.

Liability for negligence of independent contractor.

Cited in *Southwell v. Detroit*, 74 Mich. 438, 42 N. W. 118, holding city liable for negligence of independent contractor in repair of streets.

Cited in notes in 80 A. D. 83, on employer's liability for acts or omissions of contractor; 76 A. S. R. 425, on liability for negligence of independent contractors in doing work in mines.

Principal employer's control over work as affecting liability for injury to employees.

Cited in note in 46 L.R.A. 79, on effect of principal employer's reservation of control over work on liability for injury to employees.

Liability of master for defective appliances furnished.

Cited in *Watts v. Hart*, 7 Wash. 178, 34 Pac. 423, holding master not liable for injury to servant after he has proved reasonably safe and adequate appliances.

Cited in notes in 98 A. S. R. 309, on employer's liability to servants of independent contractors for injuries resulting from defective machinery and appliances; 26 L.R.A. 524, on liability to employees of contractor for unsafe appliances or premises.

Duty of railroad company on receiving cars from connecting line.

Cited in *Sykes v. St. Louis & S. F. R. Co.* 88 Mo. App. 193, holding that railroad company on receiving cars from connecting line has duty to see that they are safe.

Sufficiency of assignment of error.

Cited in *Brown v. McCord & B. Furniture Co.* 65 Mich. 360, 32 N. W. 441; *Lyon v. Watson*, 109 Mich. 390, 67 N. W. 512,—holding that assignment of error based upon detached sentence of judge's charge which is not strictly accurate will not be sustained, where charge as whole is correct.

33 AM. REP. 430, CORDES v. MILLER, 39 MICH. 581.

Discharge of contract by act of law.

Cited in *United States v. Dietrich*, 126 Fed. 671, holding that contract, lawful in its inception but which becomes unlawful by reason of act of law, is terminated; *Macon & B. R. Co. v. Gibson*, 85 Ga. 1, 21 A. S. R. 135, 11 S. E. 442, holding performance of contract excused when rendered impossible by act of law; *Wood v. Iowa Bldg. & L. Asso.* 126 Iowa, 464, 102 N. W. 410, holding that contract of employment with building and loan association providing for compensation from specified fund, is terminated by legislative act making creation of such fund and payment therefrom illegal; *Hooper v. Mueller*, 158 Mich. 595, 133 A. S. R. 399, 123 N. W. 24, holding adoption of local option in county renders contract to lease property and procure sureties on tenant's liquor bond void.

Cited in notes in 10 L.R.A.(N.S.) 415, on effect of passenger, before expiration of time for performance of contract, of statute rendering performance impossible; 15 E. R. C. 809, on release of one covenanting to rebuild a wooden building by enactment prohibiting such building.

Validity of legislation as to fire protection.

Cited in *State v. Johnson*, 114 N. C. 846, 19 S. E. 599, holding that erection of wooden buildings in fire district, may be prohibited by or through delegated authority of legislature, though it causes suspension of work contracted for.

Cited in note in 38 L.R.A. 170, on municipal power over wooden and frame buildings as nuisances.

Distinguished in *State v. Tenant*, 110 N. C. 609, 28 A. S. R. 715, 15 L.R.A. 423, 14 S. E. 387, holding that ordinance which gives alderman arbitrary discretion to grant or refuse permit to erect wooden building is void.

Building ordinances as part of building contract.

Cited in *Gerner v. Church*, 43 Neb. 690, 62 N. W. 51, holding that building ordinances enter into and become part of building contracts.

Tenant's covenants to repair.

Cited in note in 95 A. D. 122, on tenant's covenants to repair.

Liability for restoration of burned premises.

Cited in reference note in 2 A. S. R. 368, on liability of lessee for restoration of premises destroyed by fire.

33 AM. REP. 433, CAMPAU v. NORTH, 39 MICH. 606.

What constitutes privileged communication to physician.

Cited in *Missouri P. R. Co. v. Castle*, 97 C. C. A. 124, 172 Fed. 841, holding statement by injured party to defendant's physician, who treated him, as to how injury happened, is not privileged; *Guptill v. Verback*, 58 Iowa, 98, 12 N. W. 125, holding communications to physician relative to producing miscarriage of pregnant woman, privileged where not shown for unlawful purpose; *State v. Smith*, 99 Iowa, 26, 61 A. S. R. 219, 68 N. W. 428, holding communications from one physician to another, made to secure aid of latter, in commission of abortion, not privileged; *People v. Glover*, 71 Mich. 303, 38 N. W. 874, holding testimony of physician as to physical condition of one charged with rape, knowledge of which was gained from examination at jail, voluntarily submitted to after accused was informed that prosecuting attorney sent them for that purpose, not privileged; *People v. Cole*, 113 Mich. 83, 71 N. W. 455, holding statement of prosecutrix in bastardy proceedings, to her physician, as to paternity of child, not privileged communication; *Green v. Terminal R. Asso.* 211 Mo. 18, 109 S. W. 715, holding admissions of injured party to hospital physician, not privileged, where not necessary to enable them to treat him.

Cited in reference notes in 35 A. R. 524, on admissibility in murder trial of physician's testimony as to post mortem examination; 43 A. R. 765, on what is "information" as to patient within statute forbidding testimony thereof by physician; 40 A. R. 295, on physician's right to testify concerning ailments of patient; 66 A. S. R. 559, on privileged communications to physicians.

Cited in note in 17 A. S. R. 567, 568, on when testimony of physician will be received.

Waiver of privilege as to communication to physician.

Cited in *McConnell v. Osage*, 80 Iowa, 293, 8 L.R.A. 778, 45 N. W. 550, holding injured party's testimony as to condition of health prior to accident, not waiver of privileged communications, made to physician who is called in rebuttal, necessary for her proper treatment; *Dolton v. Albion*, 57 Mich. 575, 24 N. W. 786, holding injured parties' introducing of testimony of physician as to effect of injuries, not waiver of right to objection to testimony of other physician as to communication made to enable them to treat her on other occasions prior to injury; *Weitz v. Mound City R. Co.* 53 Mo. App. 39, holding that fact that physician rendered services at instance of third person whose negligence caused injury will not make his testimony competent, unless shown that patient was advised that physician came to examine her in interest of such third person and (not her own; *Noelle v. Hoquiam Lumber & Shingle Co.* 47 Wash. 519, 92 Pac. 372 (dissenting opinion), on right to hold plaintiff's testimony in personal injury action as to cause and extent of injuries, where without reference to what physician told her, not waiver of objection to testimony by physician.

33 AM. REP. 439, MARSH v. COLBY, 39 MICH. 626.

Rights as to hunting and fishing.

Cited in *Sterling v. Jackson*, 69 Mich. 488, 13 A. S. R. 405, 37 N. W. 845 (dissenting opinion), on right to hold that owner of fee of land has exclusive right of fowling on navigable water covering land.

Cited in notes in 131 Am. St. Rep. 754, on law of fishing; 60 L.R.A. 513, on right to fish in public lakes; 8 E. R. C. 347, 348, on right to claim profit in land of another by custom.

Right to take ice from stream.

Cited in note in 38 A. R. 255, on right to take ice from stream.

33 AM. REP. 440, CRITTENDEN v. SCHERMERHORN, 39 MICH. 661.

Liability of husband for necessities.

Cited in reference notes in 45 A. R. 297, on liability of husband for necessities furnished to wife living apart from husband; 98 A. S. R. 643, on what are necessities which wife is authorized to bind husband for.

Liability of husband beyond granted alimony.

Cited in *Hyde v. Leisenring*, 107 Mich. 490, 65 N. W. 536, holding that allowance of temporary alimony, to which physician's bill was appended, will be presumed to have included such bill.

Effect of divorce decree on property rights of parties.

Cited in note in 65 A. D. 361, on effect of decree of divorce a mensa et thoro on property rights of parties.

33 AM. REP. 444, RUSSELL v. PEOPLE'S SAV. BANK, 39 MICH. 671.

Liability of married woman on her contracts.

Cited in *Stiles v. Lord*, 2 Ariz. 154, 11 Pac. 314, holding that married woman has no power under act of 1871, to make contract of indorsement; *Sidway v. Nichol*, 62 Ark. 146, 34 S. W. 599, holding that married woman who has no separate estate may borrow money and become personally liable therefor; *Alpin v. Wade*, 89 Ark. 354, 116 S. W. 667, holding married woman is liable on note which she signed as surety to her own interest; *Kenton Ins. Co. v. McClellan*, 43 Mich. 564, 6 N. W. 88, holding that married woman's note, given for any other consideration than her separate estate, is void; *Edwards v. McEnhill*, 51 Mich. 160, 16 N. W. 322, holding that married women have no general capacity to make contracts in Michigan; *Waterbury v. Andrews*, 67 Mich. 281, 34 N. W. 575, holding that note and mortgage of married woman given to secure husband's debt is void; *Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank*, 68 Mich. 116, 35 N. W. 853, holding that contract of married woman to bind her must be one on behalf of her sole property; *Howe v. North*, 69 Mich. 272, 37 N. W. 213, holding that married woman cannot be held upon her agreement to pay for board of herself, husband and son; *Detroit Chamber of Commerce v. Goodman*, 110 Mich. 498, 35 L.R.A. 96, 68 N. W. 295, holding that married woman cannot be held liable on subscription for improvements; *Hoffman v. Goldsmith*, 131 Mich. 293, 91 N. W. 158, holding married woman not liable for contracts of husband.

Cited in reference note in 35 A. S. R. 469, on liability of wife's separate property for her note.

Cited in note in 17 L.R.A.(N.S.) 679, on power of married woman, under statute giving her sole control of her separate estate, to become surety for one other than her husband when her own estate is benefited.

Distinguished in *Kitchen v. Chapin*, 64 Neb. 144, 97 A. S. R. 637, 57 L.R.A. 914, 89 N. W. 632, holding married woman liable on her guaranty of promissory note owned by her and made payable to her order.

— **Joint contracts of husband and wife.**

Cited in *Kohn v. Collison*, 1 Marv. (Del.) 109, 27 Atl. 834, holding married

woman is not liable upon indorsement of husband's promissory note given for his debts; *Speier v. Opfer*, 73 Mich. 35, 18 A. S. R. 556, 2 L.R.A. 345, 40 N. W. 909, holding that married woman cannot be held liable upon joint contract with husband for improvements upon land held by entireties; *Arthur v. Caverly*, 98 Mich. 82, 56 N. W. 1102, holding that wife who joins husband in warranty deed of his land, sole consideration for which is conveyance to her of other land is jointly liable upon covenants; *Caldwell v. Jones*, 115 Mich. 124, 73 N. W. 129, holding married woman not liable on note given with husband for personal property purchased jointly; *Doame v. Feather*, 119 Mich. 691, 78 N. W. 884, holding separate estate of married woman not liable for note executed by herself and husband for lands purchased jointly.

33 AM. REP. 447, *BOSMAN v. AKELEY*, 39 MICH. 710.

Enforcement of guaranty of collection.

Cited in *Allen v. Rundle*, 50 Conn. 9, 47 A. R. 599, holding that guaranty that note is collectible is conditioned upon diligence being used in collecting it; *Clark v. Kellogg*, 96 Mich. 171, 55 N. W. 667, holding that guarantor of collection of notes cannot be sued until judgment obtained against maker and execution returned unsatisfied; *Central Invest. Co. v. Miles*, 56 Neb. 272, 71 A. S. R. 681, 76 N. W. 566, holding mere guarantor of collection liable upon guaranty only where shown note guaranteed cannot be collected of maker; *Briggs v. Brushaber*, 43 Mich. 330, 38 A. R. 187, 5 N. W. 383; *Leonhardt v. Citizens' Bank*, 56 Neb. 38, 76 N. W. 452,—to point that guarantor of collectibility of note cannot be sued until remedy against maker is exhausted.

Cited in reference notes in 13 A. S. R. 500, on liability of guarantor of note; 31 A. S. R. 625, on guaranty of collection.

Cited in note in 64 A. S. R. 395, on requirements as to suit on guaranty of collection.

Disapproved in *Colby v. Farwell*, 71 N. H. 83, 51 Atl. 254, holding that holder of promissory note may proceed against guarantor without first proceeding against utterly insolvent maker.

33 AM. REP. 450, *CURRYER v. MERRILL*, 35 MINN. 1.

Power of state to contract with publisher as to text books.

Cited in *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946, holding that legislature has power to prescribe text-books to be used in schools and to require that they be obtained from person to whom contract for supplying them is awarded; *Rand McN. & Co. v. Hartranft*, 29 Wash. 591, 70 Pac. 77, holding that state board of education has power to contract with publisher for use of certain text-books for certain period; *Rand, McN. & Co. v. Royal*, 36 Wash. 420, 78 Pac. 1103; *Wagner v. Royal*, 36 Wash. 428, 78 Pac. 1094,—holding that school district cannot question validity of contract entered into by state board of education with publishers, to furnish text-books, when state has raised no objection.

Validity of act providing for uniform text books.

Cited in *Leeper v. State*, 103 Tenn. 500, 48 L.R.A. 167, 53 S. W. 962, holding that act authorizing commission to adopt uniform text-books for state public schools, and which provides for furnishing same to patrons at reasonable prices, and for enforcement of use of books adopted is constitutional.

Uniform text books as essential to uniform system of schools.

Cited in *Campana v. Calderhead*, 17 Mont. 548, 36 L.R.A. 277, 44 Pac. 83, holding that constitutional provision for uniform system of free common schools, does not make it necessary that text-books should be uniform throughout state.

Attack on action of school board in adopting text books.

Cited in note in 36 L.R.A. 278, on attack on action of school board in adopting text-books.

What are acts for raising revenue.

Cited in note in 35 L.R.A. 190, on what are acts for raising revenue which must originate in lower branch of legislature.

—Bill for taxes and bonds of county high schools.

Cited in *Evers v. Hudson*, 36 Mont. 135, 92 Pac. 462, holding act providing for tax for current expenses of county free high schools and for bond inures for erection of school building, not "bill for raising revenue" within meaning of constitution that such bills shall originate in lower house of legislature.

Power of legislature to authorize county to aid public schools.

Cited in *Southern R. Co. v. St. Clair County*, 124 Ala. 491, 27 So. 23, holding that legislature has power to authorize county to appropriate part of revenue derived from taxation in aid of public schools therein.

Presumption as to validity of statutes.

Cited in *State ex rel. Olsen v. Board of Control*, 85 Minn. 165, 88 N. W. 533; *State ex rel. Utick v. Polk County*, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 216,—to point that legislative acts are presumably valid.

When statute will be declared unconstitutional.

Cited in *State ex rel. Day v. Hanson*, 93 Minn. 178, 102 N. W. 209 (dissenting opinion), to point that unconstitutionality of act must be clear, plain and palpable to justify court in pronouncing it invalid.

Effect of constitutional command to enact law.

Cited in note in 1 L.R.A.(N.S.) 490, on constitutional command to enact law as implied prohibition against further legislation on the same subject.

33 AM. REP. 455, STATE v. ANDERSON, 25 MINN. 66.**What constitutes larceny.**

Cited in reference notes in 39 A. R. 194, on conspiracy to induce one to intrust money to conspirator to bet and game, without possibility of winning, as larceny; 56 A. R. 102, on procuring money by trick as larceny; 54 A. S. R. 435, on larceny in making change.

Fraudulent conversion of property as larceny.

Cited in *State v. Levine*, 79 Conn. 714, 10 L.R.A.(N.S.) 286, 66 Atl. 529, holding one who receives lost bank check for purpose of delivery to owner, guilty of larceny if he subsequently convert same to own use; *Murphy v. People*, 104 Ill. 528, holding that one who takes coin for purpose of procuring change, and converts same to own use is guilty of larceny; *Currier v. State*, 157 Ind. 114, 60 N. E. 1023, holding that concealment of property and refusal to surrender except upon payment of false and fictitious claim constitutes larceny; *Williams v. State*, 165 Ind. 472, 2 L.R.A.(N.S.) 248, 75 N. E. 875, holding that one who receives property without fraudulent intent is guilty of larceny if he subsequently fraudulently converts same to own use; *State v. Woodruff*, 47 Kan. 151, 27 A. S. R. 285, 27 Pac. 842, holding that proof that one, with intent to

appropriate horse to own use, fraudulently and falsely pretended that he wanted him for temporary use, will sustain indictment for larceny.

Cited in reference note in 34 A. R. 591, on retention of property as larceny.

Cited in notes in 40 A. R. 554; 43 A. R. 138,—on larceny by retention of property lawfully taken.

Taking as element of larceny.

Cited in note in 88 A. S. R. 562, on taking as element of larceny.

Sufficiency of indictment or information.

Cited in *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953, holding that description of property deposited with allegation that better description is to grand jury unknown, is sufficient; *State v. Masteller*, 45 Minn. 128, 47 N. W. 541, holding that indictment alleging commission of crime in one county, will sustain proof that it was committed in adjoining county, where crime was committed within 100 rods of dividing line.

— For larceny of money.

Cited in *Keating v. People*, 160 Ill. 480, 43 N. E. 724, holding indictment charging theft of treasury notes, national bank bills and greenbacks, sufficient to sustain proof of theft of gold certificate, silver certificate and national bank bills; *State v. Blanchard*, 11 Wash. 116, 39 Pac. 377, holding that under code, information for larceny of sum of money need not contain special allegation of value.

33 AM. REP. 458, KEAN v. CONNELLY, 25 MINN. 222.

Accounting between cotenants.

Cited in *Carver v. Fennimore*, 116 Ind. 236, 19 N. E. 103, holding that one who establishes claim as tenant in common in property is entitled to accounting from cotenant who has had exclusive possession; *Russell v. Merchants' Bank*, 47 Minn. 286, 28 A. S. R. 368, 50 N. W. 228, holding tenant in common who is excluded from his share entitled to accounting; *LeBarren v. Babcock*, 46 Hun, 598, holding tenant in exclusive possession not required to account for value of products devoted to own use; *Cahoon v. Kinen*, 42 Ohio St. 199, holding tenants in common who contract with cotenant for exclusive use of common property, liable on contract; *Hause v. Hause*, 29 Minn. 252, 13 N. W. 43, denying right of tenant in common not excluded from enjoyment of the common property to recover from cotenant because of appropriation of its products in absence of agreement; *Starks v. Kirchgraber*, 134 Mo. App. 211, 113 S. W. 1149, holding cotenant paying taxes is entitled to contribution from other.

Cited in notes in 78 A. D. 667; 49 A. R. 686; 9 L.R.A. 625; 28 L.R.A. 829,—on liability of cotenants to account for use and occupation and rents and profits; 95 A. D. 768, on redemption by cotenant; 15 A. S. R. 666; 69 A. S. R. 559; 1 E. R. C. 454, 456, on accounts between tenants in common; 28 L.R.A. 833, on liability of cotenants to account for use and occupation and rents and profits in case of ouster; 28 L.R.A. 834, on liability of cotenants to account for use and occupation and rents and profits where agreement exists.

Distinguished in *Fish v. Dunn*, 59 Minn. 99, 60 N. W. 843, holding tenant in common who prevents use of property by cotenant, liable on promise to pay for exclusive use.

Trees removed from land held in common, as rents or profits.

Cited in *Shepard v. Petit*, 30 Minn. 119, 14 N. W. 511, holding that trees cut and removed from land cannot be regarded as rents or profits within meaning of statute.

33 AM. REP. 462, ST. PAUL v. TRAEGER, 25 MINN. 248.**Validity of municipal ordinance.**

Cited in notes in 34 A. D. 633, on invalidity of unreasonable municipal ordinances; 41 L. ed. U. S. 521, on validity of municipal ordinances.

—Regulating business or occupation.

Cited in *State ex rel. Selliger v. O'Connor*, 5 N. D. 629, 67 N. W. 824, holding that act requiring one selling by sample, goods to be shipped into state, to be licensed, is void as interfering with interstate commerce; *Re Luther Snyder*, 10 Idaho, 682. 68 L.R.A. 708, 79 Pac. 819, holding that farmers may sell beef in city without license; *State ex rel. Farnsworth v. St. Paul Municipal Ct.* 32 Minn. 329, 20 N. W. 243, holding ordinance requiring vendors of vegetables to obtain license not authorized by power to pass ordinance prohibiting such sales "during market hours;" *St. Paul v. Stoltz*, 33 Minn. 233, 22 N. W. 634, holding that power to require peddlers to obtain license cannot be implied under "general welfare clause" of city charter; *Gray v. Omaha*, 80 Neb. 526, 14 L.R.A. (N.S.) 1033, 114 N. W. 600, holding that power to license must be plainly conferred or it will not be held to exist.

Cited in notes in 34 A. D. 637, on right of municipality by ordinance to regulate but not to restrain trade; 35 A. R. 702, on validity of ordinances regulating business; 24 L.R.A. 585, on license for sales in streets; 30 L.R.A. 428, on what may be included in license fees under general power of municipality to regulate.

Licensing business as police regulation.

Cited in *Re Wan Yin*, 22 Fed. 701, holding laundry license fee of \$20 per year unreasonable as police regulation and void; *Stamps v. Burk*, 83 Ark. 351, 104 S. W. 153, holding butchers' license fee of \$12.50 per quarter unreasonable as police regulation and void; *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674, holding license upon business of attorney not within police power of city; *Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361, holding auctioneer's license fee of \$300 unreasonable as police regulation; *Littlefield v. State*, 42 Neb. 223, 47 A. S. R. 697, 28 L.R.A. 588, 60 N. W. 724, holding license plainly intended as police regulation will be upheld where revenue derived therefrom is not disproportionate to cost of issuing license and regulation of business; *State v. Moore*, 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342, holding license fee of \$1000 for occupation of emigrant agent, unaccompanied by police regulation void, as being unreasonable; *Cache County ex rel. Matthews v. Jensen*, 21 Utah, 207, 61 Pac. 303, holding that charge of license which in effect is prohibitory of business, commendable and necessary for public good, is void.

Power of municipality to establish and regulate markets.

Cited in *Jacksonville v. Ledwith*, 26 Fla. 163, 23 A. S. R. 558, 9 L.R.A. 69, 7 So. 885, holding that under power to establish and regulate markets and regulate vending of meat, etc., city has authority to restrict such sales to duly established markets where reasonable.

Cited in note in 23 A. S. R. 581, on power of municipalities to establish and regulate markets.

Validity of uniform tax upon bicycles.

Cited in *Ellis v. Frazier*, 38 Or. 462, 53 L.R.A. 454, 63 Pac. 642, holding that imposition of uniform tax upon bicycles regardless of value, for construction of bicycle paths, is unconstitutional.

Validity of city ordinance requiring flagman at railroad crossings.

Cited in *Red Wing v. Chicago, M. & St. P. R. Co.* 72 Minn. 240, 71 A. S. R. 482, 75 N. W. 223, holding that power to enact ordinance requiring flagman at railroad crossing cannot be implied under "general welfare" clause of city charter.

Who are peddlers.

Cited in reference note in 19 A. S. R. 650, on who are peddlers.

33 AM. REP. 467, BALCH v. WILSON, 25 MINN. 299.**Right of set-off.**

Cited in *Dudley v. Shaw*, 44 Kan. 688, 24 Pac. 1111, holding that stockholder, who is liable to corporation's creditors, cannot purchase claims against corporation at discount and set them off against his liability at their face value; *Hynes v. Illinois Trust & Sav. Bank*, 226 Ill. 95, 10 L.R.A. (N.S.) 472, 80 N. E. 753 (affirming 126 Ill. App. 409), holding that negotiable bonds of insolvent corporation cannot be transferred by indebted stockholder to assignee with notice so as to prevent right to set-off stockholder's liability against same; *St. Paul & M. Trust Co. v. Leck*, 57 Minn. 87, 47 A. S. R. 576, 58 N. W. 826, holding that insolvency of party against whom setoff is claimed affords sufficient ground for equitable set-off.

Cited in note in 23 L.R.A. 315, on right to set off insolvent's obligation on unmatured claim in hands of receiver.

— By depositor in insolvent bank.

Cited in *Stephens v. Schuchmann*, 32 Mo. App. 333, holding that debtor of insolvent national bank cannot set-off deposit against debt maturing after failure.

Cited in note in 47 A. S. R. 591, on set-off against insolvent national bank.

Distinguished in *Yardley v. Clothier*, 49 Fed. 337, 29 W. N. C. 305, 1 Pa. Dist. R. 46, holding that debtor of insolvent bank can set-off amount deposited to his credit against note maturing after failure.

When "time" must be pleaded.

Cited in *Clyde v. Johnson*, 4 N. D. 92, 58 N. W. 512, holding that time when material must be alleged.

33 AM. REP. 470, O'BRIEN v. ST. PAUL, 25 MINN. 331.**Damages under statute against city for changing street grade.**

Cited in note in 30 A. S. R. 849, on damages under statute against city for changing street grade.

Liability of city in making improvements—For injuries from surface water.

Cited in *Weis v. Madison*, 75 Ind. 241, 39 A. R. 135, holding that municipality has no right to collect surface-water in artificial channel, and pour it in body upon adjacent land of another; *Eufaula v. Simmons*, 86 Ala. 515, 6 So. 47; *Valparaiso v. Kyes*, 30 Ind. App. 447, 66 N. E. 175; *Hoffman v. Muscatine*, 113 Iowa, 332, 85 N. W. 17; *Hitchins Bros. v. Frostburg*, 68 Md. 100, 6 A. S. R. 422, 11 Atl. 826; *Guest v. Church Hill*, 90 Md. 689, 45 Atl. 882; *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767,—holding city, which diverts surface water from natural channel so as to cast it upon adjacent land, liable for resulting damages; *Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322, holding city,

in changing established grade not liable for failure to provide means of carrying off surface water collected upon private property; *Peters v. Fergus Falls*, 35 Minn. 549, 29 N. W. 586, holding municipality which impedes and obstructs natural flow of slough, liable for resulting damages to adjacent land; *Pye v. Mankato*, 36 Minn. 373, 1 A. S. R. 671, 31 N. W. 863, holding city which intercepts natural flow of surface water, and constructs inadequate gutters, liable for consequential damages; *Follman v. Mankato*, 45 Minn. 457, 48 N. W. 192, holding city liable where result of improvement is to collect surface water and turn upon adjacent premises; *Tate v. St. Paul*, 56 Minn. 527, 45 A. S. R. 501, 58 N. W. 158, holding city liable for insufficient sewer after notice and omission to repair evil; *Schuett v. Stillwater*, 80 Minn. 287, 83 N. W. 180, holding that city has no absolute duty, under all circumstances, to care for surface water accumulated because of street grading; *O'Neill v. St. Paul*, 104 Minn. 491, 116 N. W. 114, holding city not liable for diversion of surface water which is mere incident to street improvement; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533, holding municipality which constructs drains along highway, and onto abutting land, liable, after notice, for surface waters discharged thereon; *Evansville v. Decker*, 84 Ind. 325, 43 A. R. 86, on liability of city for throwing surface water upon private property on improving street; *Yanish v. St. Paul*, 50 Minn. 518, 52 N. W. 925, to point that general public utility and convenience is of primary consequence in fixing of grades in public streets.

Cited in reference note in 34 A. R. 598, on liability of municipality for surface water escaping to adjacent land.

Cited in notes in 35 A. R. 543, on municipal liability for flowing private lands; 29 A. S. R. 743, on municipal liability for injury by surface water; 30 A. S. R. 391, on municipal liability for interference with surface waters by grading streets; 1 L.R.A. 297, on duties and liabilities of municipal corporations in regard to drainage and sewerage; 65 L.R.A. 256, on duty of municipality to care for surface water upon gathering it in body; 65 L.R.A. 261, on negligent or wrongful acts of municipality in changing course of drainage; 65 L.R.A. 262, on negligent or wrongful act of municipality in casting collected body of surface water on adjoining property; 5 L.R.A.(N.S.) 832, on municipal liability for changing course of drainage to injury of private property.

—For removal of lateral support.

Cited in *Dyer v. St. Paul*, 27 Minn. 459, 8 N. W. 272; *Nichols v. Duluth*, 40 Minn. 389, 12 A. S. R. 743, 42 N. W. 84,—holding city liable for any damage occasioned by removing landowner's lateral support in grading of street; *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706, holding city liable for negligence in improving street which results in removal of abutting owner's lateral support; *Parke v. Seattle*, 5 Wash. 1, 20 L.R.A. 68, 32 Pac. 82, 34 A. S. R. 839, (dissenting opinion), on right to hold city liable for injury to lateral support of abutting land, in improvement of streets.

Cited in notes in 66 A. D. 648, on liability of municipal corporations for removing lateral support in making excavations; 33 A. S. R. 466, on right of lateral support as against municipal corporations.

Rights of land owners as to surface water generally.

Cited in *Schneider v. Missouri P. R. Co.* 29 Mo. App. 68, holding that superior proprietor has no right to collect surface water and precipitate it in body upon his neighbor, to latter's injury; *Hogenson v. St. Paul, M. & M. R. Co.* 31 Minn. 224, 17 N. W. 374, holding landowner cannot accumulate surface water and

transfer it to other lands; *Rowe v. St. Paul, M. & M. R. Co.* 41 Minn. 384, 16 A. S. R. 706, 43 N. W. 76; *Sheehan v. Flynn*, 59 Minn. 436, 26 L.R.A. 632, 61 N. W. 462,—holding that landowner in draining land must use way least injurious to neighbor; *Hamilton Twp. v. Wainwright*, 52 N. J. Eq. 419, 29 Atl. 200, holding that landowner cannot obstruct culvert placed in highway at point where surface water would collect and flow onto his land, if no highway were there; *Noyes v. Cosselman*, 29 Wash. 635, 92 A. S. R. 937, 70 Pac. 61, holding that one cannot drain surface waters from one portion of his land through natural barrier to another, whence it would escape over adjoining owner's land; *Brown v. Winona & S. W. R. Co.* 53 Minn. 259, 39 A. S. R. 603, 55 N. W. 123, on right of owner to improve land even though he prevent surface water from flowing on it; *Jordan v. St. Paul, M. & M. R. Co.* 42 Minn. 172, 62 L.R.A. 573, 43 N. W. 849, on rights of landowner as to surface water; *Ramsdale v. Foote*, 55 Wis. 557, 13 N. W. 557, to point that surface water may be turned upon another's land in such way as to have characteristics of natural water course.

Cited in notes in 85 A. S. R. 716, 718, on right to diminish or impede flow of surface water onto one's own land; 85 A. S. R. 727, 731, on right to accelerate or increase flow of surface water over another's land; 25 E. R. C. 424, on liability of landowner for changing flow of water.

Liability of railroad company for diverting surface water.

Cited in *Slaton v. Norfolk & C. R. Co.* 111 N. C. 278, 17 L.R.A. 838, 16 S. E. 181, holding railroad company liable for diverting surface water upon abutting land.

Cited in note in 21 L.R.A. 597, on right of railroad companies to collect or divert surface water in masses.

Liability of city which authorizes coasting upon public street.

Cited in *Burford v. Grand Rapids*, 53 Mich. 98, 51 A. R. 105, 18 N. W. 571, holding city not liable for accident resulting from use of street for coasting under municipal sanction.

Municipal acts as judicial or ministerial.

Cited in note in 79 A. D. 476, on municipal acts as judicial or ministerial.

33 AM. REP. 476, GRIFFITH v. TOWNLEY, 69 MO. 13.

Equitable relief against mistake.

Cited in reference note in 2 A. S. R. 648, on relief in equity against mistake, accident, and fraud.

Cited in notes in 11 L.R.A. 857, on relief from mistake in written contract; 22 E. R. C. 904, on rescission of written contract for mutual mistake.

—Mixed and mutual mistake of law and fact.

Cited in *Livingstone v. Murphy*, 187 Mass. 315, 105 A. S. R. 400, 72 N. E. 1012, holding that equity will relieve against mistake as to ownership of land, though mistake arose from erroneous view of legal effect of deed; *Moore v. Lindsey*, 52 Mo. App. 474, holding that equity will relieve against mixed and mutual mistake of law and fact; *Kleimann v. Geiselmann*, 45 Mo. App. 497, to point that equity will relieve against mixed and mutual mistake of law and fact.

Cited in reference note in 2 A. S. R. 67, on right to relief in equity from a mistake of law and fact.

—Of fact.

Cited in *Smith v. Patterson*, 53 Mo. App. 66, holding that equity will relieve

against mistake of fact, even in absence of intention to mislead; *Mathews v. Kansas*, 80 Mo. 231, holding that one who pays taxes on certain described lots designated by him and requests and receives receipt therefor, cannot recover amount on ground of mistake; *Summers v. Coleman*, 80 Mo. 488, holding that equity will set aside deed conveying estate in fee simple, when grantor thought she was conveying life estate only, and grantee was only seeking life estate; *Nordyke & M. Co. v. Kehlor*, 155 Mo. 643, 78 A. S. R. 600, 56 S. W. 287, holding that equity will relieve against contract founded upon mutual mistake of fact; *Park Bros. & Co. v. Blodgett & C. Co.* 64 Conn. 28, 29 Atl. 133; *Castleman v. Castleman*, 184 Mo. 432, 83 S. W. 757,—holding equity will set aside deed when through mutual mistake of fact it does not express contract intended; *Chrisman v. Linderman*, 202 Mo. 605, 119 A. S. R. 822, 10 L.R.A.(N.S.) 1205, 100 S. W. 1090, holding that equity will grant relief, where purchaser subject to dower right is by mistake given title in fee simple.

— Of law.

Cited in *Nelson v. Betts*, 21 Mo. App. 219, holding that equity will relieve against mistake of law, induced by fraud; *Dailey v. Jessup*, 72 Mo. 144, holding that equity will not relieve against mistake of law, which is result of ignorance; *Price v. Estill*, 87 Mo. 378, holding that equity will not relieve against mistake of law, unmixed with mistake of fact; *Michigan Buggy Co. v. Woodson*, 59 Mo. App. 550; *Corrigan v. Tiernay*, 100 Mo. 277, 13 S. W. 401; *Marsh v. McNair*, 48 Hun, 117; *Kemper, H. & M. Dry Goods Co. v. Kennard Grocer Co.* 68 Mo. App. 290,—holding that equity will reform instrument which fails to express contract entered into, though failure be mistake of law; *Kleinmann v. Gieselmann*, 114 Mo. 437, 35 A. S. R. 761, 21 S. W. 796, on ignorance of law as entitling one to relieve in equity.

Cited in notes in 6 L.R.A. 837, on misconception of legal rights as ground for relief; 28 L.R.A.(N.S.) 839, on relief from mistake of law as to effect of instrument.

Purpose of "subrogation."

Cited in *Larson v. Oisefos*, 118 Wis. 368, 95 N. W. 399, to point that subrogation does not in any case legitimately put money as mere gain, into purse of anyone.

33 AM. REP. 484, SMITH v. ST. LOUIS, K. C. & N. R. CO. 69 MO. 32.

Duty of master as to furnishing safe appliances.

Cited in *Arizona Lumber & Timber Co. v. Mooney*, 4 Ariz. 366, 42 Pac. 952, holding master not bound to furnish machines which are absolutely most convenient or most safe; *Watts v. Murphy*, 9 Cal. App. 564, 99 Pac. 1104, holding master bound to use ordinary care to protect his servants from danger; *Chicago, R. I. & P. R. Co. v. Lohergan*, 118 Ill. 41, 7 N. E. 55; *Chicago, B. & Q. R. Co. v. Smith*, 18 Ill. App. 119,—holding master not required to furnish best or most improved machinery, nor need it be absolutely safe; *Hannibal & St. J. R. Co. v. Kanaley*, 39 Kan. 11, 17 Pac. 324, holding that as between master and servant machinery furnished need be reasonably safe, only; *Worheide v. Missouri Car & Foundry Co.* 32 Mo. App. 387, holding master not bound to furnish safest appliances; *Berning v. Medart*, 56 Mo. App. 443, holding master not bound to furnish appliances which are known to be best of their kind; *O'Neil v. Young & Sons' Seed & Plant Co.* 58 Mo. App. 628, holding that master's duty is to fur-

nish machinery and appliances which are reasonably safe, sound and sufficient for purposes furnished; *Harrington v. Wabash R. Co.* 104 Mo. App. 663, 78 S. W. 662, holding master not required to furnish any particular kind of appliances; *Current v. Missouri P. R. Co.* 86 Mo. 62, holding master not liable for hidden defects in machine of which he had no knowledge, and which would not have been discovered by exercise of reasonable care; *Huhn v. Missouri P. R. Co.* 92 Mo. 440, 4 S. W. 937, holding that railroad is not bound to adopt every new invention, though it be actual improvement; *Bajus v. Syracuse, B. & N. Y. R. Co.* 103 N. Y. 312, 57 A. R. 723, 8 N. E. 529, holding railroad corporation not bound to furnish employees engines adequate in power for every emergency; *Flynn v. Kansas City, St. J. & C. B. R. Co.* 78 Mo. 195, 47 A. R. 99, to point that master is bound to use ordinary care and vigilance in providing suitable appliances; *Desrosiers v. Bourn*, 26 R. I. 6, 57 Atl. 935, to point that machinery is not necessarily defective because dangerous; *O'Hare v. Chicago & A. R. Co.* 95 Mo. 662, 9 S. W. 23 (dissenting opinion), to point that master is not bound to furnish very best and safest appliances.

Cited in 54 A. R. 727, on duty of master as to appliances; 48 L.R.A. 70, on liability of employer for injuries to servant for want of blocking at switches; 6 L.R.A.(N.S.) 495, on standard of master's duty with respect to selection between different styles or makes of appliances.

Test as to negligence of master in furnishing appliances.

Followed in *Cagney v. Hannibal & St. J. R. Co.* 69 Mo. 416, holding master is not liable for injury received by servant in using dangerous machinery, where machinery is kind in general use.

Cited in *Austin v. Chicago, R. I. & P. R. Co.* 93 Iowa, 236, 61 N. W. 849, holding evidence of adoption of appliance in general use competent to show diligence, providing custom followed not itself act of negligence; *Muirhead v. Hannibal & St. J. R. Co.* 19 Mo. App. 634, holding proof that another machine was safer than one used, not evidence of negligence; *Geno v. Fall Mountain Paper Co.* 68 Vt. 568, 35 Atl. 475, holding that test is not common use, but would reasonably prudent man furnish the appliance under circumstance.

Liability of master for negligence of coservant.

Cited in *Warmington v. Atchison, T. & S. F. R. Co.* 46 Mo. App. 159, holding master unless at fault himself not liable to brakeman in switch gang for negligence of engineer of switch engine; *Adams v. McCormick Harvesting Mach. Co.* 95 Mo. App. 111, 68 S. W. 1053, holding master is not liable for injury to servant due to co-servant's negligence, where he is without fault.

Assumption of risk by servant.

Cited in *Umbach v. Lake Shore & M. S. R. Co.* 83 Ind. 191, holding that one who continues in service with full knowledge of its dangerous character, assumes risk of service; *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66, 36 A. R. 454; *Stoeckman v. Terre Haute & I. R. Co.* 15 Mo. App. 503,—holding that servant assumes risk of patent defects in machinery upon which he is employed to work; *Dowling v. Gerard B. Allen & Co.* 74 Mo. 13, 41 A. R. 298; *Goins v. Chicago, R. I. & P. R. Co.* 37 Mo. App. 221, holding that inexperienced youth will not be presumed to have assumed risk of defective machinery, through defect of jurors where he was unaware of danger; *Czernicke v. Ehrlich*, 212 Mo. 386, 111 S. W. 14, holding that servant does not assume risk of concealed dangers, unknown to him but known to master; *Missouri P. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044, holding that servant assumes risk of obviously defective and dangerous

machinery which he continues to use; *Galveston, H. & S. A. R. Co. v. Lemp*, 59 Tex. 19, holding that servant does not assume risk of obviously defective machinery, where danger of same is not apparent; *Alcorn v. Chicago & A. R. Co.* 108 Mo. 81, 18 S. W. 188, to point that servant assumes all risks incident to business in which he engages and duties he engages to perform; *Epperson v. Postal Teleg. Cable Co.* 155 Mo. 346, 50 S. W. 195, on assumption of risk by servant.

Cited in reference note in 1 A. S. R. 631, on assumption by servant of risk of defects in machinery or appliances.

Cited in notes in 92 A. D. 215, on risk assumed by servant; 4 L.R.A. 52, on assumption by servant of risks of which he has notice of knowledge.

When master's negligence question for jury.

Cited in *Wilcox v. Hebert*, 90 Ark. 145, 118 S. W. 402, holding question of master's negligence in furnishing dangerous machinery is one for jury.

33 AM. REP. 491, KILEY v. KANSAS, 69 MO. 102.

Municipal liability for defects or obstructions in streets.

Cited in note in 20 L.R.A. (N.S.) 652, on liability of municipality for defects or obstructions in streets.

Liability of city for failure to abate nuisance.

Cited in *Winona v. Botzet*, 23 L.R.A. (N.S.) 204, 94 C. C. A. 563, 169 Fed. 321, holding city liable for failure to abate blowing of water works whistle near bridge which frightened horses thereon; *Langan v. Atchison*, 35 Kan. 318, 57 A. R. 165, 11 Pac. 38, holding city liable to one using ordinary care and prudence for injuries sustained from falling sign which it knew to be dangerous; *Kiley v. Kansas*, 87 Mo. 103, 56 A. R. 443, holding city liable for injuries sustained from unsafe wall near sidewalk, of which it had notice; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528, holding city liable for failure to require that contractor properly guard excavation on sidewalk next to building.

Cited in reference note in 50 A. R. 743, on liability of city for injury from materials it permits to be left in the street.

Cited in note in 15 A. S. R. 849, on liability of municipal corporation for maintaining a nuisance.

Distinguished in *Cain v. Syracuse*, 95 N. Y. 83 (affirming 29 Hun, 105), holding that charter power to abate nuisances does not render city liable for dangers wall remote from public street.

Extent of municipal power over buildings as nuisances.

Cited in note in 38 L.R.A. 163, on extent of municipal power over buildings as nuisances.

Right of appellate court to reverse prior decision on second appeal.

Cited in *Bealy v. Smith*, 158 Mo. 515, 81 A. S. R. 317, 59 S. W. 984, holding that appellate court may review and reverse its former decision, even in same case.

33 AM. REP. 496, CONOVER v. BERDINE, 69 MO. 125.

When "common report" is competent evidence.

Cited in *Ashbrook v. Dale*, 27 Mo. App. 649, holding reputation of house as brothel admissible, where existence of brothel is established; *Gordon v. Ritenour*, 87 Mo. 54, holding common report of person's insolvency admissible upon issue whether another knew or ought to have known of same; *Stephenson v. Kil-*

patrick, 166 Mo. 262, 65 S. W. 773, holding facts concerning contest as to title, generally known in community, admissible to show that one was not bona fide purchaser without notice.

33 AM. REP. 498, STATE v. TIEDEMANN, 69 MO. 306.

Governmental lands as exempt from taxation or assessment.

Cited in note in 132 Am. St. R. 304, on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest.

Right to enforce debt against property of state or municipality.

Cited in *Clinton v. Henry County*, 115 Mo. 557, 37 A. S. R. 415, 22 S. W. 494, holding that power of city to levy local assessments does not authorize enforcement of special tax bills against state or county property devoted to public uses; *Whiteside v. School Dist. No. 5*, 20 Mont. 44, 49 Pac. 445, holding school house not subject to mechanic's liens; *Board of Directors v. Bodkin Bros.* 108 Tenn. 700, 69 S. W. 27, holding that money deposited in bank by board of directors of levee district, to meet interest on bonds, is not subject to attachment; *Buell v. Arnold*, 124 Wis. 65, 102 N. W. 338, 4 A. & E. Ann. Cas. 100, to point that property of municipal corporations cannot be seized or sold upon execution.

Cited in reference notes in 23 A. S. R. 455, on exemption of state property from execution; 31 A. S. R. 69, on exemption of property of municipality from execution.

Cited in note in 30 L.R.A. 103, on injunction against execution sale of public property or other proceedings under final process.

School district as subject to garnishment.

Cited in *Kein v. Carthage School Dist.* 42 Mo. App. 460, holding school district not subject to garnishment.

St. Louis school board as public corporation.

Cited in *State ex rel. O'Connell v. St. Louis Public Schools*, 112 Mo. 213, 20 S. W. 484, holding that St. Louis school board is public or quasi municipal corporation.

Right to injunction to prevent cloud upon title.

Cited in *Clifton v. Anderson*, 40 Mo. App. 616, holding that equity may, at instance of successors to title, enjoin sale of land under void judgment; *Gardner v. Terry*, 99 Mo. 523, 7 L.R.A. 67, 12 S. W. 888, holding that foreclosure of deed of trust will be enjoined where all remedy on deed is barred by limitation.

33 AM. REP. 499, ARMSTRONG v. ST. LOUIS, 69 MO. 309.

Trespass to try title or ejectment against one claiming easement.

Cited in *Hays v. Texas & P. R. Co.* 62 Tex. 397, holding that trespass to try title lies against railway company asserting right of way claim to land.

Cited in reference note in 50 A. R. 149, on right of city to maintain ejectment for street to which it does not own the fee.

Cited in note in 25 L.R.A. (N.S.) 512, 513, on injunction or ejectment as proper remedy where highway illegally opened.

—Against municipal corporation for land taken for street.

Cited in *Tuller v. Detroit*, 97 Mich. 597, 56 N. W. 1032, holding that ejectment lies against city for land condemned for public street and in actual use for that purpose; *McCarty v. Clark County*, 101 Mo. 179, 14 S. W. 51, holding that ejectment will lie against county for land wrongfully taken for public road;

Bradley v. Missouri P. R. Co. 91 Mo. 493, 4 S. W. 427, to point that ejectment lies against city for land wrongfully taken for street.

Sufficiency of ouster or disseisin to maintain ejectment.

Cited in notes in 116 A. S. R. 572, on what constitutes sufficient ouster or disseisin of plaintiff to maintain ejectment; 13 L.R.A. 664, on public use as disseisin, warranting ejectment.

Judgment as res judicata.

Cited in *Tipton v. Cochel*, 27 Mo. App. 529, holding one who interpleads in replevin action bound by judgment against him; *Case v. Gorton*, 33 Mo. App. 597, holding that judgment of bankruptcy court that debt of insolvent was fraudulently created estops defense of discharge therefrom, in subsequent action to recover same; *Glasner v. Weisberg*, 43 Mo. App. 214, holding judgment res judicata as to matters which might have been litigated, but were not; *Sconce v. Long Bell Lumber Co.* 54 Mo. App. 509, holding judgment in replevin adjudicating ownership and right of possession of property, res judicata if defeated parties claim of artificer's lien on property, in subsequent action of trover between same parties; *Freeman v. McAninch*, 87 Tex. 132, 47 A. S. R. 79, 27 S. W. 97, holding extrinsic evidence inadmissible to contradict record by showing that issue necessarily involved in cause was not presented and decided.

Cited in note in 96 A. D. 785, on proof in second action that the same point was raised and decided in former action.

33 AM. REP. 504, *FLORI v. ST. LOUIS*, 69 MO. 341.

Liability for damages due to extraordinary storms.

Cited in *Louisville, N. A. & C. R. Co. v. Thompson*, 107 Ind. 442, 57 A. R. 120, 8 N. E. 18, holding railroad company using proper skill and care in running train is not liable for injury due to unprecedented flood; *Coleman v. Kansas City, St. J. & C. B. R. Co.* 36 Mo. App. 476, holding railroad not liable for obstructions by piling of removed bridge, due to "cloudburst;" *Ellet v. St. Louis, K. C. & N. R. Co.* 76 Mo. 518, holding railroad company not liable for failure of ditch to carry off water during extraordinary rain storm; *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737, holding lessees of building not liable to employee for injuries due to falling off building during unprecedented storm; *Powers v. St. Louis, I. M. & S. R. Co.* 158 Mo. 87, 57 S. W. 1090, to point that extraordinary flood would be sufficient defense for failure of canal to carry off water; *Newcomb v. New York C. & H. R. R. Co.* 169 Mo. 409, 69 S. W. 348, to point that intervening superhuman force is no defense for accident if negligence is one of proximate causes.

— Liability of municipality.

Cited in *Brash v. St. Louis*, 161 Mo. 433, 61 S. W. 808, holding city liable for bursting of sewer during unprecedented storm, where defect in sewer concurring cause of bursting; *Gulath v. St. Louis*, 179 Mo. 38, 77 S. W. 744, holding city not liable for overflow of sewer, due to unprecedented rain; *Oak Harbor v. Kallagher*, 52 Ohio St. 183, 39 N. E. 144, holding village not liable for injuries caused by fall of bill board, caused by unprecedented wind.

Liberty pole in street as nuisance.

Cited in reference note in 40 A. R. 649, on liberty pole in street as nuisance.

Act of God as proximate cause of injury.

Cited in note in 36 A. S. R. 838, as to when act of God is deemed proximate cause of injury.

Doctrine of vis major as applied to individual liability for falling walls.

Cited in note in 34 L.R.A. 563, on application of doctrine of vis major to individual liability for falling walls or buildings.

Husband's negligence as bar to recovery for wife's injury.

Cited in note in 22 L.R.A. 461, on husband's negligence as bar to recovery for wife's personal injury.

Liability of public corporation — As to schools.

Cited in *Freel v. Crawfordsville*, 142 Ind. 27, 37 L.R.A. 301, 41 N. E. 312, holding school corporation not liable for injuries due to negligent acts of its officers.

Cited in reference note in 30 A. S. R. 398, on municipal liability for unsafe condition of schools or school property.

— As to sewers.

Cited in *Fuchs v. St. Louis*, 133 Mo. 168, 34 L.R.A. 118, 34 S. W. 508 (dissenting opinion), on right to hold city responsible for explosion of sewer, due to generation of gas from crude petroleum which escaped from burning oilworks and ran into sewer, outlet of which was obstructed.

Cited in reference note in 34 A. R. 62, on liability of municipal corporation respecting sewers.

— As to public buildings.

Cited in *Long v. Elberston*, 109 Ga. 28, 77 A. S. R. 363, 46 L.R.A. 428, 34 S. E. 333, holding city liable where its prison is so maintained that it becomes nuisance; *La Clef v. Concordia*, 41 Kan. 323, 13 A. S. R. 285, 21 Pac. 272, holding city not liable for bad character of its prison to one confined therein upon conviction for disturbing peace.

Cited in reference note in 34 A. S. R. 371, on municipal liability for defects in public buildings.

Cited in note in 25 L.R.A.(N.S.) 96, on liability of municipality for tort in connection with buildings used by it.

— For defective bridge.

Cited in *Johnson County v. Reinier*, 18 Ind. App. 119, 47 N. E. 642, holding city not liable for defective bridge, in absence of statute; *Jasper County v. Allman*, 142 Ind. 573, 39 L.R.A. 58, 42 N. E. 206, holding county not liable, by implication, for defective bridge.

Contrary instructions as ground for reversal.

Cited in *Butz v. Murch Bros. Constr. Co.* 137 Mo. App. 222, 117 S. W. 635, holding contrary instructions to jury is ground for reversal of judgment.

33 AM. REP. 506, STATE v. WEST, 69 MO. 401.

Misconduct of juror authorizing reversal.

Cited in *Copper Queen Min. Co. v. Arizona Prince Copper Co.* 2 Ariz. 10, 7 Pac. 718, holding use of intoxicants by jurors not ground for reversal when actual intoxication does not result; *Chinn v. Davis*, 21 Mo. App. 363, holding private communication between judge and jury which may have affected jury, ground for setting aside verdict; *State v. Baker*, 74 Mo. 292, 41 A. R. 314, holding use of intoxicating liquor by jury after retirement not ground for reversal unless supplied from improper source or affected verdict; *State v. Washburn*, 91 Mo. 571, 4 S. W. 274, holding fact that juror, after retiring to Am. Rep. Vol. XVII.—43.

consider verdict, had glass of beer, not ground for reversal, where not shown intoxicated; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92, holding fact that jurors, while deliberating, had beer, not cause for reversal in absence of proof that they became intoxicated; *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55, holding fact that one juror in murder case read statute to ascertain juror's fees, and another read official report of homicide case, not misconduct authorizing reversal; *State v. Hayes*, 78 Mo. 307; *State v. Hayes*, 78 Mo. 600,—to point that misconduct which cannot be shown to have affected verdict is not cause for new trial.

Cited in reference note in 45 A. R. 526, on effect upon verdict of drinking of intoxicants by jury.

Cited in note in 134 Am. St. Rep. 1035, on misconduct of jurors other than their separation for which a verdict may be set aside.

—Waiver of misconduct.

Cited in *Grottkau v. State*, 70 Wis. 462, 36 N. W. 31, holding failure to bring to court's attention until after verdict fact that prosecuting attorney had treated two jurors to liquor, waiver of misconduct.

How venue of crime may be established.

Cited in *State v. Ruth*, 14 Mo. App. 226, holding that question of venue in criminal case is to be proved as any other fact; *State v. McGinniss*, 74 Mo. 245, holding that conviction cannot be had in absence of entire proof of venue; *State v. Sanders*, 106 Mo. 188, 17 S. W. 223, holding sufficient proof of venue if it can be reasonably inferred from facts and circumstances of case; *State v. McGinniss*, 76 Mo. 326; *State v. Chamberlain*, 89 Mo. 129, 1 S. W. 145; *State v. Shour*, 196 Mo. 202, 95 S. W. 405,—holding that venue of crime may be proved by circumstantial evidence; *State v. Forrester*, 63 Mo. App. 530; *Hawkins v. State*, 60 Neb. 380, 83 N. W. 198,—holding that venue of homicide may be established by circumstantial evidence; *State v. Lee*, 228 Mo. 480, 128 S. W. 987, on proof of venue of crime in prosecution for keeping gambling devices.

Cited in note in 97 A. S. R. 786, on proving venue by circumstantial evidence.

Presumption as to self incriminating statements by accused.

Cited in *State v. Curtis*, 70 Mo. 594; *State v. Talbott*, 73 Mo. 347; *State v. Tobie*, 141 Mo. 547, 42 S. W. 1076,—holding that law presumes true statements of accused against himself, because against himself; *State v. Wisdom*, 119 Mo. 539, 24 S. W. 1047; *State v. Merkel*, 189 Mo. 315, 87 S. W. 1186,—holding that law presumes true statements of accused against himself unless negated by some other evidence in cause; *Clay v. State*, 15 Wyo. 42, 86 Pac. 17, holding that instruction in criminal case that law presumes true statements of accused, against himself, is erroneous.

Disqualification of juror in criminal case.

Cited in *Garrett v. State*, 76 Ala. 18, holding juror opposed to capital punishment on circumstantial evidence, not competent; *State use of Goldsoll v. Chatham Nat. Bank*, 10 Mo. App. 482, as to whether juror who swears that he has against one party "prejudice that will require considerable amount of evidence to remove" is competent; *State v. Leabo*, 89 Mo. 247, 1 S. W. 788; *State v. Young*, 119 Mo. 495, 24 S. W. 1038; *State v. Miller*, 156 Mo. 76, 50 S. W. 907, holding proper to exclude from panel juror who swears he will not convict on circumstantial evidence alone; *Withers v. State*, 30 Tex. App.

383, 17 S. W. 936, holding juror incompetent who states that his verdict would be biased because of fact that accused was woman and mother.

Cited in note in 41 L. ed. U. S. 106, on challenges to jurors and to the array.

33 AM. REP. 508, MORGAN v. DURFEE, 69 MO. 469.

Right to exemplary damages.

Cited in *Bruce v. Ulery*, 79 Mo. 322, holding that officer who injures property in executing replevin, but without wilfulness or malice, is liable for actual damages only; *Nichols v. Winfrey*, 79 Mo. 544, holding that jury may give punitive damages if circumstances of homicide are of aggravating character; *Stoher v. St. Louis, I. M. & S. R. Co.* 91 Mo. 509, 4 S. W. 389, holding in action for death of parent due to railroad's negligence, exemplary damages are not recoverable where wilful misconduct or entire want of care not shown; *Bosch v. Miller*, 136 Mo. App. 482, 118 S. W. 506, on right of jury to award exemplary damages in malicious prosecution action.

—In action for tort generally.

Cited in *Clark v. Fairley*, 30 Mo. App. 335, holding that to warrant verdict for exemplary damages, it must appear that injury was inflicted with malice, violence or ill will; *Prueitt v. Chenttenham Quarry Co.* 33 Mo. App. 18; *Nelson v. Wallace*, 48 Mo. App. 193,—holding that exemplary damages are not recoverable except where malice, violence, or wanton recklessness mingles in controversy, and forms one of its chief ingredients; *Mohelsky v. Hartmeister*, 68 Mo. App. 318, holding that measure of damages for debauchment accompanied by means of force is same as in case of seduction; *Ickenroth v. St. Louis Transit Co.* 102 Mo. App. 597, 77 S. W. 162, holding that evidence that assault was wanton and malicious, entitles assessment of exemplary damages; *Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398, holding that exemplary damages may be recovered in action for wrongful killing; *Haehl v. Wabash R. Co.* 119 Mo. 325, 24 S. W. 737, holding that exemplary damages may be recovered against corporation for wrongful killing by its servant in course of employment, where same was wilful, reckless, wanton, oppressive or malicious; *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855, holding that punitive damages may be awarded in all cases of tort where wantonness, recklessness, oppression or malice is shown.

—In action for slander.

Cited in *Fulkerson v. Murdock*, 53 Mo. App. 151, holding that exemplary damages may be awarded in action for slander, for malice implied by law from speaking of words slanderous per se.

Pecuniary standing as competent evidence.

Cited in *Beck v. Dowell*, 40 Mo. App. 71 (dissenting opinion), on admissibility of evidence of pecuniary standing of plaintiff, in personal injury action, though exemplary damages warranted.

Cited in reference notes in 50 A. R. 141; 45 A. R. 143,—on admissibility of evidence of pecuniary circumstances of parties to civil action for assault and battery.

Force permissible in protecting person or property.

Cited in *Wilson v. State*, 30 Fla. 234, 17 L.R.A. 654, 11 So. 556, holding that one may use force necessary to protect home against threatened invasion; *State v. Palmer*, 88 Mo. 588, holding that one need not nicely gauge

proper quantum of force necessary to repel assault; *Jones v. State*, 76 Ala. 8, holding that one attacked in own house need not retreat further; *State v. Kennade*, 121 Mo. 406, 26 S. W. 347, holding that fact that one is leading immoral life does not lessen her right to defend her dwelling against armed and turbulent intruder; *State v. Pollard*, 139 Mo. 220, 40 S. W. 949, holding that negro may protect his home against intruder firing pistol in midst of family, even to extent of killing him; *State v. Raper*, 141 Mo. 327, 42 S. W. 935, holding that one may protect his home against any peace disturbing, profane intruder, even if necessary to taking of life; *State v. Reed*, 154 Mo. 122, 55 S. W. 278, holding that owner of store may employ such force short of killing as is necessary to eject trespasser who has assaulted him; *Norris v. Whyte*, 158 Mo. 20, 57 S. W. 1037, holding that one may use such force as is necessary to eject from premises trespasser who attempts assault; *Babcock v. Merchants' Exch.* 159 Mo. 381, 60 S. W. 732, holding that one not rightfully upon premises may be put off by use of such force as may be necessary; *State v. Taylor*, 143 Mo. 150, 44 S. W. 785, on decree of force to be used in defense of one's dwelling; *State v. McNamara*, 100 Mo. 100, 13 S. W. 398 (dissenting opinion), on force permissible in protecting himself from assailant.

Cited in reference note in 9 A. S. R. 308, as to when homicide is justifiable on ground of self defense.

Cited in notes in 44 A. R. 54; 74 A. S. R. 740; 40 L. ed. U. S. 1052,—as to when homicide in defense of property is justifiable or excusable; 93 A. S. R. 255, on right to expel trespasser without unnecessary force; 93 A. S. R. 261, on killing of trespasser; 22 L.R.A.(N.S.) 727, on right to use deadly weapon in resisting trespass; 67 L.R.A. 546, on homicide in defense of family and relations; 23 L.R.A.(N.S.) 996, on justifiable killing as defense in action for death intentionally inflicted.

Force permissible in protecting third person.

Cited in *State v. Totman*, 80 Mo. App. 125, holding that one may use in defense of third person in imminent and impending danger of death or great bodily harm, so much force as reasonably appears to be necessary, though in fact none is necessary.

Character and reputation of deceased as affecting homicide.

Cited in notes in 3 L.R.A.(N.S.) 352, on character and reputation of the deceased as affecting homicide; 3 L.R.A.(N.S.) 359, on knowledge by accused of character of deceased as affecting homicide.

Effect of instruction submitting question of law.

Cited in *Musser v. Hill*, 17 Mo. App. 169, holding instruction which submits question of law to jury erroneous; *Cottrill v. Krum*, 100 Mo. 397, 18 A. S. R. 549, 13 S. W. 753, to point that instruction submitting question of law for jury's determination is erroneous.

Right of jury to disregard uncontradicted testimony.

Cited in *Gannon v. Laclede Gaslight Co.* 145 Mo. 502, 43 L.R.A. 505 (dissenting opinion), on right of jury to disregard uncontradicted and unimpeached testimony.

Meaning of "pecuniary" and "necessary" injuries.

Cited in *Hickman v. Missouri P. R. Co.* 22 Mo. App. 344; *Goss v. Missouri P. R. Co.* 50 Mo. App. 614,—holding that "pecuniary injury" and "necessary injury" are parallel and interchangeable; *McGowan v. St. Louis Ore & Steel*

Co. 109 Mo. 518, 19 S. W. 199 (dissenting opinion), to point that terms "pecuniary injuries" and "necessary injuries" are synonymous.

Measure of damages for death by negligent act.

Cited in *Knight v. Sadtler Lead & Zinc Co.* 75 Mo. App. 541, holding that measure of wife's damages for death of husband is pecuniary injury only necessarily resulting from husband's death; *Brunke v. Missouri & K. Teleph. Co.* 112 Mo. App. 623, 87 S. W. 84, holding that measure is pecuniary damage alone and nothing is given as solatium; *Marshall v. Consolidated Jack Mines Co.* 119 Mo. App. 270, 95 S. W. 972, holding that measure of damages for death by negligent act does not include solatium.

Cited in reference note in 12 A. S. R. 377, on nonallowance for damages for suffering resulting from injury causing death.

Cited in notes in 17 L.R.A. 71, on measure of recovery for death caused by negligence; 17 L.R.A. 78, on measure of damage in action by parent for death of child.

Right of court to direct verdict.

Cited in *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235; *Powell v. Missouri P. R. Co.* 76 Mo. 80; *State use of Mayer v. O'Neill*, 151 Mo. 67, 52 S. W. 240; *Mexico v. Jones*, 27 Mo. App. 534,—holding that court shall direct verdict if whole evidence shows that verdict for plaintiff would not be allowed to stand; *Adams County Bank v. Hainline*, 67 Mo. App. 483, holding peremptory instruction proper, where, in court's opinion, there is nothing to contradict evidence offered to support cause; *O'Hare v. Chicago & A. R. Co.* 95 Mo. 602, 9 S. W. 23 (dissenting opinion), to point that mere scintilla of evidence is insufficient as basis for verdict; *Hopkins v. Nashville C. & St. L. R. Co.* 96 Tenn. 409, 32 L.R.A. 354, 34 S. W. 1029, on right to direct verdict.

Cited in note in 15 E. R. C. 71, on right of judge to direct nonsuit without plaintiff's consent.

Evidence of mitigating circumstances in reduction of damages.

Cited in *Gray v. McDonald*, 28 Mo. App. 477, holding evidence that deceased provoked difficulty, admissible in action for wrongful killing, to mitigate damages; *Gillfillan v. McCrillis*, 84 Mo. App. 576, holding evidence of mitigating circumstances inadmissible in action for wrongful killing where compensatory damages alone asked.

33 AM. REP. 517, STILLWELL v. AARON, 69 MO. 539.

What will discharge surety.

Cited in *Johnson v. Franklin Bank*, 173 Mo. 171, 73 S. W. 191, holding that creditor's acceptance of demand note after maturity of security note, releases surety where without latter's consent; *Noll v. Oberhellman*, 20 Mo. App. 336, holding that giving of note secured by trust deed maturing at later date than original note for which it is secured, does not release surety on original note, though given without his knowledge or consent.

Cited in reference note in 35 A. R. 585, on surety's discharge by indulgence to principal.

— Extension of time of payment.

Cited in *American & G. Mortg. & Invest. Corp. v. Marquam*, 62 Fed. 960; *Dresher v. Fulham*, 11 Colo. App. 62, 52 Pac. 685,—holding that agreement between payee and payor of promissory note for extension discharges non-consenting surety; *Citizens' Bank v. Moorman*, 38 Mo. App. 484, holding proof

of payment of advance interest, after note's maturity, not of itself sufficient evidence of binding agreement for extension of note; *J. T. Donovan Real Estate Co. v. Clark*, 84 Mo. App. 163, holding that extension of time of payment of promissory note granted upon execution of separate notes for future interest, and without surety's consent, releases latter; *St. Joseph F. & M. Ins. Co. v. Hauck*, 71 Mo. 465, holding that extension of promissory note in consideration of payment of interest in advance discharges surety; *Vestal v. Knight*, 54 Ark. 97, 15 S. W. 17; *Merchants' Ins. Co. v. Hauck*, 83 Mo. 21,—holding that agreement to extend promissory note in consideration of payment of interest in advance, discharges nonconsenting surety; *Fisher v. Stevens*, 143 Mo. 181, 44 S. W. 769, holding that agreement to extend note supported by valid and valuable consideration releases nonconsenting surety; *Harburg v. Kumpf*, 151 Mo. 16, 52 S. W. 19, holding that promise to extend note based only on maker's promise to keep money during extended period and pay stipulated interest, will not discharge surety; *Glenn v. Morgan*, 23 W. Va. 467, holding that extension of time of payment of debt, without surety's consent, in consideration of usurious interest in advance discharges surety.

Cited in reference note in 69 A. S. R. 736, on release of surety by extending time of payment.

Cited in note in 53 L.R.A. 317, 319, 320, on effect of payment of usury in consideration of extension of time to principal on surety's liability.

—Postponement of foreclosure of mortgage security.

Cited in *White v. Smith*, 174 Mo. 186, 73 S. W. 610, holding that agreement to postpone foreclosure of mortgage security releases surety on debt, where without his knowledge or consent.

Sufficiency of consideration.

Cited in *Wirt v. Schuman*, 67 Mo. App. 163, holding that promise of bona fide purchaser of stolen goods, who has parted with same, to assist true owner in finding them, is sufficient consideration to support agreement by true owner to pay for such services.

Cited in note in 12 L.R.A. 466, on sufficiency of benefit to promisee and detriment to promisor to support promise.

—Waiver of legal right.

Cited in *Given v. Corse*, 20 Mo. App. 132, holding agreement to withdraw execution and return it unsatisfied sufficient to support promise made on account of such agreement; *Vogel v. Meyer*, 23 Mo. App. 427, holding promisee's waiver of legal right sufficient consideration for promise made on account of such waiver.

—Extension of debt as supporting promise to pay back interest.

Cited in *Murdock v. Lewis*, 26 Mo. App. 234, holding extension of time of payment of debt, admitted due, sufficient consideration of promise to pay back interest; *Nelson v. Brown*, 140 Mo. 580, 62 A. S. R. 755, 41 S. W. 960, holding that valid extension of mortgage debt to grantee who has assumed payment, without mortgagor's consent, discharges mortgagor.

—For extensions of debt.

Cited in *Moore v. Macon Sav. Bank*, 22 Mo. App. 684, holding promise to pay same rate of interest insufficient consideration for agreement to extend time of payment of note; *Commercial Bank v. Wood*, 56 Mo. App. 214, holding that payment of interest in advance is sufficient consideration to support contract extending time of payment for definite period; *Russell v. Brown*, 21 Mo. App.

51; *American Nat. Bank v. Love*, 62 Mo. App. 378,—holding that payment of interest in advance furnishes good consideration for agreement to extend time of payment of promissory note; *Lemmon v. Whitman*, 75 Ind. 318, 39 A. R. 150; *Wild v. Howe*, 74 Mo. 551,—holding payment of usurious interest sufficient consideration for promise to extend note.

Extension of debt as new contract.

Cited in *Cole v. Yancey*, 62 Mo. App. 234, holding that extension of time for payment of note has not effect of making new contract with reference to interest so as to make same usurious because of statutory change in legal rate.

Liability of accommodation maker of promissory note, to bona fide holder.

Cited in *Moffat v. Greene*, 149 Mo. 48, 50 S. W. 809, holding that accommodation maker is liable to bona fide holder as principal, not as surety.

Parol evidence to show nature of signature on note.

Cited in note in 20 L.R.A. 712, on parol evidence to show who is principal and who surety on note not under seal.

33 AM. REP. 523, BLAISDELL v. STEPHENS, 14 NEV. 17.

Liability for maintaining nuisance.

Cited in reference note in 21 A. S. R. 677, on liability for maintaining nuisances.

Right to join as plaintiffs.

Cited in *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. 94, holding that several owners of waters of stream cannot join in action to recover damages for wrongful diversion; *Frost v. Alturas Water Co.* 11 Idaho, 29, 81 Pac. 996, holding that appropriators and users of water, who each own his separate lands and water right in his individual capacity, may join as parties plaintiff in action to quiet title to water rights.

Joint liability of several tort feorsors.

Cited in *Morris v. Bean*, 123 Fed. 618, holding that junior appropriators of water cannot be joined in action for damages, where damages not jointly inflicted; *Miller v. Highland Ditch Co.* 87 Cal. 430, 22 A. S. R. 254, 25 Pac. 550, holding that several owners of different ditches not jointly liable for damages resulting from depositing of debris upon another's land, where there was no concert of action; *Livesay v. First Nat. Bank*, 36 Colo. 526, 118 A. S. R. 120, 6 L.R.A.(N.S.) 498, 86 Pac. 102; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 A. S. R. 522, 39 N. E. 909, holding that several tort feorsors are not jointly liable though acts contribute to single injury, if there is no concert of action; *McBride v. Scott*, 125 Mich. 517, 8 N. W. 1079, holding that owner of property, who contracts for obviously defective and dangerous building and architect and contractors may be joined in action for injuries received by collapse of building; *Miles v. Du Bey*, 15 Mont. 340, 39 Pac. 313, holding misjoinder of parties in action for wrongful diversion of water, where each acted separately and independently; *Mau v. Stoner*, 15 Wyo. 109, 87 Pac. 434, holding no joint liability for wrongful diversion where several parties separately and independently, at different times and places, without concert, took water from ditch for irrigation of their separate lands; *Swain v. Tennessee Copper Co.* 111 Tenn. 430, 78 S. W. 93, holding that nuisance resulting from

separate acts of independent persons is no cause for joint action: *Foster v. Busey*, 132 Iowa, 640, 109 N. W. 1105, to point that in trespass against several acting independently, one cannot be held liable for acts of other.

Cited in reference note in 33 A. R. 566, on liability of each for nuisance created by several acting independently.

Cited in note in 118 A. S. R. 873, on action at law against two or more persons for damages for creating or maintaining private nuisance.

Distinguished in *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. 39, holding that where wrongful diversion of water is made by one, in interest of and for benefit of several, all are jointly liable; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879, holding that several tortfeasors whose separate acts combined create nuisance are jointly and severally liable to one sustaining special damage therefrom.

— Right to injunction against.

Cited in *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73; *Pacific Live Stock Co. v. Hanley*, 98 Fed. 327,—holding that suit may be maintained to restrain several persons from wrongfully diverting water; *Mining Debris Case*, 8 Sawy. 628, 16 Fed. 25; *Lockwood Co. v. Lawrence*, 77 Mo. 297, 52 A. R. 763,—holding that several parties whose separate acts combine to cause nuisance, may be joined in same bill to restrain nuisance; *Draper v. Brown*, 115 Wis. 361, 91 N. W. 1001, holding that suit may be maintained to restrain several parties from lowering lake, where, though acting independently and without concert, their acts united and concurred in producing result.

Cited in reference note in 30 A. S. R. 555, on joinder of parties defendant in suit to enjoin nuisance.

Rights of prior appropriator, as to use of water.

Cited in *Lehi Irrig. Co. v. Moyle*, 4 Utah, 327, 9 Pac. 867, holding that prior appropriator of water has prior right to its use to extent in amount and time of his prior appropriation.

Prescriptive right to increase flow of water.

Cited in *Boynton v. Longley*, 19 Nev. 69, 3 A. S. R. 781, 6 Pac. 437, holding that permission to flow land in way which does no injury does not give prescriptive right to increase flow to such extent as to damage land.

33 AM. REP. 526, STATE v. CLIFFORD, 14 NEV. 72.

What constitutes larceny.

Cited in *State v. Hayes*, 98 Iowa, 619, 60 A. S. R. 219, 37 L.R.A. 116, 67 N. W. 673, holding that one who finds lost property and keeps same, knowing owner, is guilty of larceny; *People v. Miller*, 4 Utah, 410, 11 Pac. 514, holding that one who takes property under mistake of fact and thereafter converts it to own use with felonious intent is not guilty of larceny.

Cited in notes in 57 A. D. 275, on intent as element of larceny; 57 A. D. 283, on larceny by finders of lost goods or estrays; 34 A. R. 734; 88 A. S. R. 592-594,—on larceny of lost property; 88 A. S. R. 564, on taking as element of larceny; 88 A. S. R. 603, on intent as element of larceny in case of finding lost property; 37 L.R.A. 124, 125, on belief as element of larceny by finder of property.

Possession of stolen property as justifying conviction of larceny.

Cited in *State v. Bouton*, 26 Nev. 34, 62 Pac. 595, holding that recent possession of stolen property, unexplained, justifies conviction of larceny; *People*

v. Swasey, 6 Utah, 93, 21 Pac. 400, holding that reasonable explanation of possession of alleged stolen property, if unchallenged, entitles acquittal of larceny.

33 AM. REP. 530, STATE v. AH CHUEY, 14 NEV. 79.

Compelling accused to be witness against himself.

Cited in *Blackwell v. State*, 67 Ga. 76, 44 A. R. 717, holding that accused in criminal case cannot be required to make proof of leg to ascertain character of amputation, to establish correspondence between limb and marks on ground; *People v. Ecarius*, 124 Mich. 616, 83 N. W. 628, holding that one charged with murder committed with iron bar may be required to put bar in his pocket, to show how it might have been concealed; *Thornton v. State*, 117 Wis. 338, 98 A. S. R. 924, 93 N. W. 1107, holding that to require one accused of crime to surrender shoe for purpose of comparing it with tracks in snow is not forcing prisoner to be witness against himself; *People v. Golden-son*, 76 Cal. 328, 19 Pac. 161; *State v. Gartrell*, 171 Mo. 489, 71 S. W. 1045; *State v. Miller*, 71 N. J. L. 527, 60 Atl. 202,—holding jail physician's evidence as to wounds observed on back of accused's hands, admissible although he had accused remove his clothes; *State v. Ruck*, 194 Mo. 416, 92 S. W. 706, 5 A. & E. Ann. Cas. 976, holding that it is not error to require accused to stand up in court room in order that state's witnesses may identify him; *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382, holding that personal effects of every kind belonging to prisoner may be taken from his person and used upon trial as criminating evidence; *State v. Loveless*, 17 Nev. 424, 30 Pac. 1080; *State v. Atkinson*, 40 S. C. 363, 42 A. S. R. 877, 18 S. E. 1021,—on right to compel accused to put his foot into "tracks" and make other tracks.

Cited in notes in 75 A. S. R. 328, on what is testifying against one's self within rule as to privilege of witness; 28 L.R.A. 700, 702, 703, on right to compel accused to exhibit himself for identification.

Proof of corpus delicti.

Cited in *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433, holding that corpus delicti may be established by circumstantial evidence; *Buel v. State*, 104 Wis. 132, 80 N. W. 78, holding that corpus delicti and every element of it, may be established by circumstantial evidence; *Re Kelly*, 28 Nev. 491, 83 Pac. 223, on sufficiency of evidence to establish corpus delicti.

Cited in notes in 68 L.R.A. 38, on what constitutes proof of corpus delicti in homicide case; 68 L.R.A. 78, on necessity of direct or positive evidence of corpus delicti.

Power of court to compel physical examination—In criminal cases.

Cited in *State v. Height*, 117 Iowa, 650, 94 A. S. R. 323, 59 L.R.A. 437, 91 N. W. 935, holding that compulsory physical examination of person charged with rape for purpose of ascertaining if he is affected with venereal disease is unconstitutional; *O'Brien v. State*, 125 Ind. 38, 9 L.R.A. 323, 25 N. E. 137, on right to compel accused in criminal case to submit to physical examination.

Cited in notes in 68 A. S. R. 252, on physical examination of parties in criminal cases; 94 A. S. R. 339, on compelling accused to submit his person to examination; 54 A. R. 402, on admissibility in criminal case of evidence of physical examination of accused.

—In personal injury action.

Cited in *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 44 A. R. 659; *May v. Northern P. R. Co.* 32 Mont. 522, 70 L.R.A. 111, 81 Pac. 328, 4 A. & E. Ann. Cas. 605,—holding that court may in personal injury action, compel plaintiff to submit to physical examination.

Cross-examination of accused.

Cited in reference note in 75 A. S. R. 318, on cross-examination of defendant in criminal prosecution.

Practical tests and experiments as evidence.

Cited in note in 49 A. R. 191, on right to put in evidence various practical tests and experiments.

Admissibility of evidence wrongfully obtained.

Cited in note in 136 Am. St. Rep. 151, on admissibility of evidence wrongfully obtained.

33 AM. REP. 548, GASTON v. DRAKE, 14 NEV. 175.**Validity of contracts.**

Cited in *Sheldon v. Pruessner*, 52 Kan. 579, 22 L.R.A. 709, 35 Pac. 201, holding that mortgage assigned to evade payment of taxes cannot be enforced by assignor in name of assignee; *Drexler v. Tyrell*, 15 Nev. 114, holding that mortgage executed to evade payment of taxes is illegal and void.

—Relating to public office.

Cited in *Schneider v. Local Union No. 60*, 116 La. 270, 114 A. S. R. 549, 5 L.R.A. (N.S.) 891, 40 So. 700, 7 A. & E. Ann. Cas. 868, holding that agreement to use one's influence to secure appointment to public office is void; *Basket v. Moss*, 115 N. C. 448, 44 A. S. R. 463, 48 L.R.A. 842, 20 S. E. 733, holding that agreement to compensate one who procures another's appointment to public office is void.

Cited in reference note in 44 A. S. R. 471, on invalidity as against public policy of contracts relating to public office.

Cited in notes in 66 A. D. 510, on invalidity of contract to pay for services improperly influencing elections; 4 L.R.A. 683, on invalidity of contract for purchase of office or official influence; 6 E. R. C. 345, 346, on validity of agreements tending to interfere with selection by merit of person to fill public office.

Effect of illegal purpose of partnership.

Cited in note in 115 A. S. R. 409, on effect of illegal purpose of partnership.

33 AM. REP. 559, STATE v. HALLOCK, 14 NEV. 202.**Effect on repealing clause of unconstitutionality of body of act.**

Cited in *State ex rel. Law v. Blend*, 121 Ind. 514, 16 A. S. R. 411, 23 N. E. 511, holding that repealing clause falls with act to which it is attached.

Cited in note in 88 A. S. R. 295, on effect of unconstitutional statute to repeal earlier statute by implication.

Implied repeal by void enactment.

Cited in *Stephens v. Ballou*, 27 Kan. 594, holding that void enactment can never have force and effect to repeal by implication any valid law supposed to be in conflict with void enactment.

Effect of act unconstitutional in part.

Cited in *Black v. Trower*, 79 Va. 123, holding whole act void if unconstitutional part be so connected with constitutional part that one would not have been enacted without other.

Effect of constitutional amendment to control statute.

Cited in *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, holding that constitutional amendment adopted subsequent to enactment of statute controls effect of statute.

Legislative authority.

Cited in *The Judges' Cases*, 102 Tenn. 509, 46 L.R.A. 567, 53 S. W. 134, holding that state legislature, in its sphere of legislative action, has unlimited power, subject to constitutional restraints; *Schwartz v. People*, 46 Colo. 239, 104 Pac. 92, on power of legislature as to liquor traffic as affected by constitutional provision on such subject.

Construction of clause in constitution expressly enumerating subject-matter.

Cited in *Eastman v. Gurrey*, 14 Utah, 169, 46 Pac. 828, to point that expression of one thing in constitution implies necessary exclusion of things not expressed.

33 AM. REP. 563, STATE v. DAVIS, 14 NEV. 439.**Disqualification of juror for opinion.**

Cited in *State v. Carrick*, 16 Nev. 120, holding that juror who has unqualified opinion that there was deficiency in county treasurer's accounts, but no opinion as to accused's guilt or innocence, is not disqualified.

When challenge to array is waived.

Cited in *State v. Wright*, 45 Kan. 136, 25 Pac. 631, holding that challenge to polls for favor or prejudice amounts to waiver of challenge to array.

Constitutionality of act which embraces more than one subject.

Cited in *State ex rel. School Trustees v. Storey County*, 17 Nev. 96, 28 Pac. 122, holding statute authorizing county commissioners to transfer certain funds not unconstitutional because it authorizes and directs transfer of moneys from two different funds.

Escape of prisoner.

Cited in reference note in 89 A. S. R. 373, on escape of prisoner.

33 AM. REP. 566, CHIPMAN v. PALMER, 77 N. Y. 51.**Liability for injury by concurrent wrongful acts—Liability to joint action.**

Cited in *Sparkman v. Swift*, 81 Ala. 231, 8 So. 160, holding that several creditors, who separately and independently wrongfully sue court attachments cannot be held liable as joint trespassers; *McBride v. Scott*, 125 Mich. 517, 84 N. W. 1079, holding owner of building, contractor and architect jointly liable for collapse of defectively constructed building; *Clement v. Crosby & Co.* 148 Mich. 293, 10 L.R.A.(N.S.) 588, 111 N. W. 745, 12 A. & E. Ann. Cas. 265, holding manufacturer and retailer jointly and severally liable for dangerous article negligently placed upon market; *Flaherty v. Minneapolis & St. L. R. Co.* 39 Minn. 328, 12 A. S. R. 654, 1 L.R.A. 680, 40 N. W. 160, holding both railroad companies jointly liable where concurrent negligence of each

produced collision; *Magee v. Pennsylvania S. Valley R. Co.* 13 Pa. Super. 187; *De Donato v. Morrison*, 160 Mo. 581, 61 S. W. 641,—holding that damages caused by acts of several joint tortfeasors, without concert of action, is no cause for joint action; *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172, *Middlesex Co. v. Lowell*, 149 Mass. 509, 21 N. E. 872; *Watson v. Colusa-Parrot Min. & Smelting Co.* 31 Mont. 513, 79 Pac. 14,—holding that several who are engaged in polluting stream are liable for injuries caused by own wrongful acts, only; *Martinowsky v. Hannibal*, 35 Mo. App. 70; *Mansfield v. Bristol*, 76 Ohio St. 270, 118 A. S. R. 852, 10 L.R.A.(N.S.) 806, 81 N. E. 631. 7 A. & E. Ann. Cas. 767,—holding that pollution of stream by several, without common design or concert of actions is no cause for joint action; *Swain v. Tennessee Copper Co.* 111 Tenn. 430, 78 S. W. 93, holding that nuisance resulting from separate acts of independent persons is no cause for joint action; *Neville v. Mitchell*, 28 Tex. Civ. App. 89, 66 S. W. 579, holding that there is no joint liability for nuisance created by acts of several acting separately and independently; *Sloggy v. Dilworth*, 38 Minn. 179, 8 A. S. R. 656, 36 N. W. 451; *Mau v. Stoner*, 15 Wyo. 109, 87 Pac. 434, holding that two or more parties, who separately and independently wrongfully divert water are not jointly liable for damages; *Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co.* 110 Va. 444, 24 L.R.A.(N.S.) 1185, 66 S. E. 73; *Sun Co. v. Wyatt*, 48 Tex. Civ. App. 349, 107 S. W. 934,—holding several persons whose separate acts result in nuisance cannot be joined as defendants; *Crane v. Hunt*, 26 Ont. Rep. 641, holding two taverns each of which served deceased with intoxicants to excess, cannot be sued jointly for his death while thus intoxicated; *Foster v. Bussey*, 132 Iowa, 640, 109 N. W. 1105; *Reddick v. Newburn*, 76 Mo. 423,—to point that where cattle are straying at large each owner is liable for damage done by his cattle, only; *Willard v. Red Bank Oil Co.* 151 Ill. App. 433, as to when acts of several in allowing escape of oil cannot be made joint.

Cited in reference note in 93 A. D. 494, on right of one injured by joint negligence of several to sue one or all.

Cited in notes in 71 A. D. 313, on joinder of parties defendant in action at law to abate private nuisance; 118 A. S. R. 873-875, on action at law against two or more persons for damages for creating or maintaining private nuisance; 6 L.R.A.(N.S.) 1149, on joinder of parties in suit to restrain pollution of water course; 10 L.R.A.(N.S.) 168, on character of the liability of several persons whose independent wrongs of the same kind contribute to enhance the degree or extent of the injury sustained by plaintiff.

Distinguished in *Gardner v. Friederich*, 25 App. Div. 521, 49 N. Y. Supp. 1077, holding that action lies against one or all where direct personal injury results from concurrent or successive negligence of several.

—Liability to separate actions.

Cited in *Indianapolis Water Co. v. American Strawboard Co.* 57 Fed. 1000, holding that each of several parties engaged in polluting stream is liable to separate suit and may be restrained; *Townsend v. Bell*, 62 Hun, 306, 17 N. Y. Supp. 210, holding no defense in action for polluting stream that others also pollute it.

Cited in reference note in 25 A. S. R. 707, on individual liability for nuisance committed by several independently.

Cited in notes in 8 A. S. R. 661; 24 L.R.A.(N.S.) 1185,—on liability of one of several polluters of stream.

—Right to hold one contributor liable for entire damage.

Cited in *Harley v. Merrill Brick Co.* 83 Iowa, 73, 48 N. W. 1000, holding one of several contributors to nuisance cannot be held liable for entire damage, though damage caused by each cannot be accurately measured; *Carmichael v. Texarkanna*, 94 Fed. 561; *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185, 39 N. E. 908; *Valparaiso v. Moffit*, 12 Ind. App. 250, 54 A. S. R. 522, 39 N. E. 909; *O'Donnell v. Syracuse*, 184 N. Y. 1, 112 A. S. R. 558, 3 L.R.A.(N.S.) 1053, 76 N. E. 738, 6 A. & E. Ann. Cas. 173,—to point that where different parties are engaged in polluting stream, entire damages cannot be collected of one.

Injunction to restrain concurrent wrongs—Right to joint action.

Cited in *Mining Debris Case*, 16 Fed. 25; *United States v. Luce*, 141 Fed. 385,—holding that several persons whose separate acts together constitute nuisance may be joined in action to restrain nuisance; *People v. Gold Run Ditch & Min. Co.* 66 Cal. 138, 56 A. R. 80, 4 Pac. 1152, holding that in action to abate public nuisance, all persons engaged in wrongful acts may be sued jointly or severally; *Miller v. Highland Ditch Co.* 87 Cal. 430, 22 A. S. R. 254, 25 Pac. 550, holding that joint action may be maintained to enjoin all of several tort-feasors from continuing wrong, though there is no concert of action; *Pittsburgh, C. C. & St. L. R. Co. v. Crothersville*, 159 Ind. 330, 64 N. E. 914, holding that acts of several persons acting together or independently may constitute nuisance, though injury occasioned by acts of one would not have amounted to nuisance; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 A. R. 763; *Baltimore v. Warren Mfg. Co.* 59 Md. 96; *Warren v. Parkhurst*, 186 N. Y. 45, 6 L.R.A.(N.S.) 1149, 78 N. E. 579, 9 A. & E. Ann. Cas. 512 (affirming 45 Misc. 466, 92 N. Y. Supp. 725), holding that injunction lies to restrain several parties who unite in pollution of stream.

Cited in note in 30 A. S. R. 555, on joinder of parties defendant in suit to enjoin nuisance.

—Right to separate actions.

Cited in *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499, holding that each of several contributors to pollution of stream may be enjoined against commission of wrong with which he is individually chargeable.

Injunction to prevent pollution of stream by municipality.

Cited in *Robb v. LaGrange*, 158 Ill. 21, 42 N. E. 77, holding that injunction lies to prevent pollution of stream by municipality by discharge of sewage therein; *Schrivver v. Johnstown*, 54 N. Y. S. R. 573, 24 N. Y. Supp. 1083, holding injunction lies to prevent pollution of pond by municipality, by discharge of sewage therein.

Right of private action to restrain public nuisance.

Cited in *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341; *Ackerman v. True*, 175 N. Y. 353, 67 N. E. 629, holding that one who sustains private and peculiar injury from obstruction of highway may maintain action to abate it and to recover damages occasioned thereby.

Injunction to restrain apprehended nuisance.

Distinguished in *Stilwell v. Buffalo Riding Academy*, 21 Abb. N. C. 472, 4 N. Y. Supp. 414, holding that injunction will not lie to restrain erection of proposed stable prior to any actual disturbance or annoyance.

When demurrer lies for misjoinder of actions.

Cited in *McKenzie v. Hatton*, 9 Misc. 16, 29 N. Y. Supp. 18, holding that demurrer for misjoinder of causes of action lies if each cause of action does not affect all parties.

Joinder of actions on bond and for damages.

Cited in *Wiley v. Nichols*, 18 Wash. 528, 52 Pac. 237, holding that action against principal and sureties on injunction bond for penalty and against principal in further sum for maliciously instituting injunction proceedings is demurrable as misjoinder of actions.

When joint act arises.

Cited in note in 25 E. R. C. 161, on act, several when committed, being made joint because of consequences following in connection with others.

Liability for nuisance.

Cited in reference note in 21 A. S. R. 677, on liability for maintaining nuisances.

Property right necessary to sustain action for private nuisance.

Cited in note in 15 L.R.A. 689, on how far property right necessary to sustain action for private nuisance.

33 AM. REP. 570, DUNHAM v. BOWER, 77 N. Y. 76.**Former judgment as bar.**

Cited in *Goble v. Dillon*, 86 Ind. 327, 44 A. R. 308, holding that recovery by physician of judgment for professional services is bar to action for malpractice; *John V. Farwell Co. v. Lykins*, 59 Kan. 96, 52 Pac. 99, holding that though special findings against notes are silent as to account constituting their consideration and sued on therewith, judgment for defendant for costs bar subsequent action on account; *Crandall v. Grow*, 41 N. J. Eq. 482, 5 Atl. 136, holding one recovering judgment for defective performance of contract must credit thereon the balance due as consideration for contract; *Campbell v. Thompson*, 27 Hun, 541, holding that recovery of amount due for commissions does not estop consignor from recovering damages for sale wrongfully made in violation of instructions; *Wilcox v. Gilchrist*, 85 Hun, 1, 32 N. Y. Supp. 608, holding that judgment against person individually is bar to action against him as surviving partner as to all matters which might have been litigated; *Fritz v. Tompkins*, 39 App. Div. 73, 56 N. Y. Supp. 847, holding that judgment in action in which fee is claimed is bar to action in which same party claims easement only in same land; *Clement v. Moore*, 135 App. Div. 723, 119 N. Y. Supp. 883, holding judgment in favor of defendant in action to revoke liquor license will prevent subsequent suit for penalty; *Schwinger v. Raymond*, 83 N. Y. 192, 38 A. R. 415, holding submission to judgment for freight not bar to action against carrier for damages to goods while en route; *Reich v. Cochran*, 151 N. Y. 122, 56 A. S. R. 607, 37 L.R.A. 805, 45 N. E. 367, holding judgment in favor of landlord in summary proceedings bar to pending action by tenant to have lease adjudge mortgage; *Kirven v. Virginia-Carolina Chemical Co.* 77 S. C. 493, 58 S. E. 424, holding judgment in Federal court on note given for fertilizer is not bar to state court action for damage to crop from use thereof, where such question was not litigated in Federal court; *Sale v. Eichberg*, 105 Tenn. 333, 52 L.R.A. 894, 59 S. W. 1020, holding judgment obtained by physician for services, confessed as condition to granting injunction to prevent prosecution of action to recover for services, pending action against physician for malpractice, will not

upon reversal of injunction order operate as estoppel to action for malpractice; *Jordahl v. Berry*, 72 Minn. 119, 71 A. S. R. 469, 45 L.R.A. 541, 75 N. W. 10; *Lawson v. Conway*, 37 W. Va. 159, 38 A. S. R. 17, 18 L.R.A. 627, 16 S. E. 564,—holding that recovery by physician of judgment by default for professional services not bar to cross action for malpractice; *Ressequie v. Byers*, 52 Wis. 650, 38 A. R. 775, 9 N. W. 779, holding recovery by physician of judgment for professional services not bar to action for malpractice where question of malpractice not litigated; *Dowd v. Smith*, 8 Misc. 619, 29 N. Y. Supp. 821, to point that accepted offer of judgment bars counterclaim; *Merlette v. North & East River S. B. Co.* 13 Daly, 114, to point that recovery had for freight is bar to action for damages for nonperformance of contract by carrier.

Cited in reference note in 47 A. R. 364, on judgment of damages for seduction as bar to action for breach of promise of marriage.

Cited in note in 38 A. R. 780, on former action for value of services as bar to subsequent action for nonperformance.

Conclusiveness of judgment — What matters concluded.

Cited in *The Tubal Cain*, 9 Fed. 834, holding judgment conclusive as to matters available and involved in issue though not availed of; *Grotton Bridge & Mfg. Co. v. Clark Pressed Brick Co.* 68 C. C. A. 577, 136 Fed. 27, holding judgment constitutes estoppel to subsequent action between same parties based upon same state of facts; *Godding v. Colorado Springs Live Stock Co.* 4 Colo. App. 14, 34 Pac. 942, holding that point once adjudicated by court of competent jurisdiction is conclusive upon parties or their privies; *McNichols v. Lake*, 13 Colo. App. 164, 56 Pac. 987, holding judgment unreversed and unappealed from conclusive between parties; *Aldridge v. Walker*, 73 Hun, 281, 26 N. Y. Supp. 296; *Bell v. Merrifield*, 109 N. Y. 202, 4 A. S. R. 436, 16 N. E. 55, 14 N. Y. Civ. Proc. Rep. 146; *Campbell Printing Press & Mfg. Co. v. Walker*, 114 N. Y. 7, 20 N. E. 625; *Hartnett v. Adler*, 15 Daly, 69, 2 N. Y. Supp. 713 (affirming 1 N. Y. Supp. 321); *Lee v. Jefferson County*, 62 How. Pr. 207,—holding judgment conclusive upon all questions actually litigated, or which might have been litigated, upon parties to action and their privies; *Pray v. Hegeman*, 98 N. Y. 351, holding judgment conclusive as to relief within scope thereof and which might have been granted therein; *Nollman v. Evenson*, 5 N. D. 344, 65 N. W. 686; *Lawton v. Hudson*, 19 App. Div. 522, 46 N. Y. Supp. 617,—holding that former judgment is bar to all matters which were or might have been litigated as between same parties.

Cited in note in 112 A. S. R. 35, on judgment of eviction against tenant for nonpayment of rent, as *res adjudicata*.

— As to parties.

Cited in *J. I. Case Threshing Mach. Co. v. Pederson*, 6 S. D. 140, 60 N. W. 747, holding that validity of judgment cannot be denied in action thereon between same parties; *Woodhouse v. Duncan*, 106 N. Y. 527, 13 N. E. 334, holding judgment conclusive upon parties thereto, and also upon those in privity, though not made parties.

Cited in note in 53 A. D. 337, on conclusiveness of judgment upon parties and privies.

Right of separate action upon claim available by way of recoupment.

Cited in *Morehouse v. Baker*, 48 Mich. 335, 12 N. W. 170, holding that there is no imperative requirement that demand available by way of recoupment shall be made use of as counterclaim.

Cited in reference note in 82 A. D. 359, on right of defendant to elect between setting up counterclaim or set-off and bringing a cross action.

Right of carrier to freight when part of cargo is lost.

Cited in *Donovan v. Standard Oil Co.* 155 N. Y. 112, 49 N. E. 678, holding that carrier can recover freight on part of cargo delivered, where balance lost through peril of sea.

Another action pending as plea in abatement.

Cited in *Tyler v. Standard Wine Co.* 52 Misc. 374, 102 N. Y. Supp. 65, holding that action against architect to recover money paid, because of failure to perform contract, cannot be pleaded in abatement of action by architect to recover balance due on contract.

33 AM. REP. 574, *RING v. COHOES*, 77 N. Y. 83.

Liability for negligence where there are concurring causes of injury.

Cited in *Laidlaw v. Sage*, 73 Hun, 125, 25 N. Y. Supp. 955, holding that accident or injury cannot be attributed to cause unless without its operation, it would not have happened; *Quill v. Empire State Teleph. & Teleg. Co.* 92 Hun. 539, 37 N. Y. Supp. 1149 (affirming 13 Misc. 435, 34 N. Y. Supp. 470), holding telegraph company liable for injury sustained by falling of insecurely attached insulator, though lifting of wires concurring cause; *Leeds v. New York Teleph. Co.* 64 App. Div. 484, 72 N. Y. Supp. 250, holding telephone company which attaches wire to dilapidated chimney responsible for fall of chimney caused by wire being struck by boom of derrick; *Johnson v. New York*, 109 App. Div. 821, 96 N. Y. Supp. 754, holding one responsible for illegal rate of speed of automobile liable for injury inflicted, though defective construction of machine concurrent cause of accident; *Leeds v. New York Teleph. Co.* 178 N. Y. 118, 70 N. E. 219 (reversing 79 App. Div. 121, 80 N. Y. Supp. 114), holding telephone company which attaches wire to dilapidated chimney not responsible for fall of chimney caused by wire being struck by boom of derrick; *Ashborn v. Waterbury*, 70 Conn. 551, 40 Atl. 458; *Waller v. Missouri, K. & T. R. Co.* 59 Mo. App. 410; *Van Houten v. Fleischmann*, 1 Misc. 130, 48 N. Y. S. R. 763, 20 N. Y. Supp. 643; *Young v. Syracuse, B. & N. Y. R. Co.* 45 App. Div. 296, 61 N. Y. Supp. 202; *Pzepka v. American Glucose Co.* 11 Misc. 131, 31 N. Y. Supp. 1019,—to point that where there are two efficient concurrent causes for accident, it may be attributed to either of them; *Murtaugh v. New York C. & H. R. R. Co.* 49 Hun, 456, 3 N. Y. Supp. 483; *Hawley v. Gloversville*, 4 App. Div. 343, 38 N. Y. Supp. 647; *McCabe v. Brainard*, 17 App. Div. 45, 44 N. Y. Supp. 964; *Scandell v. Columbia Constr. Co.* 50 App. Div. 512, 64 N. Y. Supp. 232; *Carhart v. State*, 115 App. Div. 1, 100 N. Y. Supp. 499; *Laidlaw v. Sage*, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679; *Rider v. Syracuse Rapid Transit R. Co.* 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836; *Whittaker v. Delaware & H. Canal Co.* 34 N. Y. S. R. 822, 11 N. Y. Supp. 914,—to point that where there are concurring causes for accident it cannot be attributed to one of them unless without its operation accident would not have happened; *Deegan v. Gutta Percha & Rubber Mfg. Co.* 131 App. Div. 101, 115 N. Y. Supp. 291, on liability in case of concurring causes of injury.

— **Defect in sidewalk and other causes generally.**

Cited in *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. 932, holding city liable to one stepping into hole in sidewalk made by displacement of loose plank by passing bicycle just as injured party was about to step onto plank; *Indianapo-*

lis v. Cook, 99 Ind. 10, holding city not liable to one stumbling over water box one and a half inches above level of sidewalk; *Galveston v. Posnainsky*, 62 Tex. 118, 50 A. R. 517, holding municipality liable where by reason of defective sidewalk child fell into ditch and was injured on broken bottle; *Crawford v. New York*, 68 App. Div. 107, 74 N. Y. Supp. 261 (dissenting opinion), on right to hold city not liable for negligent failure to remove snow if subsequent snowfall concurred in producing injury.

— Defect in sidewalk and icy condition.

Cited in *Rusk v. Manhattan R. Co.* 46 App. Div. 100, 61 N. Y. Supp. 384, holding that to make elevated railroad company liable to one slipping on icy depression in platform, it must appear that depression was efficient cause of accident; *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688; *Taylor v. Yonkers*, 105 N. Y. 202, 59 A. R. 492, 11 N. E. 642,—holding city not liable to one falling upon icy defective sidewalk unless shown that defect was efficient cause of injury; *Harrington v. Buffalo*, 18 N. Y. S. R. 425, 2 N. Y. Supp. 333; *Sawyer v. Amsterdam*, 20 Abb. N. C. 227; *Hamilton v. Buffalo*, 55 App. Div. 423, 66 N. Y. Supp. 990; *Graham v. Poughkeepsie*, 68 App. Div. 262, 74 N. Y. Supp. 97; *Hampson v. Taylor*, 15 R. I. 83, 23 Atl. 732,—holding town liable to one injured by falling on icy sidewalk, where accident would not have occurred if sidewalk were not defective.

— Defect in highway and other causes, generally.

Cited in *Thunborg v. Pueblo*, 18 Colo. App. 80, 70 Pac. 148, holding immoderate speed at which horse was going in defense for defective highway unless driver responsible for speed; *Cartesen v. Stratford*, 67 Conn. 428, 35 Atl. 276; *Overhouser v. American Cereal Co.* 118 Iowa, 417, 92 N. W. 74; *Lincoln Twp. v. Koenig*, 10 Kan. App. 504, 63 Pac. 90,—holding town liable for injuries where proximate cause was defect in highway though other cause contributed to injury; *Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621; *Olathe v. Mizze*, 48 Kan. 435, 30 A. S. R. 308, 29 Pac. 754,—holding city liable for injuries where unguarded excavation in street was efficient cause, though other cause contributed to injury; *Storey v. New York*, 29 App. Div. 316, 51 N. Y. Supp. 580, holding mound of earth in city street not proximate cause of child being run over though its height obstructed view of himself and driver; *Halstead v. Warsaw*, 43 App. Div. 39, 59 N. Y. Supp. 518, holding municipality liable where injuries are result of two proximate causes, primary one of which is attributable to municipality's negligence, and secondary cannot be laid to either party; *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548; *Sheridan v. New York*, 12 Misc. 47, 33 N. Y. Supp. 71; *Ehr Gott v. New York*, 96 N. Y. 264, 48 A. R. 622; *Gardner v. Wasco County*, 37 Or. 392, 61 Pac. 834,—to point that municipality is liable for injury due to defective highway combined with other cause, if injury would not have been sustained but for defect.

Cited in notes in 36 A. S. R. 836, as to when defect in highway is deemed proximate cause of injury to traveler; 9 L.R.A.(N.S.) 552, on obstructions in highway as proximate cause of injury notwithstanding intervening cause.

— Defect in highway and fright of horse.

Cited in *Decatur Waterworks Co. v. Foster*, 161 Ala. 176, 49 So. 759, holding waterworks company liable for injury caused by water plug in street and frightened horse; *Crawfordsville v. Smith*, 79 Ind. 308, 41 A. R. 612, holding city liable for injuries sustained by frightened runaway horse, by reason of dangerous excavation in street; *Langworthy v. Green Twp.* 95 Mich. 93, 54 N. W.

Am. Rep. Vol. XVII.—44.

697, holding township liable for injuries sustained upon partially embedded log in highway, though shying of horse contributing cause; *McLemore v. West End*, 159 Ala. 235, 48 So. 663; *Janes v. Tampa*, 52 Fla. 292, 42 So. 729, 11 A. & E. Ann. Cas. 510; *Joliet v. Shufeldt*, 144 Ill. 403, 36 A. S. R. 453, 18 L.R.A. 750, 32 N. E. 969; *Rock Falls v. Wells*, 65 Ill. App. 557; *Sweet v. Perkins*, 196 N. Y. 482, 90 N. E. 50; *Wood v. Gilboa*, 76 Hun, 175, 27 N. Y. Supp. 586,—holding municipality liable for injury resulting from defective highway though conduct of frightened horse was one proximate cause of injury; *Schillinger v. Verona*, 96 Wis. 456, 71 N. W. 888, holding town not liable, to driver of runaway team, for defective highway, where horses more than momentarily beyond control, and fright not caused by defect in highway.

Cited in reference note in 34 A. R. 631, on liability for article left in highway which frightens horse.

Cited in notes in 98 A. D. 611, on liability of cities and towns for injuries to or by horses frightened by defects in highway; 8 L.R.A.(N.S.) 79, on municipal liability for injury to person or property of one driving over defective highway whose horse is frightened without fault of either party.

—Defect in highway and contributory negligence.

Cited in *Denver v. Utzler*, 38 Colo. 300, 120 A. S. R. 108, 8 L.R.A.(N.S.) 77, 88 Pac. 143, holding city not liable for injuries due to obstructions in street, where negligence of driver contributing cause; *Shafer v. New York*, 12 App. Div. 384, 42 N. Y. Supp. 744 (dissenting opinion), on right to absolve city from liability for defective highway because of injured party's contributory negligence.

—Unguarded embankment and fright of horse.

Cited in *Hubbell v. Yonkers*, 35 Hun, 349, holding city liable for injuries sustained by frightened horse carrying wagon and injured party over unguarded embankment along side of street; *Glazier v. Hebron*, 62 Hun, 137, 16 N. Y. Supp. 503, holding town liable for absence of barrier where frightened horse backed off bank of highway into pond; *Ivory v. Deerpark*, 116 N. Y. 476, 22 N. E. 1090, holding town liable for injuries occasioned by frightened team going over bank, where absence of railing was efficient cause of injury; *Plymouth Twp. v. Graver*, 125 Pa. 24, 11 A. S. R. 867, 17 Atl. 249, 24 W. N. C. 221, 46 Phila. Leg. Int. 335, 20 Pittsb. L. J. N. S. 39, holding township liable where by reason of neglect to maintain barrier where road paralleled railroad tracks, horse, frightened at passing train, ran upon track and was killed.

—Defective bridge railing and fright of horse.

Cited in *Sullivan County v. Sisson*, 2 Ind. App. 311, 28 N. E. 374, holding county commissioners liable for defective bridge railing through fright of horse contributed to accident; *Walrod v. Webster County*, 110 Iowa, 349, 47 L.R.A. 480, 81 N. W. 598, holding instruction proper that county was liable if defective bridge railing was efficient cause of accident, though fright of horses, at flash of lightning contributed thereto; *Thomas v. Springville*, 9 Utah, 426, 35 Pac. 503, holding municipality liable for injuries sustained where horse becomes frightened at defect in bridge and backs carriage into stream.

—Negligence of railroad company and fright of horse.

Cited in *Grimes v. Louisville, N. A. & C. R. Co.* 3 Ind. App. 573, 30 N. E. 200, holding railroad company which unlawfully obstructs street with its cars liable for injury to runaway horse in attempting to leap through space between coupled cars; *Gage v. Pontiac, O. & N. R. Co.* 105 Mich. 335, 63 N. W. 318, holding rail-

road company liable for injuries due to absence of railing on approach to bridge, though shying of horse contributory cause.

—Negligence of railroad employee and fright of horse.

Cited in *Putman v. New York C. & H. R. R. Co.* 47 Hun, 439, holding railroad company liable where employee's negligence cause of frightening horse though contributing cause to injury was breaking of reins while endeavoring to control horse; *Coopins v. New York C. & H. R. R. Co.* 48 Hun, 292, holding railroad company liable where open switch one cause of accident, though concurrent negligence of engineer contributed to accident; *Schmerhorn v. New York C. & H. R. R. Co.* 33 App. Div. 17, 53 N. Y. Supp. 279, holding railroad company liable where horse frightened by negligent blowing of locomotive whistle ran upon track and occupant of buggy was killed; *Phillips v. New York C. & H. R. R. Co.* 127 N. Y. 657, 27 N. E. 978, 3 Silv. Ct. App. 467, holding railroad company liable where employees negligence was efficient cause of accident, though fright of horse and breaking of reins were concurrent causes.

—Negligence of railroad setting out fire and other causes.

Cited in *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229, 22 A. S. R. 582, 9 L.R.A. 750, 26 N. E. 51, holding railroad company negligently setting out fire on right of way liable for damages though ordinary wind rekindled flame after it was extinguished; *Cook v. Minneapolis, St. P. & S. Ste. M. R. Co.* 98 Wis. 624, 67 A. S. R. 830, 40 L.R.A. 457, 74 N. W. 561, holding railroad not liable for fire negligently set by locomotive where that fire joined with other fire of irresponsible origin, either of which would independently have caused damage complained of; *Chicago Mill & Lumber Co. v. Cooper*, 90 Ark. 326, 119 S. W. 672, on liability where defective engine and negligence of engineer concur in injuring fellow servant of engineer.

—Negligence of master and other causes.

Cited in *Farrell v. Eastern Mach. Co.* 77 Conn. 484, 107 A. S. R. 45, 68 L.R.A. 239, 59 Atl. 611, holding master liable for injury to employee from defective scaffolding, though intervening negligence of superintendent contributory cause; *Williams v. Delaware, L. & W. R. Co.* 39 Hun, 430, holding master not liable where several proximate causes contribute to accident, unless shown his negligence was efficient cause; *Hall v. Cooperstown & S. Valley R. Co.* 49 Hun, 373, 3 N. Y. Supp. 584; *Whittaker v. Delaware & H. Canal Co.* 49 Hun, 400, 3 N. Y. Supp. 576,—holding master not liable for injuries sustained by employee through negligence both of himself and coemployees unless without his negligence accident would not have happened; *Larkin v. Washington Mills Co.* 45 App. Div. 6, 61 N. Y. Supp. 93, holding master liable to employee for injury sustained by failure of automatic elevator gate to close, though third person's moving car concurring cause of accident; *Murphy v. Hudson River Teleph. Co.* 127 App. Div. 450, 112 N. Y. Supp. 149, holding master liable for injury to lineman caused by shock due to use of tape furnished by it, although shaking of tape by fellow-servant might have concurred in causing shock; *Kern v. De Castro & D. Sugar Ref. Co.* 24 N. Y. S. R. 748, 5 N. Y. Supp. 548, holding master liable for injury to employee due to absence of safety appliances on elevator though acts of fellow servants in pushing elevator concurring cause.

—Landowner's obstructing highway and other causes.

Cited in *Merritt v. Fitzgibbons*, 20 Hun, 634, holding who negligently obstructs sidewalk with team of horses liable to another who accidentally slipped on coal hole cover of adjoining premises, fell under horses feet and was injured; *Hough-*

taling v. Shelley, 51 Hun, 598, 3 N. Y. Supp. 904, holding landowner who obstructs side of road with stone pile liable for injuries sustained by frightened horse running wagon onto same; Sweet v. Perkins, 115 App. Div. 784, 101 N. Y. Supp. 163 (dissenting opinion), on right to hold landowner not liable for injuries sustained by one whose horse becoming frightened by automobile, veered to one side, ran into pile of muck in highway and overturned vehicle.

Duty and liability as to safety of street.

Cited in reference note in 27 A. S. R. 689, on liability for defects in highway.

Cited in notes in 27 A. R. 398; 34 A. R. 668; 20 L.R.A.(N.S.) 587, 620, 621, 734,—on liability of municipality for defects or obstructions in streets; 3 L.R.A. 257, on rule that municipality is not insured against accidents in streets; 5 L.R.A. 254, on duty of municipal corporations to keep streets and sidewalks in safe condition.

—For runaway horses.

Cited in Lane v. Wheeler, 35 Hun, 606, holding that highway commissioners owe no duty to erect barriers at unsafe bridges sufficiently strong and high to stop unrestrained horses running away; Stacy v. Phelps, 47 Hun, 54, holding highway commissioners not compelled to erect barrier horses running away without restraint, from falling into excavation made in erecting bridge.

Cited in note in 18 L.R.A. 103, on when liability of municipalities to provide for safety of runaway horse exists.

Joint and several liability in cases of concurrent negligence.

Cited in Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744, holding owners of contiguous buildings liable jointly and severally for their collapse by reason of coexistent and concurring negligence in keeping separate walls in repair; Demarest v. Forty-second Street, M. & St. N. Ave. R. Co. 104 App. Div. 503, 93 N. Y. Supp. 663, to point that third person injured by negligence of two or more persons, he being free from negligence, may maintain joint or several action for damages sustained.

When occupation of highway for purpose other than travel, is lawful.

Cited in District of Columbia v. Moulton, 15 App. D. C. 363, holding that municipal corporation may be liable for injuries resulting from fright of horse at disabled steam roller permitted to remain in street; Platt v. New York, 8 Misc. 409, 28 N. Y. Supp. 672, holding division fence between bridle path and walk in public park not unlawful occupation of highway making city liable to one injured by coming in contact with it; Jordan v. New York, 26 Misc. 53, 55 N. Y. Supp. 716, holding hubstone on city sidewalk not per se nuisance; Wells v. Brooklyn, 9 App. Div. 61, 41 N. Y. Supp. 143, holding show case maintained upon curb of street such unlawful occupation of highway as to render city responsible for accidents caused thereby; Whitney v. Ticonderoga, 53 Hun, 214, 6 N. Y. Supp. 844, holding that road scraper, belonging to town, and left standing in road, establishes existence of defective highway rendering town liable for injuries from collision therewith; Tubesing v. Buffalo, 51 App. Div. 14, 64 N. Y. Supp. 399, holding trap door leading to vault under sidewalk not unlawful occupation of highway where unobstructed passage left; McMillan v. Klaw & E. Constr. Co. 107 App. Div. 407, 95 N. Y. Supp. 365, holding ornamental projections of building into sidewalk, unlawful occupation of highway; Frank v. Warsaw, 116 App. Div. 618, 101 N. Y. Supp. 938, holding maintenance of peanut roaster in streets not nuisance rendering village liable for injury to pedestrian injured from explosion thereof; Winters v. New York, 15 Daly, 102, 2 N. Y. Supp. 695, holding that

occupation of street and sidewalk by person erecting building is lawful; *Dougherty v. Horse Leads*, 159 N. Y. 154, 53 N. E. 799, holding maintenance of stone to protect grass plat at private driveway not such unlawful obstruction of street as renders village liable for injury sustained through collision of vehicle with stone.

Distinguished in *Sautter v. Utica City National Bank*, 119 App. Div. 898, 104 N. Y. Supp. 1139 (affirming 45 Misc. 15, 90 N. Y. Supp. 838), (dissenting opinion), on right to hold projection of columns of building into sidewalk not unlawful occupation of highway.

Right to use gutter for purpose of travel.

Distinguished in *Fisher v. Mt. Vernon*, 41 App. Div. 293, 58 N. Y. Supp. 499, holding that where part of highway denominated as gutter is paved portion four feet wide, it is proper for drivers to use all parts of it.

When horse is uncontrollable.

Cited in *St. Louis, I. M. & S. R. Co. v. Aven*, 61 Ark. 141, 32 S. W. 500; *Van Wie v. Mt. Vernon*, 26 App. Div. 330, 49 N. Y. Supp. 779; *Schillinger v. Verona*, 85 Wis. 589, 55 N. W. 1040,—to point that horse is not to be considered uncontrollable that merely shies or starts or is momentarily not controlled by driver.

Liability of municipality generally.

Cited in *Hunt v. New York*, 109 N. Y. 134, 16 N. E. 320; *Jenney v. Brooklyn*, 120 N. Y. 164, 24 N. E. 274,—holding that municipal corporation's liability for damages can only be predicated upon its neglect or misconduct; *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341, holding that city which operates its own waterworks is liable to patron for negligent failure to furnish water for extinguishing fires.

Negligence as question for jury.

Cited in *Sleeper v. Worcester & N. R. Co.* 58 N. H. 520, holding that whether person was in lawful use of highway as "traveller" and in exercise of due care when his horse was injured are questions for jury.

Snow and ice as defect in sidewalk.

Cited in *McCollum v. South Omaha*, 84 Neb. 413, 121 N. W. 438, holding dangerous accumulation of snow and ice is defect in sidewalk.

Cited in note in 10 L.R.A. 179, on municipal negligence in not removing snow and ice from sidewalk.

Proximate cause.

Cited in *Evansville Hoop & Stave Co. v. Bailey*, 43 Ind. App. 153, 84 N. E. 549, as to what constitutes proximate cause.

Cited in note in 50 A. R. 574, on negligence as proximate cause of injury.

Physical laws as affecting liability for injury.

Cited in note in 36 A. S. R. 822, on liability for injuries inflicted as determined by operation of normal physical laws.

33 AM. REP. 579, RE DODGE & S. MFG. CO. 77 N. Y. 101.

Disqualification of judge—Because of interest.

Cited in *Re Reddish*, 18 N. Y. S. R. 41, 2 N. Y. Supp. 259, holding judge disqualified to sit in proceedings to remove assignee, who was director of one of petitioning creditors; *Re Carboy*, 27 Hun, 78, holding one indebted to estate

cannot act as surrogate on probate of will; *Re Livingston Street*, 82 N. Y. 621, on right of judge to sit in case in which he is interested.

—Relationship to party to action.

Cited in *Detroit v. Detroit City R. Co.* 54 Fed. 1, to point that it was no ground at common law for excepting to judge that he was related to either party; *Patterson v. Collier*, 75 Ga. 419, 58 A. R. 472, holding judge not disqualified because of affinity to deceased party where deceased party left no one having interest in subject matter; *Russell v. Belcher*, 76 Me. 501, holding probate judge legally competent to appoint administrator with will annexed upon estate of testatrix whose deceased husband was judge's uncle; *Hamtramck Twp. v. Hollahan*, 46 Mich. 127, 8 N. W. 720, holding member of school board not disqualified from acting in proceeding to remove school director for refusing to recognize validity of teaching contracts because of relationship to third person who had contract subject to same objections; *Horton v. Howard*, 79 Mich. 642, 19 A. S. R. 198, 44 N. W. 1112, holding that judge who is nephew of one of three complainants and cousin of other two is disqualified from sitting in cause; *People v. Patrick*, 183 N. Y. 52, 75 N. E. 963, 19 N. Y. Crim. Rep. 136, holding that relationship between judge and public officer who opposed motion for new trial does not legally disqualify judge from taking part in hearing and decision of appeal; *Hume v. Commercial*, 10 Lea, 1, 43 A. R. 290, holding judge not incompetent to sit in cause in which husband of his wife's sister is party; *Wise County Coal Co. v. Carter Bros.* 3 Tex. App. Civ. Cas. (Willson) 372, holding that relation to stockholder in company which is party to suit does not disqualify judge; *Reg v. Major*, 29 N. S. 373, holding affinity existing between judge and prosecutor because they married sisters will not disqualify judge.

Cited in reference notes in 66 A. S. R. 830; 79 A. S. R. 199,—on disqualification of judges by relationship or affinity.

Validity of judgment rendered by disqualified judge.

Cited in note in 84 A. D. 127, on validity of judgment rendered by disqualified judge.

Disqualification as applied to quasi-judicial tribunal.

Cited in *Re Middletown*, 63 Hun, 188, 22 N. Y. Civ. Proc. Rep. 14, 17 N. Y. Supp. 744, holding commissioner to lay out streets not disqualified because he is brother-in-law to one owning property affected; *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964, holding that common law disqualification applied to judges has no application to members of quasi judicial tribunal acting judicially in dealing with administrative matters.

Conclusiveness of assessment by receiver pursuant to ex parte order.

Cited in *Cuykendall v. Corning*, 88 N. Y. 129, holding assessment made by receiver pursuant to ex parte order of court not conclusive upon stockholder.

33 AM. REP. 589, *ZINK v. PEOPLE*, 77 N. Y. 114.

What constitutes larceny.

Cited in *State v. Loser*, 132 Iowa, 419, 104 N. W. 337, holding that one who fraudulently converts property delivered to him for temporary purpose only, is guilty of larceny; *People v. Martin*, 116 Mich. 446, 74 N. W. 653, holding that one who obtains money from another upon representation that he will procure certain property therewith for latter intending at time to convert money and actually converting it, is guilty of larceny; *Connor v. People*, 18 Colo. 373, 36 A. S. R. 295, 25 L.R.A. 341, 33 Pac. 159; *State v. Waghalter*, 177 Mo. 676,

76 S. W. 1028,—holding not larceny where owner consents to taking of goods by another, though only for purpose of entrapping intended thief; *Collins v. Ralli*, 20 Hun, 246, holding that one converting to his own use goods intrusted to him for delivery to another is guilty of larceny; *Benedict v. Williams*, 48 Hun, 123, holding obtaining of goods by false and fraudulent pretenses not larceny; *Hentz v. Miller*, 94 N. Y. 64; *Soltau v. Gerdau*, 48 Hun, 537, 1 N. Y. Supp. 163,—holding that fraudulent sale of personal property by broker to another than designated vendee, constitutes larceny; *People v. Dumar*, 106 N. Y. 502, 8 N. Y. Crim. Rep. 263, 13 N. E. 325, holding that indictment for grand larceny cannot be sustained by proof that goods were obtained from owner upon sale or credit induced by false and fraudulent representations; *People v. Miller*, 169 N. Y. 339, 88 A. S. R. 546, 16 N. Y. Crim. Rep. 281, 62 N. E. 418 (reversing 64 App. Div. 450, 16 N. Y. Crim. Rep. 67, 72 N. Y. Supp. 253), holding that obtaining possession of property by false pretenses with intention at time of subsequently appropriating it to own use, constitutes larceny; *People v. Neff*, 191 N. Y. 210, 83 N. E. 970, holding that county auditor who corruptly countersigned purported warrant payable to contractor on his contract with county, whom auditor knew had been overpaid, is guilty of larceny; *Williams v. State*, 165 Ind. 472, 2 L.R.A.(N.S.) 248, 75 N. E. 875; *People v. Morse*, 99 N. Y. 662, 2 N. E. 45, 3 N. Y. Crim. Rep. 321,—on distinction between procuring money by false pretenses, and grand larceny.

Cited in note in 88 A. S. R. 574, on larceny of goods possession of which was acquired lawfully.

Effect of injured person's consent to larceny.

Cited in note in 72 A. S. R. 702, on effect of injured person's consent to crime of larceny.

What constitutes false pretenses.

Cited in notes in 25 A. S. R. 391, on obtaining money under false pretenses distinguished from other crimes; 10 L.R.A. 303, on false pretenses as distinguished from theft.

33 AM. REP. 601, LUDDINGTON v. BELL, 77 N. Y. 138.

What constitutes valid accord and satisfaction.

Cited in *Wenz v. Meyersohn*, 59 App. Div. 130, 68 N. Y. Supp. 1091, holding that agreement not completely executed does not constitute accord and satisfaction; *McKay v. Buffalo Bill's Wild West Co.* 17 Misc. 396, 39 N. Y. Supp. 1041, to point that slightest consideration is sufficient to support most erroneous obligation; *People v. Cushing*, 36 Hun, 483, to point that additional security constitutes sufficient consideration to compromise claim.

Cited in notes in 1 A. S. R. 398; 20 L.R.A. 787,—on accord and satisfaction by part payment; 100 A. S. R. 400, on accord and satisfaction between joint debtors; 100 A. S. R. 434, on combination of money and notes as consideration for accord and satisfaction.

— For firm debt.

Cited in *Amend v. Becker*, 37 Misc. 496, 75 N. Y. Supp. 1095, holding endorsement of firm note by one partner as individual good consideration for agreement to release one partner from liability thereon; *Matherson v. Belden*, 14 App. Div. 519, 43 N. Y. Supp. 888, holding that promise by one partner to look to continuing partner, in consideration of assignment by retiring partner to latter of his interest in firm is good accord and satisfaction; *Bendix v. Ayers*, 21 App.

Div. 570, 48 N. Y. Supp. 211, holding that part payment of firm debt upon agreement of their release from further liability constitutes good accord and satisfaction; *Clark v. House*, 40 N. Y. S. R. 956, 16 N. Y. Supp. 777, holding that taking of individual note of one partner in place of firm note constitutes good accord and satisfaction; *Allison v. Abendroth*, 108 N. Y. 470, 15 N. E. 606 (affirming 38 Hun, 586), to point that acceptance by creditor of individual note of one member of firm after dissolution, for portion of firm debt is good consideration for creditor's agreement to discharge maker from liability.

Cited in notes in 100 A. S. R. 437, on note by one debtor or copartner in part payment as consideration for accord and satisfaction; 15 L.R.A.(N.S.) 1023, on note or other commercial paper of individual partner as payment of firm debt which he had not previously assumed.

—Note as generally.

Cited in *Strauss v. Trotter*, 6 Misc. 77, 26 N. Y. Supp. 20, holding that acceptance of indorsed promissory note of debtor in payment and satisfaction of existing indebtedness for goods sold is valid accord and satisfaction; *Schmidt v. Livingston*, 16 Misc. 554, 38 N. Y. Supp. 746, holding that part payment by payee of note to holder and giving by him of new note for balance, without additional security or surrender of original note, does not operate as accord and satisfaction; *Jaffray v. Davis*, 124 N. Y. 164, 11 L.R.A. 710, 26 N. E. 351, 4 Silv. Ct. App. 315, holding note for one half open book account, secured by chattel mortgage good consideration for release from balance of debt.

Cited in note in 20 L.R.A. 791, on accord and satisfaction by giving debtor's note or check in part payment.

—Payment of valid liquidated demand.

Cited in *Chicago, M. & St. P. R. Co. v. Clark*, 35 C. C. A. 120, 92 Fed. 968, holding payment by debtor of liquidated demand, to which he has no defense insufficient consideration to sustain release of other unliquidated claims; *Shanley v. Koehler*, 80 App. Div. 566, 80 N. Y. Supp. 679, holding that acceptance by creditor "in full settlement of his account," of fifty dollars in cash and debtors' note for fifty dollars and its subsequent payment do not discharge judgment for two hundred twenty-six dollars.

—Surety's surrender of all property.

Cited in *Lange v. Perley*, 47 Mich. 352, 11 N. W. 193, holding surety's surrender of all property in consideration of exoneration from all liability growing out of suretyship, good accord and satisfaction.

Note of one debtor as release of joint indebtedness.

Cited in *Brink v. Stratton*, 112 App. Div. 299, 98 N. Y. Supp. 421, holding good accord and satisfaction where holder of demand note executed by three makers, by special contract accepts three months' note of one of them in payment; *Newman v. Stuckey*, 32 N. Y. S. R. 876, 10 N. Y. Supp. 760, holding agreement to release joint indebtedness by acceptance of note of one debtor good accord and satisfaction.

Liability of retiring partner for partnership debts.

Cited in note in 19 E. R. C. 737, on liability of retiring partner for partnership debts.

33 AM. REP. 607, HAY v. STAR F. INS. CO. 77 N. Y. 235.**Construction of insurance contracts.**

Cited in note in 14 E. R. C. 21, on rules of construction of contracts of insurance.

Validity of limitation clause in policy.

Cited in Blair v. Sovereign F. Ins. Co. 19 N. S. 372, on validity of condition in policy requiring suit to be commenced within six months.

Rights under policy limiting time for bringing suit thereon.

Cited in reference notes in 33 A. R. 47, on effect of provision in fire insurance policy limiting time for suit thereon; 37 A. R. 800, on construction of clause as to limitation of action in insurance policy; 2 A. S. R. 572, on what is compliance with condition in insurance policy limiting time for bringing suit.

Cited in note in 8 L.R.A. 769, on rights under insurance policy limiting right of action to period less than that of statute of limitations.

When limitation clause in policy begins to run — Fire insurance.

Cited in Thompson v. Phenix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019, holding that limitation clause may be waived by conduct of insurer in holding out hopes of adjustment; Spare v. Home Mut. Ins. Co. 9 Sawy. 142, 17 Fed. 568; Friezen v. Allemania F. Ins. Co. 30 Fed. 362; Sun Ins. Co. v. Jones, 54 Ark. 376, 15 S. W. 1034; Case v. Sun Ins. Co. 83 Cal. 473, 8 L.R.A. 48, 23 Pac. 534,—holding that limitation does not begin to run until loss is payable and right of action accrues; Putze v. Saginaw Valley Mut. F. Ins. Co. 132 Mich. 670, 94 N. W. 191; Ellis v. Council Bluffs Ins. Co. 64 Iowa, 507, 20 N. W. 782,—holding that limitation does not begin to run until lapse of sixty days after proofs of loss are furnished; German Ins. Co. v. Fairbank, 32 Neb. 750, 29 A. S. R. 459, 49 N. W. 711, holding that limitation to sue on policy does not begin until ninety days after proof of loss received; Insurance Co. v. Telfair, 27 Misc. 247, 57 N. Y. Supp. 780, holding that limitations of insurer's action on insurance policy against reinsurer began to run against insurer from date of judgment against it; Clarkson v. Western Assur. Co. 92 Hun, 527, 37 N. Y. Supp. 53, holding that insurance company cannot take advantage of limitation clause in action to compel delivery of policy and payment of claim; Barnum v. Merchants' F. Ins. Co. 97 N. Y. 188, holding that limitation of right to sue on policy began at close of negotiations for further proofs of loss; Sample v. London & L. F. Ins. Co. 46 S. C. 491, 57 A. S. R. 701, 47 L.R.A. 696, 24 S. E. 334, holding that stipulation that action can be brought within twelve months after fire means twelve months after accrual of right; Boston Marine Ins. Co. v. Scales, 101 Tenn. 628, 49 S. W. 743, holding that limitation of time to sue for insurance begins to run after failure of arbitration; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698; Steen v. Niagara F. Ins. Co. 89 N. Y. 315, 42 A. R. 297; Murdock v. Franklin Ins. Co. 33 W. Va. 407, 7 L.R.A. 572, 10 S. E. 777,—holding that limitation of time to sue for insurance begins to run at close of sixty days allowed company for payment; Phenix Ins. Co. v. Belt R. Co. 82 Ill. App. 265, to point that insurance company may be estopped to set up limitation clause as defense; Matthews v. American Cent. Ins. Co. 9 App. Div. 330, 41 N. Y. Supp. 304 (dissenting opinion), on right to hold limitation clause in policy not affected by death of insured and delay of executor in qualifying; State Ins. Co. v. Meesman, 2 Wash. 459, 26 A. S. R. 870, 27 Pac. 77 (dissenting opinion), on right to hold limitation to action on policy begins from date of fire notwithstanding stipulation in proof of loss clause; Peoria Sugar Ref. Co. .

v. Canada F. & M. Ins. Co. 12 Ont. App. Rep. 418, as to when time for commencing action begins to run under policy limiting suit to six months.

Cited in note in 47 L.R.A. 699, 700, as to when stipulation limiting time for suit on insurance policy for fixed period after loss begins to run.

Distinguished in *Steel v. Phenix Ins. Co.* 47 Fed. 863, holding that limitation of twelve months from date of fire, within which to sue, commences to run from such date; *Allen v. Dutchess County Mut. Ins. Co.* 95 App. Div. 86, 88 N. Y. Supp. 530, holding that limitation begins from day of fire where stipulated that action shall be brought within twelve months after fire.

Disapproved in *Bradley v. Phenix Ins. Co.* 28 Mo. App. 7, holding that limitation begins to run from date of fire not from date proofs of loss made and presented; *Egan v. Oakland Ins. Co.* 29 Or. 403, 54 A. S. R. 798, 42 Pac. 990, holding that limitation of time to sue on policy began from date of fire notwithstanding loss not payable until sixty days after proof of loss.

— Life insurance.

Cited in *Bloodgood v. Massachusetts Ben. Life Asso.* 19 Misc. 460, 44 N. Y. Supp. 563, holding that stipulation that action can be brought within one year from death, means one year from time claimant has power to do so; *Cole v. Preferred Acci. Ins. Co.* 40 Misc. 260, 81 N. Y. Supp. 901, holding waiver of proof of death will not start limitation of right to sue from time of death; *Cooper v. United States Mut. Ben. Asso.* 132 N. Y. 334, 28 A. S. R. 581, 16 L.R.A. 138, 30 N. E. 833 (affirming 57 Hun, 407, 10 N. Y. Supp. 748), holding that limitation of one year mentioned in policy of accidental life insurance began to run when proofs were accepted and claim in condition to be sued upon.

Disapproved in *McFarland v. Railway Officials & E. Acci. Asso.* 5 Wyo. 126, 63 A. S. R. 29, 27 L.R.A. 48, 38 Pac. 347, holding that provision on life insurance policy limiting time to sue begins at death.

— Accident insurance.

Cited in *Cooper v. United States Mut. Acci. Asso.* 57 Hun, 407, 10 N. Y. Supp. 748, holding action may be brought on accident policy within time limit after right of action is complete.

— Marine insurance.

Cited in *Rogers v. Aetna Ins. Co.* 35 C. C. A. 396, 95 Fed. 103, holding that limitation of action on marine policy begins 60 days after proofs furnished unless waived.

Reformation of written instruments.

Cited in *Bethell v. Bethell*, 92 Ind. 318, to point that written contract may be reformed where terms of previous agreement are fraudulently changed.

Cited in notes in 65 A. S. R. 485, on reformation of contracts; 65 A. S. R. 498, on reformation of contract for fraud; 28 L.R.A. (N.S.) 854, 863 891, on relief from mistake of law as to effect of instrument.

— Insurance policy.

Cited in *McGuire v. Hartford F. Ins. Co.* 7 App. Div. 575, 40 N. Y. Supp. 300, holding that insurance policy may be reformed when by agents fraud or mistake chattel mortgage was not protected; *McCoubrey v. St. Paul F. & M. Ins. Co.* 50 App. Div. 416, 64 N. Y. Supp. 112, holding that insurance policy may be reformed where by agent's mistake it has been made out in wrong name; *Steinbach v. Prudential Ins. Co.* 62 App. Div. 133, 70 N. Y. Supp. 809, holding that insurance policy may be reformed as to name of beneficiary; *Kenyon Paper Co.*

v. *Nederlandsche Lloyds*, 124 App. Div. 886, 109 N. Y. Supp. 311, holding that renewal policy which expresses terms at variance with policy deemed to be renewed may be reformed; *Medley v. German Alliance Ins. Co.* 55 W. Va. 342, 47 S. E. 101, 2 A. & E. Ann. Cas. 99, holding that insurance contract may be reformed in equity where contract is written by agent different than original agreement between parties; *Penn Furniture Co. v. Liberty Mut. F. Ins. Co.* 57 Pittsb. L. J. 482, holding renewal policy will be reformed to contain same provision as old; *McMaster v. New York L. Ins. Co.* 40 C. C. A. 119, 99 Fed. 856 (dissenting opinion), on right to hold assured bound by clause secretly interpolated into policy by agent of company; *Dougherty v. Lion F. Ins. Co.* 95 App. Div. 618, 88 N. Y. Supp. 1096 (dissenting opinion), on right to reform insurance policy for fraud on agent's part in issuing policy in wrong name.

Cited in notes in 5 L.R.A. 712, on reformation of policy of insurance; 13 E. R. C. 490, on reformation of insurance policy for mistake; 3 L.R.A. 189, on jurisdiction of equity to reform insurance policy.

Distinguished in *Fidelity & C. Co. v. Dierks Lumber & Coal Co.* 133 Mo. App. 637, 114 S. W. 55, holding one cannot have insurance contract reformed where he inexcusably allows renewal year after year without discovering change; *Arthur v. Homestead F. Ins. Co.* 78 N. Y. 462, 34 A. R. 550, to point that policy of insurance may be reformed where different policy is fraudulently issued in place of one contracted for.

— Discretion of court as to reformation of fraudulent instrument.

Cited in *Knauer v. Globe Mut. L. Ins. Co.* 16 Jones & S. 454; *Syms v. New York*, 18 Jones & S. 289,—holding that propriety of granting relief against fraudulent instrument, where there is evidence of laches becomes question for discretion for court.

Waiver of variation of terms on renewal policy.

Cited in note in 67 L.R.A. 720, on retention of insurance policy as waiver of variation of terms on renewal of policy.

Notice of intention to commence actions against city.

Cited in *Werner v. Rochester*, 77 Hun, 33, 28 N. Y. Supp. 226, holding that before action can be commenced against city, by virtue of charter provisions, notice of intention to commence action must be given within time limited for right to sue.

Right of insurance company to subrogation.

Cited in *Nelson v. Bound Brook Mut. F. Ins. Co.* 43 N. J. Eq. 256, 3 A. S. R. 308, 11 Atl. 681, holding insurance company which pays amount of policy to mortgagee not entitled to assignment of mortgage.

33 AM. REP. 613, KILMER v. SMITH, 77 N. Y. 226.

Reformation of written contract.

Cited in *March v. McNair*, 48 Hun, 117, holding that equity may reform written instrument where by mistake it fails to express previous agreement though mistake of law involved; *Kelley v. Ward*, 94 Tex. 289, 60 S. W. 311, holding that equity will reform written instrument where by mutual mistake writing does not represent real contract; *Koffman v. Southwest Missouri Electric R. Co.* 95 App. 459, 68 S. W. 212, to point that equity will reform written instrument which fails to express previous agreement; *Kirchner v. New Home Sewing Mach. Co.* 135 N. Y. 182, 48 N. Y. S. R. 242, 31 N. E. 1104, as to when action lies to reform instrument because of fraud or mistake.

Cited in notes in 65 A. S. R. 484, on reformation of contracts; 3 L.R.A. 189, on jurisdiction of equity to reform written instrument; 5 L.R.A. 156, on instances of mistakes relieved from in equity; 28 L.R.A.(N.S.) 855, on relief from mistake of law as to effect of instrument.

— Deed.

Cited in *Los Angeles & R. R. Co. v. New Liverpool Salt Co.* 150 Cal. 21, 87 Pac. 1029, holding that deed will be reformed where mistake therein is mutual or if made by grantor and known to grantee; *Rogers v. Castle*, 51 Minn. 428, 53 N. W. 651, holding that deed will be reformed where by mistakes of scrivener mortgage assumption clause is inserted; *Andrews v. Andrews*, 81 Me. 337, 17 Atl. 166; *Page v. Higgins*, 150 Mass. 27, 5 L.R.A. 152, 22 N. E. 63; *Bartlett v. Brown*, 121 Mo. 353, 25 S. W. 1108,—holding that deed cannot be reformed unless mistake mutual and evidence to establish it clear and convincing; *Van Alstyne v. Smith*, 82 Hun, 382, 31 N. Y. Supp. 277, holding that deed will be reformed where mortgage assumption clause fraudulently inserted.

Cited in note in 65 A. S. R. 507, on reformation of deeds.

— Mortgage.

Cited in *Fletcher v. Chamberlin*, 61 N. H. 438, holding that mortgage and note which incorrectly states agreement may be reformed; *Garvey v. New York Bldg. Loan Bkg. Co.* 57 App. Div. 193, 68 N. Y. Supp. 317, holding that mortgage will not be reformed because amount is in excess of loan where there was no fraud, accident or mutual mistake; *Gotthelf v. Shapiro*, 136 App. Div. 1, 120 N. Y. Supp. 210, holding instrument accepted by mortgagee by mistake due to fraud of mortgagor in using another name, may be reformed in equity.

— Land contract.

Cited in *Jamaica Sav. Bank v. Taylor*, 72 App. Div. 567, 76 N. Y. Supp. 790, holding that equity will reform contract for sale of land where scrivener by mistake inserted description of entire plot instead of part as intended; *Gallup v. Bernd*, 17 N. Y. S. R. 194, 1 N. Y. Supp. 471, holding that equity will reform agreement of sale which fraudulently misrepresented amount of land to be conveyed.

— Insurance policy.

Cited in *Steinbach v. Prudential Ins. Co.* 62 App. Div. 133, 70 N. Y. Supp. 809, holding that life insurance policy may be reformed when by mistake wrong beneficiary was named.

Estoppel by failure to read contract.

Cited in *Paisley v. Casey*, 41 N. Y. S. R. 339, 18 N. Y. Supp. 102, holding failure to read not bar to relief against written contract which through scrivener's error names larger sum than agreed upon; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40, holding failure to read deed not such negligence as deprives grantee of right to relief against mortgage assumption clause fraudulently inserted; *Griffin v. Roanoke R. & Lumber Co.* 140 N. C. 514, 6 L.R.A.(N.S.) 463, 53 S. E. 307, holding that failure to read instrument not such negligence as bars relief against deliberate fraud; *Knapp v. Fowler*, 30 Hun, 512, to point that instrument fraudulently altered may be relieved against though party seeking relief omitted to read instrument.

Defenses of grantee to enforcement of mortgage.

Cited in note in 78 A. D. 86, on defenses of grantee to enforcement of mortgage.

Liability of grantee where assumption clause is fraudulently inserted.

Cited in *Clifford v. Minor*, 76 Minn. 12, 78 N. W. 661, holding grantee not liable for debt where insertion of mortgage agreement is fraudulent; *Smith v. Truslow*, 84 N. Y. 660; *Dey Ermand v. Chamberlin*, 88 N. Y. 858,—holding grantee not liable for deficiency judgment where mortgage assumption clause fraudulently inserted in deed; *Northern Dispensary v. Merriam*, 59 How. Pr. 226, holding one allowing deficiency judgment by default may, after discovering contract showing assumption clause was entered in mortgage by mistake, have default opened; *American Nat. Bank v. Klock*, 58 Mo. App. 335, to point that grantee is not liable on assumption clause fraudulently inserted in deed.

Ratification of assumption clause in deed.

Cited in *Blass v. Terry*, 156 N. Y. 122, 50 N. E. 953 (reversing 87 Hun, 563, 68 N. Y. S. R. 378; 34 N. Y. Supp. 475), holding that there can be no ratification by grantee of assumption clause in deed, in absence of knowledge thereof and of its legal effect.

33 AM. REP. 618, FIRST NAT. BANK v. FOURTH NAT. BANK, 77 N.

Y. 320, Later appeals in 84 N. Y. 469; 89 N. Y. 412, which modifies 24 Hun, 241.

Duties and liabilities of collecting bank generally.

Cited in notes in 34 A. D. 308, 309, on duty and liability of collecting bank; 34 A. D. 310; 77 A. S. R. 616,—on duty of collecting banks as to presentment; 34 A. D. 312, as to whether collecting bank may accept anything but money in payment; 77 A. S. R. 615, on duty of bank acting as collection agent; 77 A. S. R. 625, on liability of collecting banks for their own negligence and that of their notaries, correspondents, and other agents; 3 L.R.A. (N.S.) 1168, 1169, on diligence required in collecting checks taken by collecting banks; 25 L.R.A. 201, on accepting something besides money from bank as discharge of drawer of check.

Measure of damages for negligence in collecting negotiable instrument.

Cited in *Omaha Nat. Bank v. Kiper*, 60 Neb. 33, 82 N. W. 102, holding that measure of damages in case debt is lost through negligence of collecting agent, is actual loss resulting from neglect; *Mott v. Havana Nat. Bank*, 22 Hun, 354, holding measure of damages for loss due to neglect to protest note, amount of actual loss; *Povall v. Danaville Cigar Mfg. Co.* 59 Hun. 70, 12 N. Y. Supp. 653, holding that measure of damages for loss due to laches in presenting check for payment is amount of actual loss; *Peoples' Nat. Bank v. Brogden*, 98 Tex. 360, 83 S. W. 1098, holding that measure of damages for negligence in presenting draft for carload of apples is value if apples at destination less freight charges.

Cited in notes in 34 A. D. 317, on measure of damages for negligence of collecting bank; 1 L.R.A. (N.S.) 249, 250, on damages for negligence as to collection of check.

Liability of bank for failure to give endorser notice of protest.

Cited in *Howard v. Bank of Metropolis*, 95 App. Div. 343, 88 N. Y. Supp. 1070, holding failure of collecting bank to give notice of protest to endorser renders it liable to holder of note.

Liability of bank for failure to collect draft.

Cited in *Citizens' Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69, 49 N. E. 171, holding that measure of damages where debt is lost through negligence of bank, is prima facie, amount of draft; *Selz v. Collins*, 55 Mo. App. 55, holding that to justify recovery of entire amount, it must be shown that entire loss was due to banks neglect; *Dern v. Kellogg*, 54 Neb. 560, 74 N. W. 844, holding collecting bank liable for amount of draft when through its neglect draft became uncollectible; *Kirkhan v. Bank of America*, 26 App. Div. 110, 49 N. Y. Supp. 767, holding bank which receives draft for collection is liable for loss occasioned by acts of its agents selected to effect collection; *A. G. Becker & Co. v. First Nat. Bank*, 15 N. D. 279, 107 N. W. 968, holding collecting bank is liable for negligence in not collecting draft sent to it for collection; *Noble v. Doughten*, 72 Kan. 336, 3 L.R.A.(N.S.) 1167, 83 Pac. 1048, holding collecting bank liable for any loss occasioned where instead of cash it accepts drawee's check and is negligent in collecting same.

Effect of delay in presenting negotiable instrument—To discharge indorser.

Cited in *Manitoba Mortg. & Invest. Co. v. Weiss*, 18 S. D. 459, 112 A. S. R. 799, 101 N. W. 37, 5 A. & E. Ann. Cas. 858, holding negligence of creditor in not transmitting for collection on day following receipt, check of third person received in payment, converts check into absolute payment of debt; *Hayward v. Empire State Sugar Co.* 105 App. Div. 21, 93 N. Y. Supp. 449, holding that failure to present, at maturity, renewal note, discharges endorser of original note; *Carroll v. Sweet*, 128 N. Y. 19, 13 L.R.A. 43, 27 N. E. 763, holding that delay in presenting check at drawee's request, whereby check becomes uncollectible discharges indorser; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 22 L.R.A. 785, 24 S. W. 1130, holding indorser released where because of negligence in presentation check was uncollectible.

— To discharge drawer.

Cited in *Morris v. Eufaula Nat. Bank*, 122 Ala. 580, 82 A. S. R. 95, 25 So. 499, holding collecting bank which accepts debtor's check on another bank in same place for accepted draft, not liable if drawee bank fails before close of business hours of next secular day; *Murphy v. Levy*, 23 Misc. 147, 50 N. Y. Supp. 682, holding that failure to present check during business hours of next regular day after received, where bank located in same place, discharges drawer upon subsequent failure of bank.

Presentation of draft sufficient to charge endorser.

Cited in *Sylvester v. Crohan*, 138 N. Y. 494, 34 N. E. 273, holding payee of draft in exercise of reasonable diligence where he presented it to drawer within twenty-four hours or next day.

Duty of one in trust position generally.

Cited in *Hill v. American Surety Co.* 107 Wis. 19, 81 N. W. 1024, holding assignee liable to creditor for failure to use ordinary diligence to obtain insurance on assigned property.

Presumption as to prevalence of common law.

Cited in *Pink v. Perlin & Co.* 40 N. S. 260, holding court may presume that common law prevails in foreign state in absence of proof of law of such state.

Cited in note in 67 L.R.A. 51 on conflict between presumption in favor of common law and presumption that law of other jurisdiction is the same as that of forum where proper common law is not proved.

33 AM. REP. 626, COMER v. CUNNINGHAM, 77 N. Y. 391.**Conditional sales — When title passes.**

Cited in *Merchants' Exch. Bank v. McGraw*, 8 C. C. A. 420, 15 U. S. App. 332, 59 Fed. 972, holding that delivery of goods to railroad company consigned to purchasers and taking of bill of lading to that effect did not pass title where agreed that title should not pass until property paid for; *Brewer v. Ford*, 59 Hun, 17, 12 N. Y. Supp. 619 (dissenting opinion), to point that vendee under conditional sale is bailee for vendor.

Cited in reference note in 37 A. R. 665, on conditional delivery of chattel.

— Title of bona fide purchaser from vendee.

Cited in *Van Leeuwen v. Fish*, 28 Misc. 443, 59 N. Y. Supp. 183, holding bona fide purchaser of personal property not affected by prior conditional sale unless contract of sale or copy filed as required by statute; *Parker v. Baxter*, 86 N. Y. 586; *Hintermister v. Lane*, 27 Hun, 497,—holding that bona fide purchaser from vendee acquires good title, though as between original vendor and vendee delivery was conditional; *Dows v. Kidder*, 84 N. Y. 121; *Lembeck & B. Eagle Brewing Co. v. Sexton*, 184 N. Y. 185, 77 N. E. 38,—holding that one in possession of property under color of actual sale is enabled to give legal title to bona fide purchaser; *Wilder v. Wilson*, 16 Lea, 548, holding that conditional sale of retail stock of goods with unlimited power in vendee to resell enables latter to give bona fide subvendee good title as against original vendor; *Nash v. Weaver*, 23 Hun, 513, to point that sheriff is not in attitude of bona fide purchaser; *Weston v. Brown*, 158 N. Y. 360, 53 N. E. 36, on rights of bona fide purchasers from vendees under conditional sale; *Walker v. Mitchell*, 25 Hun, 527 (dissenting opinion), on right to hold that bona fide purchaser from vendee under conditional sale acquires no better title than vendee has.

Cited in notes in 25 A. D. 615; 13 L.R.A.(N.S.) 701,—on right of bona fide purchaser from vendee of goods sold for cash, but delivered without payment.

— Leivable interest in property.

Cited in *McClelland v. Scroggin*, 35 Nev. 536, 53 N. W. 469, holding that vendee has no leivable interest in property where vendor retains title until purchase price paid; *National Cash Register Co. v. Coleman*, 85 Hun, 125, 32 N. Y. Supp. 593, holding that purchase of property on conditional sale has no leivable interest in property; *Empire State Type Founding Co. v. Grant*, 44 Hun, 434 (dissenting opinion), on right to hold vendee under conditional sale has leivable interest in property.

— Liability for loss under.

Cited in *National Cash Register Co. v. South Bay Club House Asso.* 64 Misc. 125, 118 N. Y. Supp. 1044, holding seller under conditional contract reserving title must bear loss sustained before full payment.

— Right of vendor to retake property upon breach of conditions.

Distinguished in *Puffer v. Reeve*, 35 Hun, 480, 15 Abb. N. C. 388, holding that vendor under conditional sale has right to retake property on breach of conditions even from purchaser for value without notice of agreement.

— Conflict of law as to title.

Cited in note in 64 L.R.A. 833, on conflict of laws as to title to or interest in personal property upon conditional sale.

Waiver of prepayment of goods in cash.

Cited in *Albert v. R. Lewis Steiner Mfg. Co.* 42 Misc. 522, 86 N. Y. Supp.

162, holding that delivery of goods without requiring prepayment in cash waiver of condition that vendor shall retain title until purchase price paid in cash.

Rights of chattel mortgagee.

Cited in *Washington Trust Co. v. Morse Iron Works & Dry Dock Co.* 106 App. Div. 195, 84 N. Y. Supp. 495, holding that mortgage may embrace after-acquired property, of which vendor retains title until it is paid for.

Distinguished in *Metropolitan Concert Co. v. Sperry*, 9 N. Y. S. R. 342, holding rights of mortgagee under chattel mortgage given to secure purchase price superior to that of landlord.

33 AM. REP. 632, NATIONAL TRUST CO. v. GLEASON, 77 N. Y. 400.

When action for money had and received maintainable.

Cited in *Fowler v. Union Coarse Salt Co.* 83 Hun, 416, 34 N. Y. Supp. 821, holding that receipt of money must be shown to entitle action for money had and received; *Gilbert v. Finch*, 72 App. Div. 38, 76 N. Y. Supp. 143, holding that money paid by corporation ultra vires may be reclaimed in action for money had and received; *Brundage v. Port Chester*, 102 N. Y. 494, 7 N. E. 398, holding that action as for money had and received will not lie to recover back money deducted from amount due; *Rosenberg v. Block*, 118 N. Y. 329, 23 N. E. 190, holding that in action against commission merchant to recover proceeds of sale, actual receipt of pay for goods must be shown; *Strahl v. Fink*, 132 App. Div. 12, 116 N. Y. Supp. 352, holding treasurer of company is not liable to action for money had and received because he reported worthless check received from predecessor as cash on hand; *Johnston v. Charles Abresch Co.* 109 Wis. 182, 85 N. W. 348, holding that action for money had and received is maintainable for recovery of insurance money from bailee; *J. V. LeClair Co. v. Rogers-Ruger Co.* 124 Wis. 44, 102 N. W. 346, holding that action for money had and received can be maintained only when in equity and good conscience it ought to be paid; *Iselin v. Chemical Nat. Bank*, 6 App. Div. 532, 40 N. Y. Supp. 390, to point that to maintain action for money had and received it must be established that money has been received to which party is entitled.

— Against whom.

Cited in *McClure v. Wilson*, 13 App. Div. 274, 43 N. Y. Supp. 209, holding that action for money had and received is maintainable against directors who for consideration turn over control of corporation; *Crown Cotton Mills Co. v. Turner*, 42 App. Div. 270, 59 N. Y. Supp. 1, holding that action for money had and received cannot be had against agent who received no benefit from transaction; *National Bank v. Manufacturers' & T. Bank*, 15 N. Y. S. R. 630, holding that drawee may hold innocent party collecting on raised draft, for amount over paid; *Bate v. McDowell*, 17 Jones & S. 106, holding all members of brokerage firm liable in action for money had and received for proceeds of bonds received by one member; *New York Guaranty & Indemnity Co. v. Gleason*, 78 N. Y. 503, holding that action for money had and received cannot be had against one connected with forgery unless shown she shared in proceeds; *Limited Invest. Asso. v. Glendale Invest. Asso.* 99 Wis. 54, 74 N. W. 633, holding that action for money had and received cannot be maintained against agent who received no benefits except his commissions.

Nature of action for money had and received.

Cited in *Halsey v. Tradesmen's Nat. Bank*, 24 Jones & S. 7, 4 N. Y. Supp. 804, holding that action for money had and received is action at law triable before jury.

Felony committed in foreign jurisdiction as disqualification — Of juror.

Cited in *Queenan v. Territory*, 11 Okla. 261, 61 L.R.A. 324, 71 Pac. 218, holding that felony as disqualification of juror can have no effect beyond limits of state in which judgment is rendered.

— Of witness.

Cited in *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Palmer v. Cedar Rapids & M. R. Co.* 113 Iowa, 442, 85 N. W. 756,—holding that conviction in another jurisdiction cannot be shown for purpose of disqualifying witness; *State v. Landrum*, 127 Mo. App. 653, 106 S. W. 1111, holding that conviction of felony in sister state does not disqualify one as witness.

Cited in reference notes in 37 A. R. 458; 7 A. S. R. 88,—on disqualification as witness by conviction of felony in other state.

— To act as administrator.

Cited in *Garitee v. Bond*, 102 Md. 379, 111 A. S. R. 385, 62 Atl. 631, 5 A. & E. Ann. Cas. 915, holding that conviction in Federal court of offense then considered infamous will not disqualify one to act as executor when such offense not considered infamous at common law; *O'Brien's Estate*, 67 How. Pr. 503, 3 Dem. 156, holding that conviction for larceny in foreign jurisdiction no evidence that person convicted is "incompetent by reason of improvidence" to act as administrator.

Damages recoverable for false representations.

Cited in *Huganir v. Cotter*, 102 Wis. 323, 72 A. S. R. 884, 78 N. W. 423, holding that amount recoverable on implied contract where one fraudulently induced to enter into contract to do work is not profits that would have been made had facts been as represented but amount other party was benefited by false representation.

Extraterritorial effect of legislative enactments.

Cited in note in 12 L.R.A. 862, on extraterritorial effect of legislative enactments.

33 AM. REP. 641, HENNEQUIN v. CLEWS, 77 N. Y. 427, Affirmed in 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576, Reaffirmed on later appeal in 84 N. Y. 676.

Indebtedness covered by discharge in bankruptcy.

Cited in *Palmer v. Hussey*, 87 N. Y. 303; *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406; *Rowe v. Guillaume*, 18 Hun, 556,—holding claim for conversion of property barred by discharge; *Bergen v. Patterson*, 24 Hun, 250, holding that debt created upon refusal or neglect to deliver upon proper demand property held as collateral security is discharged in bankruptcy; *Stratford v. Jones*, 97 N. Y. 586 (affirming 16 Jones & S. 185), holding discharge in bankruptcy complete defense to action against broker for unauthorized sale of stock; *Mulock v. Byrnes*, 129 N. Y. 23, 29 N. E. 244, holding that judgment recovered on indebtedness incurred by one because of failure to pay over rents collected as agent is barred by discharge in bankruptcy.

— Claims for conversion of property.

Cited in *Morrison v. Savage*, 56 Md. 142, holding liability for balance due upon Am. Rep. Vol. XVII.—45.

subscription to capital stock of corporation covered by discharge; *Frey v. Torrey*, 70 App. Div. 166, 32 N. Y. Civ. Proc. Rep. 386, 75 N. Y. Supp. 40, holding that discharge does not cover indebtedness created by fraud.

— **Obligation of agent or factor for proceeds of sale.**

Cited in *Du Pont v. Beck*, 81 Ind. 271, holding that obligation of factor to principal for proceeds of goods sold is discharged by discharge in bankruptcy; *Chipley v. Frierson*, 18 Fla. 639; *Guilfoyle v. Anderson*, 9 Daly, 64,—holding discharge in bankruptcy good defense to action against agent for failure to remit proceeds of sale.

Distinguished in *Hardenbrook v. Collson*, 24 Hun, 475, 61 How. Pr. 426, holding that debt due from factor, for goods sold on commission is not covered by discharge in bankruptcy.

— **Auctioneer's liability for deposit made on sale.**

Cited in *Gibson v. Gorman*, 44 N. J. L. 325, holding auctioneer's discharge in bankruptcy good defense to action against him to recover back deposit made on sale of property.

— **Warehouseman's liability for grain stored.**

Cited in *Sumner v. Richie*, 54 Iowa, 554, 6 N. W. 752, holding action to recover value of grain stored with one as warehouseman, to be returned in kind barred by discharge in bankruptcy.

— **Partner's liability for copartner's fraud.**

Cited in *Maxwell v. Evans*, 90 Ind. 596, 46 A. R. 234, holding that fraud of partner will not prevent discharge of bankrupt, himself guilty of no act involving moral turpitude; *Re McEachran*, 82 Cal. 219, 23 Pac. 46, as to whether judgment for copartner's fraud is covered by discharge of partner.

Distinguished in *Bradner v. Strang*, 89 N. Y. 299 (affirming 23 Hun, 445) holding partner's liability for fraudulent representations of copartner not affected by discharge in bankruptcy.

— **Debt due United States.**

Cited in *Hamilton v. Reynolds*, 88 Ind. 191, holding that discharge in bankruptcy does not release debt due United States.

When money is held in fiduciary capacity within meaning of bankruptcy act.

Cited in *Haggerty v. Badkin*, 72 N. J. Eq. 473, 66 Atl. 420, holding trust fund of deceased partner misappropriated by surviving partner is exempt from discharge in bankruptcy; *Lewis v. Shaw*, 122 App. Div. 96, 106 N. Y. Supp. 1012, holding that naked bailee of money holding under express agreement to keep safely and pay over on request is not acting in "fiduciary capacity."

Cited in reference note in 77 A. D. 386, as to what are fiduciary debts within meaning of bankrupt and insolvency laws.

Cited in note in 39 A. R. 725, on "fiduciary character" of relation of factor to principal within bankruptcy act.

Liability of broker for converting collateral security.

Cited in *People ex rel. Mansfield v. Flynn*, 64 Misc. 276, 118 N. Y. Supp. 533, on liability of broker for larceny in pledging stock for security where he received it to hold for collateral.

33 AM. REP. 648, BUTLER v. BUTLER, 77 N. Y. 472.

Right to arrest performance of executory contract.

Cited in *Gibbons v. Bente*, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756, holding

that one party has power by explicit direction to stop performance of executory contract.

Recovery of entire contract price where performance is arrested.

Cited in *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 94 A. S. R. 112, 59 L.R.A. 122, 42 S. E. 378, holding that action for contract price not maintainable upon breach of contract for purchase and sale of goods; *Beardsley v. Smith*, 61 Ill. App. 340, holding that measure of damages for breach of contract to purchase goods is difference between lowest jobbing price and cost of manufacture; *Davis v. Bronson*, 2 N. D. 300, 33 A. S. R. 783, 16 L.R.A. 655, 50 N. W. 836; *Dunham v. Hastings Pav. Co.* 95 App. Div. 360, 88 N. Y. Supp. 835; *Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423,—holding that executory contract cannot be completed after performance interdicted, and contract price recovered; *Woolf v. Hamberger*, 129 App. Div. 883, 114 N. Y. Supp. 186, holding vendor of goods which are not yet manufactured can recover only damages incurred at time of cancellation of order; *Herring-Marvin Co. v. Smith*, 43 Or. 315, 72 Pac. 704, holding that action as for sale and delivery will not lie where performance of executory contract is expressly interdicted; *Ward v. American Health Food Co.* 119 Wis. 12, 96 N. W. 388, holding that action to recover full contract price cannot be maintained where executory contract is terminated before completed.

Distinguished in *Wallace v. Blake*, 18 N. Y. S. R. 922, 2 N. Y. Supp. 403, holding action for contract price maintainable where contract for manufacture of goods completed and acceptance refused.

Recovery upon entire contract for part performance.

Cited in *Garvin Mach. Co. v. Hutchinson*, 1 App. Div. 380, 37 N. Y. Supp. 394, holding that recovery upon quantum meruit for reasonable value of work done may be had where performance of contract forbidden; *Fisher v. Goodrich*, 61 App. Div. 534, 70 N. Y. Supp. 38, holding that entire contract must be completed to entitle recovery of any part of contract price; *Mahon v. Guilfoyle*, 44 N. Y. S. R. 879, 18 N. Y. Supp. 93; *Silberman v. Fretz*, 16 Misc. 449, 38 N. Y. Supp. 151,—to point that recovery cannot be had upon entire contract until entire contract completed.

Cited in note in 59 A. S. R. 294, as to when complete performance is essential to cause of action *ex contractu*.

Effect of countermand of contract.

Cited in reference note in 35 A. R. 272, on effect of countermand reaching principal before order through agent.

Cited in note in 94 A. S. R. 121, on effect of countermand of executory contract of sale.

Apportionment of contracts.

Cited in note in 31 A. D. 519, on apportionment of contracts.

33 AM. REP. 651, PRENTICE v. KNICKERBOCKER L. INS. CO. 77 N. Y. 483.

What constitutes waiver of breach of conditions of policy.

Cited in *German Ins. Co. v. Gibson*, 53 Ark. 494, 14 S. W. 672, holding forfeiture for misrepresentation in application waived by acceptance of proof of loss with knowledge of misrepresentation.

Cited in note in 1 L.R.A. 564, on waiver of forfeiture for breach of condition.

—“Iron safe clause.”

Cited in *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 35 S. W. 955, holding investigation of loss without production of books and demand for duplicate invoices of goods purchased, evidence of waiver of “iron safe clause.”

—Against increased risk.

Cited in *Roby v. American Cent. Ins. Co.* 120 N. Y. 510, 24 N. E. 808, holding objection to proof of loss merely because not properly made out and demanding proper proof of waiver of condition against increased risk.

—Against encumbrances.

Cited in *Armstrong v. Agricultural Ins. Co.* 130 N. Y. 562, 29 N. E. 991, holding failure of insurer to reply to mortgagee's notice of foreclosure not waiver of condition against encumbrances.

—As to proofs of loss.

Cited in *Replogle v. American Ins. Co.* 132 Ind. 360, 31 N. E. 947, holding requiring assured to furnish proofs of loss and go to other expense with knowledge of other insurance, waiver of breach of that condition; *Smith v. Home Ins. Co.* 47 Hun, 30, holding statement of adjuster that he would settle in course of two weeks sufficient to establish waiver of proof of loss; *Mosley v. Vermont Mut. F. Ins. Co.* 55 Vt. 142, holding failure to object to sufficiency of proofs of loss and refusal to pay expressed upon other grounds waiver of defects in proof; *Bolan v. Fire Asso.* 58 Mo. App. 225, to point that acts of insurer after expiration of time for furnishing proofs of loss may amount to waiver thereof; *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981, to point that defects in proof furnished are waived by refusal to pay on other grounds.

—As to notice of accident or death.

Cited in *Reynolds v. Equitable Acci. Asso.* 59 Hun, 13, 1 N. Y. Supp. 738, holding that notice of accident may be waived by acts and declarations of insurer; *Equitable Life Assur. Soc. v. Winning*, 7 C. C. A. 359, 19 U. S. App. 173, 58 Fed. 541, holding that evidence that company declare policy forfeited after default in payment of premium and entered it as lapsed policy, competent to establish waiver of notice and proof of loss; *Dezell v. Fidelity & C. Co.* 176 Mo. 253, 75 S. W. 1102, holding that insurance company by pleading that insured's death was from cause not covered by policy does not waive defense of failure to notify in required time.

—As to payment of premiums.

Cited in *Robertson v. Metropolitan L. Ins. Co.* 15 Jones & S. 377, holding that statement to assured who called to pay premium next day after it fell due, to effect that premium had been attended to furnishes evidence of waiver of forfeiture for nonpayment when due; *Perry v. Banker's L. Ins. Co.* 47 App. Div. 567, 62 N. Y. Supp. 553, as to what constitutes waiver of forfeiture of policy.

Cited in reference note in 1 A. S. R. 111, on waiver by insurance company of condition as to payment of premium note.

Distinguished in *How v. Union Mut. L. Ins. Co.* 80 N. Y. 32, holding retention of note after nonpayment thereof not waiver of condition of forfeiture for nonpayment of premium.

—Against prohibited occupations.

Cited in *Supreme Tent K. M. v. Volkert*, 25 Ind. App. 627, 57 N. E. 203, holding acceptance and retention of assessments with knowledge of assured's occupation waiver of conditions against prohibited occupations.

— **As to time of bringing suit.**

Cited in *Bowen v. Preferred Acci. Ins. Co.* 82 App. Div. 458, 81 N. Y. Supp. 840, holding continued investigation of claim and reasonable promise of amicable adjustment evidence of waiver of provision as to time of bringing suit.

Necessity for new consideration to support waiver of conditions of contract.

Cited in *Toplitz v. Bauer*, 161 N. Y. 325, holding no new or independent consideration is required to support waiver of condition in contract requiring payment upon date designated; *Thorne v. French*, 4 Misc. 436, 24 N. Y. Supp. 694, to point that new considerations are not essential to establish waiver of conditions of contract.

— **Insurance contract.**

Cited in *Brink v. Hanover F. Ins. Co.* 80 N. Y. 108; *Dobson v. Hartford F. Ins. Co.* 86 App. Div. 115, 83 N. Y. Supp. 456,—holding no new consideration necessary to support waiver of condition as to service of proof of loss; *Baker v. New York State Mut. Ben. Asso.* 9 N. Y. S. R. 653, holding no new consideration necessary to establish effectual waiver of forfeiture of policy for nonpayment of assessments; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410, 8 Abb. N. C. 315, holding that waiver of breach of condition in insurance policy need not be based upon any agreement or estoppel; *Harold v. People's Mut. Acci. Ins. Asso.* 12 Pa. Co. Ct. 454, 2 Pa. Dist. R. 505, holding no new consideration needed to support waiver of limitation of action on accident policy.

What constitutes a waiver or estoppel generally.

Cited in *Boulware v. Crohn*, 122 Mo. App. 571, holding right to rescind land contract for nonperformance of covenant to deposit deed in escrow not waived by purchaser's attempting to sell land, where he had no knowledge of action to deposit deed; *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93, holding failure to assert such claim at time of attempted removal of chattels, estoppel to assert that right of removal had been lost by failure to reserve it in lease.

Forfeiture of policy for nonpayment of premium.

Cited in note in 35 A. R. 126, on forfeiture of policy for nonpayment of premium.

33 AM. REP. 655, STEINBACH v. RELIEF F. INS. CO. 77 N. Y. 498.

Election of remedies.

Cited in *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1, 3 A. & E. Ann. Cas. 773, holding that unsuccessful use of remedy supposed to be, but in effect not appropriate one does not bar invoking proper remedy; *Vulcan Iron Works Co. v. Rapid City Farmers' Elevator Co.* 9 Manitoba L. Rep. 577, holding one who has not proceeded to judgment is not estopped by electing to pursue certain remedy.

Cited in notes in 1 A. S. R. 628, on right to maintain action in equity to reform contract after bringing action at law; 13 L.R.A. 91, on election of remedies; 12 L.R.A.(N.S.)907, on action on policy as bar to action to reform it.

— **Effect of election of one of two inconsistent remedies.**

Cited in *Thomas v. Joslin*, 36 Minn. 1, 1 A. S. R. 624, 29 N. W. 344, holding one bound by election between specific performance and reformation of contract; *Avery v. Equitable Life Assur. Soc.* 52 Hun. 392, 5 N. Y. Supp. 278, holding ac-

ceptance of sum paid to holder of policy, by insurer, not bar to action to reform policy and make it conform to real contract and to recover thereon; *Goodsell v. Western U. Teleg. Co.* 23 Jones & S. 173, holding election to affirm contract as it was, estopped to sue for breach of contract; *Gaffney v. Megrath*, 23 Wash. 476, 63 Pac. 520, holding that election to pursue one of two inconsistent remedies estops party from thereafter pursuing other; *State v. Barr Dry-Goods Co.* 45 Mo. App. 96, to point that party is concluded by his election of one of two inconsistent remedies; *Brewer v. Ford*, 59 Hun, 17, 12 N. Y. Supp. 619 (dissenting opinion), on right to bring action for conversion of goods sold and to sue on notes given on making of contract; *O'Rourke v. Hadcock*, 114 N. Y. 541, 22 N. E. 33 (dissenting opinion), on conclusiveness of judgment; *Re Garver*, 176 N. Y. 386, 68 N. E. 667 (dissenting opinion), on right to take under assignment where one has judgment in action to set aside assignment as fraudulent.

Distinguished in *Bolton Mines Co. v. Stokes*, 82 Md. 50, 31 L.R.A. 789, 33 Atl. 491, holding that voluntary discontinuance before judgment of suit in replevin does not prevent subsequent suit for purchase price; *Carter, R. & Co. v. Howard*, 17 Misc. 381, 39 N. Y. Supp. 1060, holding judgment against maker of note on original debt not bar to subsequent action against indorser; *Vinal v. Continental Constr. & Improv. Co.* 53 Hun, 247, 6 N. Y. Supp. 595, holding failure to recover in action for breach of contract not bar to action to recover back, because of failure of consideration, property transferred to corporation; *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316, 21 N. W. 216, holding that upon vacation of judgment in ejectment and granting of new trial answer may be amended so as to set up counterclaim for reformation of deed to accord with alleged intention of all parties.

Test as to whether judgment is res judicata.

Cited in *Greene v. Merchants' & P. Bank*, 73 Miss. 542, 19 So. 350; *Marsh v. Masterson*, 18 Jones & S. 187; *McGrane v. New York Elev. R. Co.* 67 App. Div. 37, 73 N. Y. Supp. 498,—to point that test as to whether second suit is founded substantially upon same cause of action is that same evidence will support both actions.

Conclusiveness of Federal court judgments.

Cited in reference notes in 32 A. S. R. 213, on conclusiveness of judgments of national courts; 73 A. S. R. 487, on collateral attack on judgments of Federal court.

Equity jurisdiction to reform written instrument.

Cited in note in 3 L.R.A. 189, on jurisdiction of equity to reform written instrument.

Court's aversion to doing vain or useless things.

Cited in *Buchanan v. Harrington*, 152 N. C. 333, 136 A. S. R. 828, 67 S. E. 747, holding court will not correct deed where its correction will do plaintiff no good.

33 AM. REP. 659, PEOPLE EX REL. KELLY v. BROOKLYN, 77 N. Y. 503.

Right to injunction against issuance of certificate of election.

Distinguished in *People v. McClees*, 20 Colo. 403, 26 L.R.A. 646, 38 Pac. 468, holding that injunction does not lie to restrain issuance of certificate of election where only question is title to office.

Necessity of judgment of a motion on forfeiture of office.

Cited in *Scofield v. United States*, 98 C. C. A. 39, 174 Fed. 1, holding office of trustee in bankruptcy becomes vacant ipso facto when trustee absconds with money of estate; *Gosman v. State*, 106 Ind. 203, 6 N. E. 349, holding that office becomes vacant ipso facto upon termination of term of one ineligible to succeed himself and his successor has died without qualifying; *Osborne v. State*, 128 Ind. 129, 27 N. E. 345, holding office deemed vacant without judicial determination when occupant is defaulter and flees state and indicates settled purpose to abandon office; *Bishop v. State*, 149 Ind. 223, 63 A. S. R. 279, 39 L.R.A. 278, 48 N. E. 1038, holding that acceptance of second incompatible or lucrative office forfeits first without previous judicial determination; Opinion of the Justices, 95 Me. 564, 51 Atl. 224, holding that acceptance of second incompatible office ipso facto vacates first office; *State ex rel. Walker v. Bus*, 135 Mo. 325, 33 L.R.A. 616, 36 S. W. 636, holding that acceptance by one who holds public office of second office incompatible therewith operates ipso facto as resignation of first; *State ex rel. Berge v. Lansing*, 46 Neb. 514, 35 L.R.A. 124, 64 N. W. 1104, holding that office becomes vacant upon failure to file required official bond without any previous judicial determination; *People ex rel. Grogan v. Glass*, 19 App. Div. 454, 46 N. Y. Supp. 572, holding judgment of a motion unnecessary to declare vacant, office that has become vacant by operation of law; *Shell v. Cousins*, 17 Va. 328, holding that sheriff's acceptance of second office actually vacates sheriffalty.

Distinguished in *Cronin v. Stoddard*, 97 N. Y. 271, holding that omission of excise commissioner elected under act of 1874, to execute official bond approved by supervisor of town, does not create vacancy.

Public offices and officers.

Cited in *Foltz v. Kerlin*, 105 Ind. 221, 55 A. R. 197, 4 N. E. 439, holding that postmasters are public officers; *Atty. Gen. v. Drohan*, 169 Mass. 534, 61 A. S. R. 301, 48 N. E. 279, holding that membership in political committee belonging to political party is not public office; *Oliver v. Jersey City*, 63 N. J. L. 96, 42 Atl. 782, holding that position of colonel in fourth regiment of New Jersey volunteers for United States army is "office" within meaning of statutory provision that office shall become vacant upon acceptance of appointment to another office; *People ex rel. Ward v. Drake*, 43 App. Div. 325, 60 N. Y. Supp. 309, holding that lieutenant-colonelcy in United States army is public office; *Rowland v. New York*, 83 N. Y. 372, holding appointed attendant of Supreme Court "holds office" within meaning of statutory prohibition against "increasing salaries of those now in office;" *People ex rel. Sherwood v. State Canvassers*, 129 N. Y. 360, 14 L.R.A. 646, 29 N. E. 345, holding that member of board of park commissioners of city of Hornellsville is public officer; *Dempsey v. New York C. & H. R. R. Co.* 146 N. Y. 290, 40 N. E. 867, holding one appointed to office of railroad policeman under "Railroad law" is public officer within meaning of constitutional prohibition against public officer taking pass from corporation; *Greenough v. Lucey*, 28 R. I. 230, 66 Atl. 300, holding member of political ward committee not public officer.

Cited in notes in 6 A. S. R. 130, as to when act of incumbent of office is to be regarded as an official act, and when not; 63 A. S. R. 181, on what are public offices; 63 A. S. R. 187, on office as part of administration of government; 63 A. S. R. 189, on official duties prescribed by law; 13 L.R.A. 177, on office and officer; 17 L.R.A. 247, on members of Congress and state legislature as public officers.

Continuance of duties of office.

Cited in reference note in 63 A. S. R. 189, on continuance of duties of office.

Forfeiture of title to office.

Cited in reference note in 83 A. D. 375, on forfeiture of title to office.

Effect of holding incompatible office.

Cited in reference note in 63 A. S. R. 289, on effect of holding incompatible offices.

Cited in notes in 2 A. S. R. 924; 7 E. R. C. 327,—on vacation of office by acceptance of incompatible office.

What offices are incompatible.

Cited in reference note in 15 A. S. R. 708, on what offices are incompatible.

Cited in notes in 86 A. S. R. 579, on incompatibility between offices at common law; 86 A. S. R. 584, 589, on incompatibility between offices under statutes and constitutions; 86 A. S. R. 588, on incompatibility of offices held under different governments.

Who is a de facto officer.

Cited in *People ex rel. Howard v. Erie County*, 42 App. Div. 510, 59 N. Y. Supp. 476, holding that one performing duties of office without color of right is not de facto officer.

Distinguished in *Re Collins*, 75 App. Div. 87, 77 N. Y. Supp. 702, holding that town clerk, who after removal from town, performs duties of clerk and keeps office open as before, without dispute and with acquiescence of town officers, and draws salary as such, will be considered de facto clerk until expiration of term.

Right to writ of mandamus.

Cited in *Atty. Gen. v. Taggart*, 66 N. H. 362, 25 L.R.A. 613, 29 Atl. 1027, holding that question of existence of vacancy in office of governor may be determined on petition for mandamus brought by attorney general; *People ex rel. Rumph v. Kings County*, 89 Hun, 38, 34 N. Y. Supp. 1128, holding that title to office cannot be determined by mandamus where there is serious question as to validity of claim and another is holding and exercising functions of office; *People ex rel. Corscadden v. Howe*, 177 N. Y. 499, 66 L.R.A. 604, 69 N. E. 1114, holding that title to public office which is vacant may be determined by mandamus; *People ex rel. Hays v. Brush*, 110 App. Div. 720, 96 N. Y. Supp. 500, holding that mandamus lies to compel presiding officer of common council to put motion where duty is purely ministerial and not based on claim that it was technically out of order.

Right of private citizen to maintain mandamus.

Cited in *Re Howard*, 26 Misc. 233, 56 N. Y. Supp. 318, holding one illegally denied right to act as member of board of supervisors entitled to peremptory mandamus against board; *People ex rel. Sherrill v. Guggenheimer*, 28 Misc. 735, 59 N. Y. Supp. 913, holding any citizen entitled to writ of mandamus to compel municipal council to execute its legal functions; *Kelly v. Van Wyck*, 35 Misc. 210, 71 N. Y. Supp. 814, holding elector of city entitled to writ of mandamus to require official duty of appointment to office to be performed; *People ex rel. Cooke v. Stewart*, 77 App. Div. 181, 78 N. Y. Supp. 1054, holding that citizen may maintain mandamus to compel superintendent to enforce building law; *State ex rel. Harvey v. Mason*, 45 Wash. 234, 9 L.R.A.(N.S.) 1221, 88 Pac. 126, holding that any citizen has sufficient interest to be entitled to institute mandamus to compel canvas of election returns; *State ex rel. Dakota Hail Asso. v. Carey*,

2 N. D. 36, 49 N. W. 164, to point that any citizen of locality may apply for writ where subject-matter is of common concern to all citizens of county, town, city or district.

Sufficiency of denial on information and belief on motion for mandamus.

Cited in *Sheehan v. Long Island City*, 11 Misc. 487, 33 N. Y. Supp. 428, holding that denial on information and belief, of material statements in application for writ, will be disregarded; *Re Guess*, 16 Misc. 306, 38 N. Y. Supp. 91, holding that opposing affidavits in mandamus proceedings which are unspecific and indefinite or based upon information and belief will not be considered; *People ex rel. Anibal v. Fulton County*, 53 Hun, 254, 6 N. Y. Supp. 591; *People ex rel. Frost v. New York, C. & H. R. R. Co.* 168 N. Y. 187, 61 N. E. 172 (reversing 61 App. Div. 494, 70 N. Y. Supp. 684); *Shepard v. Oakley*, 181 N. Y. 339, 74 N. E. 227; *Re Long Acre Electric Light & P. Co.* 51 Misc. 407, 101 N. Y. Supp. 460,—holding positive allegations in support of motion for writ of mandamus not put in issue by denial on information and belief; *Re Martin*, 62 Hun, 557, 17 N. Y. Supp. 133, holding that denials to allegations in support of motion for writ of mandamus must be positive not evasive; *People ex rel. Rau v. York*, 31 App. Div. 527, 52 N. Y. Supp. 401, holding that denials and affirmative allegations made solely upon information and belief do not put in issue positive statements in moving affidavit, where source of information not stated; *Blust v. Collier*, 62 App. Div. 478, 70 N. Y. Supp. 774; *Elder v. Bingham*, 118 App. Div. 25, 103 N. Y. Supp. 617,—holding that allegations of petition on mandamus are not put in issue by denials made upon information and belief; *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146, holding allegation in mandamus complaint that relator has no other adequate remedy not put in issue by denial on information and belief; *Re Freel*, 73 N. Y. S. R. 331, 38 N. Y. Supp. 143, holding that denials upon information and belief, in mandamus proceedings, and affirmations which are not specific and positive are of no avail.

33 AM. REP. 664, McDONALD v. MALLORY, 77 N. Y. 546.

Conflict of laws.

Cited in *St. Joseph F. & M. Ins. Co. v. Leland*, 90 Mo. 177, 59 A. R. 9. 2 S. W. 431, holding foreign municipal officer's common law liability for refusal to obey mandate to levy tax to pay judgment against county enforceable here; *Davis v. Mills*, 99 Fed. 39, holding statute making corporation trustees liable for debts, when failing to file annual report, not penal, so as to prevent enforcement in another state.

Cited in notes in 37 A. R. 160, on extraterritorial effect of statutes; 13 L.R.A. 459, as to when *lex fori* governs; 67 L.R.A. 60, on refusal to apply any substantive law where proper foreign law is not proved.

Distinguished in *Waters v. Spencer*, 44 Misc. 15, 89 N. Y. Supp. 693, holding right of assignee of foreign judgment, to sue in own name, relates to remedy, and is not controlled by foreign statute.

— Maritime torts.

Cited in *Re Clyde S. S. Co.* 134 Fed. 95; *The Hamilton*, 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133,—holding that statute of Delaware giving damages for wrongful death extends to case of citizen of that state wrongfully killed while on high seas in vessel belonging to Delaware corporation by negligence of another vessel belonging to Delaware corporation; *Lindstrom v. International*

Nev. Co. 117 Fed. 170, sustaining administrator's right of action under New York statute, for intestate's death on high seas, through negligent management of American vessel registered at New York; *Geoghegan v. Atlas Steam Ship Co.* 3 Misc. 224, 22 N. Y. Supp. 719, denying administrator's right of action for death upon British vessel in foreign port, without showing right of action under foreign law; *Billings v. Breinig*, 45 Mich. 65, 7 N. W. 722, sustaining state court's right to entertain administrator's statutory action for negligent killing of intestate, when act constituted maritime tort actionable at common law; *Cavanagh v. Ocean Steam Nav. Co.* 19 N. Y. Civ. Proc. Rep. 391, 13 N. Y. Supp. 540, denying administrator's right of action for negligent killing on high seas, after time limited by statute of country to which vessel belonged; *The Lamington*, 87 Fed. 752, denying seaman's right of action in rem for injuries negligently inflicted on British vessel on high seas when British law confers no such right.

Cited in note in 46 L.R.A. 275, on ship being subject to law of flag.

— Wrongful death in sister state or foreign country.

Cited in *Gurofsky v. Lehigh Valley R. Co.* 121 App. Div. 126, 105 N. Y. Supp. 514, holding that action for death of person in sister state can only be maintained when right exists in that state; *Bruce v. Cincinnati R. Co.* 83 Ky. 174; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 A. R. 491; *Kiefer v. Grand Trunk R. Co.* 12 App. Div. 28, 42 N. Y. Supp. 171, 26 N. Y. Civ. Proc. Rep. 147; *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169, 15 N. E. 230,—sustaining administrator's right of action for negligently causing death in foreign state, where statutes of both states substantially alike; *Louisville & N. R. Co. v. Williams*, 113 Ala. 402, 21 So. 938, denying administrator's right of action for negligent killing of intestate in foreign state where common law prevails; *Debevoise v. New York, L. E. & W. R. Co.* 98 N. Y. 377, 50 A. R. 683, denying administrator's right of recovery when failing to prove right of action by statute of foreign state where intestate negligently killed; *O'Reilly v. New York & N. E. R. Co.* 16 R. I. 388, 5 L.R.A. 316, 17 Atl. 906, denying sufficiency of declaration in administrator's action for negligent killing of intestate in another state, when foreign statute of survivorship not alleged; *Mexican C. R. Co. v. Goodman*, 20 Tex. Civ. App. 109, 48 S. W. 778, denying widow's right to continue action begun by husband for personal injuries received in foreign country, unless authorized by foreign statute; *Wooden v. Western New York & P. R. Co.* 126 N. Y. 10, 22 A. S. R. 803, 13 L.R.A. 453, 26 N. E. 1050, sustaining right of action for negligent killing under foreign statute giving right to widow, instead of administrator, and not limiting damages.

Cited in notes in 48 A. D. 641, on extraterritorial effect of statute giving right of action for death of relative; 4 L.R.A. 262, on right of action for death caused by negligence when injuries were inflicted beyond state limits; 56 L.R.A. 194, on what law determines right of action for death or bodily injury.

Distinguished in *Willis v. Missouri P. R. Co.* 61 Tex. 432, 48 A. R. 301, denying right of action for negligent killing in foreign territory, when unauthorized by foreign statute, although railroad inflicting injury within state, and plaintiff not permitted to sue where accident occurred; *Sherwin v. Sternberg*, 77 N. J. L. 117, 71 Atl. 117, holding one who receives money under agreement to incorporate certain company is liable in assumpsit for money paid on failure to incorporate.

Criticized in *Boyle v. Southern R. Co.* 36 Misc. 289, 73 N. Y. Supp. 465, 32 N. Y. Civ. Proc. Rep. 218, sustaining administrator's right of action for death,

under foreign statute substantially different from local law, in allowing recovery for pain and suffering.

— Personal injury in foreign state.

Cited in *Warn v. Easton & McM. Transit Co.* 17 N. Y. S. R. 855, 2 N. Y. Supp. 620, holding actions for injuries to person committed abroad maintainable, without proof in final instance of *lex loci*; *Mexican C. R. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282, sustaining right of action by citizen for personal injury negligently inflicted in foreign state, without proof of foreign law; *Voshefskey v. Hillside Coal & I. Co.* 21 App. Div. 168, 47 N. Y. Supp. 386, holding liability of foreign corporation for injury to employee in state of its domicile, while acting contrary to statute, determined by foreign law.

Right of action for wrongful death.

Cited in *Tanas v. Municipal Gas Co.* 88 App. Div. 251, 84 N. Y. Supp. 1053, holding that under statute giving right of action for wrongful death, for benefit of "next of kin," action is maintainable although next of kin are nonresident aliens.

Cited in note in 70 A. S. R. 681, on actions for causing death of human being.

Abatement of cause of action for death.

Cited in *Hegerich v. Keddle*, 99 N. Y. 258, 52 A. R. 25, 1 N. E. 787 (reversing 32 Hun, 141, 5 N. Y. Civ. Proc. Rep. 228), holding that statutory cause of action given representatives of decedent killed by another's negligence abates upon wrongdoer's death.

Disobedience of statute as actionable negligence.

Cited in note in 9 L.R.A.(N.S.) 340, on disobedience of statute as actionable negligence.

Jurisdiction over oceans.

Cited in note in 46 L.R.A. 265, on jurisdiction over oceans.

Law of flag — Private action for violation of maritime laws.

Cited in note in 9 L.R.A.(N.S.) 375, on private action for violation of laws and rules of navigation and water carriage.

33 AM. REP. 671, DICKINSON v. EDWARDS, 77 N. Y. 573.

Conflict of laws — As to validity of contract.

Cited in *Savings Bank v. National Bank*, 38 Fed. 800, holding that validity of negotiable instrument is to be determined by laws of place where made and payable though negotiated in another state; *Parker v. Day*, 9 Misc. 298, 29 N. Y. Supp. 267, holding that partnership contract, whether created by express agreement or by operation of law, is to be governed by *lex loci*; *Marie v. Garrison*, 13 Abb. N. C. 210, holding that contract made in another state with reference to lands there situated is governed by laws of that state; *Wilson v. Lewiston Mill Co.* 150 N. Y. 314, 55 A. S. R. 680, 44 N. E. 959, holding that contract for sale of cotton by New York broker, through its traveling salesmen, to Maine manufacturer, is governed by laws of latter state; *Hooley v. Talcott*, 129 App. Div. 233, 113 N. Y. Supp. 820, holding laws of New York govern as to loan negotiated in New York although notes were signed by borrower in another state; *Re Grant*, 37 Misc. 151, 74 N. Y. Supp. 958, to point that contract must be governed by laws of place of performance; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390 (dissenting

opinion), on right to determine validity of lease by local laws where both parties resident of another state which was place of execution and performance.

Cited in notes in 31 A. R. 78, on conflict of laws as affecting validity of promissory notes; 3 L.R.A. 524, on contract as governed by *lex loci contractus*.

— As to usury in note.

Cited in *Thorn v. Alvord*, 32 Misc. 456, 66 N. Y. Supp. 587, holding promissory note presumably to be governed by usury laws of state where made, where nothing indicates parties contracted otherwise; *Simpson v. Hefter*, 42 Misc. 482, 87 N. Y. Supp. 243, holding rate of interest for promissory note governed by law of place of performance, when no rate expressed; *Sheldon v. Haxton*, 24 Hun, 196, holding validity of notes determined by usury laws of place where they are made; *Le Baron v. Van Brunt*, 9 Daly, 349, holding that laws of state where note is made and discounted govern, though maker reside in another state and note payable there; *Merchants' Nat. Bank v. Southwick*, 67 How. Pr. 324, holding note drawn, dated, signed, delivered, made payable and first used in one state, but given for precedent debt arising in another state governed by usury laws of former state; *Grand Rapids School Furniture Co. v. Hammerstein*, 45 N. Y. S. R. 863, 18 N. Y. Supp. 766, holding that note executed, delivered and payable in one state, given upon renewal agreement made in that state with agent of foreign corporation are governed by usury laws of such state; *Manhattan L. Ins. Co. v. Johnson*, 188 N. Y. 108, 9 L.R.A.(N.S.) 1142, 80 N. E. 658, 11 A. & E. Ann. Cas. 223 (affirming 115 App. Div. 429; 101 N. Y. Supp. 65), holding mortgage upon lands in one state given as collateral to promissory notes executed in foreign state, where both parties reside, governed by usury laws of state where principal transaction took place; *Brown v. Gates*, 120 Wis. 349, 97 N. W. 221, 1 A. & E. Ann. Cas. 85, holding promissory note governed by usury laws of place where payable though executed and delivered in another state; *Rodecker v. Littauer*, 8 C. C. A. 315, 19 U. S. App. 455, 59 Fed. 859, to point that note is governed by usury laws of place where made and payable though discounted in another state.

Cited in reference note in 86 A. D. 374, as to what law governs defense to usury on promissory note.

Cited in note in 55 A. R. 612, 615, on conflict of laws involving usury.

Distinguished in *Whitehead v. Heidenheimer*, 57 App. Div. 590, 68 N. Y. Supp. 704, holding drafts governed by usury law of place where expressly understood they were to be negotiated though made payable elsewhere; *Wayne County Sav. Bank v. Low*, 81 N. Y. 566, 37 A. R. 533, holding that note made and payable in one state with express understanding that it is to be negotiated in another state is governed by laws of latter state.

— As to usury in contract, generally.

Cited in *National Mut. Bldg. & L. Assn. v. Burch*, 124 Mich. 57, 83 A. S. R. 311, 82 N. W. 837; *National Mut. Bldg. & L. Assn. v. Brahan*, 80 Miss. 407, 57 L.R.A. 793, 31 So. 840,—holding that loan by foreign building and loan association secured by real estate mortgage governed by laws where land situated, though notes payable in foreign state were association as agents in state to whom payments are to be made; *Meroney v. Atlanta Bldg. & L. Assn.* 116 N. C. 882, 47 A. S. R. 841, 21 S. E. 924, holding that usury law of state where land situate governs enforcement of mortgage thereon, where

money is used in that state, though payment in another state provided for; *Washington Nat. Bldg. & L. Invest. Asso. v. Stanley*, 38 Or. 319, 84 A. S. R. 793, 58 L.R.A. 816, 63 Pac. 489, holding that contract made in one state between citizen thereof and foreign corporation doing business there, relating to property in such state and sued on in its courts, is domestic contract though stipulated that it be considered foreign contract; *Pacific States Sav. Loan & Bldg. Co. v. Hill*, 40 Or. 280, 91 A. S. R. 477, 56 L.R.A. 163, 67 Pac. 103, holding usurious contract, valid when payable will not be enforced, if payment in foreign state stipulated for, merely to avoid local usury law.

Cited in note in 62 L.R.A. 57, on law governing when contract is usurious by *lex loci solutionis* but valid by *lex loci contractus*.

—As to interest in case of default.

Cited in *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 150, holding that place of performance governs rate of interest thereafter in case of default in payment of note made elsewhere.

—As to rights of parties to check.

Cited in *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 A. R. 518, holding that rights of parties to check are governed by laws of place of payment.

—As to liability of surety.

Cited in *Morgan v. Merchants' Co-op. F. Ins. Asso.* 52 App. Div. 57, 64 N. Y. Supp. 873, holding that liability of surety on promissory note is determined by law of state where it is to be performed; *Bath Gaslight Co. v. Rowland*, 84 App. Div. 563, 82 N. Y. Supp. 841, holding that contract of suretyship, given in connection with lease, executed where lease to be performed and where parties thereto reside and property situate, is governed by laws of that state.

—As to rights of nonresident transferee of warehouse receipt.

Cited in *First Nat. Bank v. Dean*, 28 Jones & S. 299, 16 N. Y. Supp. 107, 27 Abb. N. C. 281, holding that rights on non-resident transferee of warehouse receipt, in action against warehouseman are governed by laws of place where goods are stored and receipt given.

Right to contract for legal rate of interest of another state.

Cited in *Scott v. Perlee*, 39 Ohio St. 63, 48 A. R. 421, holding that one may contract in another state for loan and agree to pay lawful rate of interest of place of his residence though greater than place where contract made.

Contract of acceptor, maker, or indorser of negotiable paper.

Cited in note in 4 E. R. C. 306, on contract of acceptor, maker, or indorser of negotiable paper.

33 AM. REP. 683, LORD v. HARDIE, 82 N. C. 241.

Right to attach benefit fund of fraternal insurance society.

Cited in *Brenizer v. Supreme Council R. A.* 141 N. C. 409, 6 L.R.A.(N.S.) 235, 53 S. E. 835, holding that moneys in hands of local collector of beneficial society belonging to fund created by societies constitutes, for benefit of widows and orphans, cannot be attached by creditor of society.

Capacity of "wardens and vestry" to take conveyance.

Cited in *St. James v. Bagley*, 138 N. C. 384, 70 L.R.A. 160, 50 S. E. 841, holding that "vestry and wardens of" church are corporate body with capacity to take and hold legal title to land.

Sale of property to pay pastor's salary.

Cited in note in 38 L.R.A. 689, on sale of property to pay pastor's salary.

33 AM. REP. 685, JACKSON v. LOVE, 82 N. C. 405.**Rights of nonpayee of negotiable paper.**

Cited in *Thompson v. Osborne*, 152 N. C. 408, 67 S. E. 1029, on right of assignee of note to recover thereon.

Cited in reference notes in 100 A. D. 352, on rights of possessor of undorsed negotiable paper, not payable to bearer; 1 A. S. R. 806, on right of person not payee to sue on indorsed note payable to a particular person.

Presumption of ownership from possession.

Cited in *Worth v. Wrenn*, 144 N. C. 656, 57 S. W. 388, holding possession of bond, though non-negotiable, by one suing thereon, prima facie evidence of ownership as against every one except payee.

— Of note or mortgage.

Cited in *Plummer v. Park*, 62 Neb. 665, 87 N. W. 534, holding possession of mortgage and note sued on, evidence of ownership; *Kiff v. Weaver*, 94 N. C. 274, holding that possession of undorsed promissory note, payable to bearer, raises presumption that person producing it at trial is rightful owner; *Holly v. Holly*, 94 N. C. 670, holding that possession of undorsed negotiable note raises presumption as between holder and payee that holder is owner; *Triplet v. Foster*, 115 N. C. 335, 20 S. E. 475, holding production of notes by one maintaining action to foreclose mortgage security, prima facie evidence of ownership; *O'Keefe v. First Nat. Bank*, 49 Kan. 347, 38 A. S. R. 370, 30 Pac. 473; *Johnson v. Gooch*, 116 N. C. 64, 21 S. E. 39,—holding that possession of undorsed negotiable note or bond raises presumption that person producing it at trial is rightful owner; *Pate v. Brown*, 85 N. C. 166; *Robertson v. Dunn*, 87 N. C. 191; *Farthing v. Dark*, 111 N. C. 243, 16 S. E. 337; *Causey v. Snow*, 120 N. C. 279, 26 S. E. 775,—holding one suing on note and producing same at trial presumptively rightful owner thereof; *Bresce v. Crumpton*, 121 N. C. 122, 28 S. C. 351, holding that holder of undorsed negotiable paper has, prima facie, equitable title; *Vann v. Edwards*, 128 N. C. 425, 39 S. E. 66, holding possession of note by indorsee of married woman presumed lawful, note having been in husband's possession after indorsement; *Beaman v. Ward*, 132 N. C. 68, 43 N. E. 545, holding that possession of non-negotiable instrument by one claiming to be assignee thereof, is presumptive evidence of ownership; *Jenkins v. Wilkinson*, 113 N. C. 532, 18 S. E. 696, to point that transferee of undorsed note is equitable assignee thereof.

Sufficiency of denial of ownership of negotiable instrument.

Cited in note in 66 L.R.A. 536, on sufficiency of denial of ownership as affected by statute requiring action on negotiable instruments to be brought by real party in interest.

Necessity of suit by real party in interest.

Cited in *Chapman v. McLawhorn*, 150 N. C. 166, 63 S. E. 721, holding action will be dismissed where it appears that plaintiff is not real party in interest.

33 AM. REP. 688, BELO v. FORSYTH COUNTY, 82 N. C. 415.**Liability of stock to taxation.**

Cited in *Worth v. Wilmington & W. R. Co.* 89 N. C. 291, 45 A. R. 679, hold-

ing that property of shareholder is distinct form of taxable property; *Durham County v. Blackwell Durham Tobacco Co.* 116 N. C. 441, 21 S. E. 423, holding that "capital stock" is distinct subject of taxation from "shares of capital stock."

Cited in notes in 74 A. D. 95, on taxation of shares of stock; 44 A. S. R. 953; 67 A. S. R. 380,—on taxation of corporate stock; 12 L.R.A. 763, on distinction between capital and shares of stock; 13 L.R.A. 166, on taxation of corporation's capital.

—Stock of foreign corporation.

Cited in *Worth v. Ashe County*, 82 N. C. 420, 33 A. R. 692, holding that shares of stock in foreign corporations are personal property and may be taxed where owner resides; *North Carolina R. Co. v. Alamance*, 91 N. C. 454, to point that shares in foreign corporation held by resident owner are subject to taxation though corporate property taxed in jurisdiction where business carried on.

Cited in reference note in 33 A. R. 692, on right to tax stock in foreign corporation to resident owner.

Liability of corporate franchise to taxation.

Cited in *Atlanta, T. & O. R. Co. v. Mecklenburg*, 87 N. C. 129, holding franchise of railroad distinct species of property from that enumerated in clause of charter exempting road bed etc. from taxation and is subject to tax.

Cited in note in 1 L.R.A. 244, on taxation of corporation franchise.

Extent of exemptions from corporate taxation.

Cited in note in 60 L.R.A. 86, on extent of exemptions from corporate taxation under contract clause in Federal Constitution.

Double taxation.

Cited in notes in 58 L.R.A. 590, on double taxation in taxing corporations and stockholders; 60 L.R.A. 367, on double taxation of corporations.

Distinction between property of bank and shares of stockholder.

Cited in *Pullen v. Corporation Commission*, 152 N. C. 548, 68 S. E. 155 (dissenting opinion), on distinction between property of bank and shares of stockholder.

Shares of stock as personalty.

Cited in *Judy v. Beckwith*, 137 Iowa, 24, 15 L.R.A.(N.S.) 142, 114 N. W. 565, 15 A. & E. Ann. Cas. 890, holding shares of stock in corporation are personal property.

33 AM. REP. 692, WORTH v. ASHE COUNTY, 82 N. C. 420, Reaffirmed on later appeal in 90 N. C. 409.

Taxation of bonds and shares of stock.

Cited in *North Carolina R. Co. v. Alamance*, 91 N. C. 454, holding non-resident holder of shares in domestic corporation not subject to tax; *Worth v. Ashe County*, 90 N. C. 409, holding that stock in foreign corporation may be taxed to resident owner.

Cited in reference note in 66 A. S. R. 146, on taxation of stock in foreign corporations.

Cited in notes in 56 A. D. 528, on where bonds and shares of stock taxed; 62 A. S. R. 458, on situs for taxation of shares of stock.

32 AM. REP. 694, STATE v. YEARBY, 82 N. C. 561.**What constitutes "dealing."**

Cited in note in 14 L.R.A. 529, on what constitutes "dealing."

Butchers as dealers.

Cited in *Com. v. Hiller*, 1 Dauphin Co. Rep. 188, holding persons who sell meat slaughtered by themselves, not "dealers" within meaning of statute imposing mercantile tax; *Com. v. Hiller*, 21 Pa. Co. Ct. 163, 7 Pa. Dist. R. 471, holding those who sell at slaughter house or from stalls at public market meat slaughtered by themselves, are not dealers within the taxing act.

Distinguished in *Johnson v. Armour*, 31 Fla. 413, 12 So. 842, holding fact that vendors of dressed meat raise animals in another state and there kill them does not prevent them from being "dealers" within meaning of occupation tax law, requiring "dealers" to pay tax.

Cited and explained in *State v. Carter*, 129 N. C. 560, 40 S. E. 11, holding that statute imposing tax on business of buying and selling fresh meat applies to persons buying and butchering cattle and selling meat.

Tax on markets.

Cited in note in 24 L.R.A. 586, on tax on markets.

Who are lumber dealers.

Cited in *State v. Barnes*, 126 N. C. 1063, 35 S. E. 605, holding that "lumber dealer" within meaning of revenue act does not apply to general merchant who occasionally takes lumber in payment of debt or in exchange for goods.

33 AM. REP. 696, MATASCH v. HUGHES, 7 OR. 39.**Presumption of settlement of indebtedness.**

Cited in *Scoggin v. Schloath*, 15 Or. 380, 15 Pac. 635, holding that it is presumed that every item of account existing between parties at time of settlement was included therein in absence of evidence as to items included.

—By note.

Cited in *Hoyt v. Clarkson*, 23 Or. 51, 31 Pac. 198; *Williams v. Culver*, 30 Or. 375, 48 Pac. 365,—holding that execution of promissory note is prima facie evidence of accounting and settlement between parties of all existing demands.

—By deed.

Cited in *Moore v. Frazer*, 15 Or. 635, 16 Pac. 869, holding conveyance of land in settlement of indebtedness presumed to include every item of account existing between parties.

33 AM. REP. 698, SMITH v. WHEELER, 7 OR. 49.**Measure of damages for nonacceptance of article contracted for.**

Cited in *Gardner v. Caylor*, 24 Ind. App. 521, 56 N. E. 134, holding that vendor cannot recover damages for buyer's refusal to take specific amount of ice when he neither tendered it nor attempted to dispose of it at market price; *Dwiggins v. Clark*, 94 Ind. 49, 48 A. R. 140, holding that measure of damages where no delivery or tender made, is difference between contract price and market price at time and place of delivery; *Kinthead v. Lynch*, 132 Fed. 692; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210,—holding that measure of damages is contract price where contract is for specific article to be manufactured by vendor.

What constitutes change in possession of goods mortgaged or sold.

Cited in note in 5 E. R. C. 97, on what constitutes a change of possession of goods mortgaged or sold.

33 AM. REP. 703, HEILNER v. UNION COUNTY, 7 OR. 83.

Statutory liability of county for nonrepair of bridges and approaches.

Cited in note in 39 L.R.A. 53, on statutory liability of county for injuries to travelers and vehicles by bridges and approaches being out of repair.

Necessity of knowledge by county of defective bridge.

Cited in *Rice v. Wallowa County*, 46 Or. 574, 81 Pac. 358, holding allegations showing defective condition of bridge and that such condition was well known to county, sufficient after verdict; *Cederson v. Oregon R. & Nav. Co.* 38 Or. 343, 62 Pac. 637, to point that in action against municipality for damages resulting from defective bridge, actual or constructive notice to municipality must be shown.

Notice to road supervisor as notice to county.

Cited in *Eastman v. Clackamas Co.* 32 Fed. 24, holding that notice to supervisor of roads of defect in highway is notice to county.

Necessity for alleging negligent acts.

Cited in *Woodward v. Oregon R. & Nav. Co.* 18 Or. 289, 22 Pac. 1076, holding that in action to recover damages for negligence, acts or omissions upon which recovery is based must be averred and shown to have occurred through or by other's negligence.

Cited in notes in 59 L.R.A. 251, on sufficiency of general allegations of municipal negligence as to dangerous or defective bridges; 21 L.R.A. (N.S.) 43, on sufficiency of allegation of facts in regard to defect in street or highway, in damage suit against municipality.

33 AM. REP. 705, STEEPLES v. NEWTON, 7 OR. 110.

Recovery where contract for services is not completed.

Cited in *Todd v. Huntington*, 13 Or. 9, 4 Pac. 295; *Gove v. Island City Mercantile & Mill. Co.* 19 Or. 363, 24 Pac. 521,—holding that one who fails to complete contract for any reason except voluntary abandonment may recover reasonable value of services and material less damages sustained to other party by failure to complete.

Cited in reference notes in 35 A. R. 477, on recovery for part performance of entire contract; 1 A. S. R. 468, on recovery for services rendered where special contract is not completed; 2 A. S. R. 615, on conclusiveness of special contract of employment.

Cited in notes in 59 A. S. R. 291, as to when complete performance is essential to cause of action on contract for personal services; 24 L.R.A. 234, on effect of employee's abandonment of contract for services without cause; 6 E. R. C. 639, on right to recover upon quantum meruit for work done under contract for an entire service.

Impeachment of character of witness.

Cited in note in 14 L.R.A. (N.S.) 707, on impeachment of character of witnesses.

Am. Rep. Vol. XVII.—46.

33 AM. REP. 708, TRULLINGER v. KOFOED, 7 OR. 228.**Waiver of mechanic's lien.**

Cited in notes in 41 A. D. 223; 21 L. ed. U. S. 860; 35 A. S. R. 438,—on waiver of mechanics' lien; 41 A. S. R. 764, on waiver of mechanics' lien by taking notes or other securities.

— By taking mortgage security.

Cited in *Willison v. Douglass*, 66 Md. 99, 6 Atl. 530, holding mechanics' lien of material-man waived by agreement to accept mortgage security; *Crane v. Runey*, 26 Fed. 15, to point that mechanics' lien is waived by taking of mortgage security.

Cited in reference note in 47 A. S. R. 789, on waiver of mechanics' lien by taking note or mortgage.

Distinguished in *Howe v. Kindred*, 42 Minn. 43, 44 N. W. 311, holding chattel mortgage taken as additional and collateral security for portion of claim not waiver of mechanics' lien.

Application of payments.

Cited in *Anderson v. Griffith*, 51 Or. 116, 93 Pac. 934, holding creditor may apply payment to any lawful demand in absence of direction from debtor.

Cited in note in 96 A. S. R. 55, on application of payments by the court where neither party applies.

— By debtor.

Cited in *Bond v. Armstrong*, 88 Ind. 65; *Montour v. Grand Lodge*, 38 Or. 47, 62 Pac. 524,—to point that debtor at time of making payment may direct application thereof which direction creditor is bound to obey.

Cited in note in 96 A. S. R. 47, on application of payments by debtor.

33 AM. REP. 710, GILMORE v. BURCH, 7 OR. 374.**Proof as to fraud in transaction between parties in fiduciary relations.**

Cited in *Hallett v. Fish*, 120 Fed. 986, to point that courts will closely scrutinize transactions between affianced parties to see whether improper influences were used.

Cited in notes in 33 A. R. 739, on burden of proof as to undue influence in gift from patient to physician; 11 A. S. R. 759, on presumptions and proof as to fraud between persons in fiduciary relations; 6 E. R. C. 877, on degree of proof necessary on part of one who occupies position of trust or sustains position of legal or natural authority over another, to establish validity of gift or benefit from latter to former or any financial settlement between them.

Right to curtesy.

Cited in *Beam v. United States*, 89 C. C. A. 240, 162 Fed. 260, holding husband of allottee Indian dying during first twenty-five years after allotment, has right of curtesy in her equitable title.

33 AM. REP. 717, ORTON v. ORTON, 7 OR. 478.**Validity of chattel mortgage as to creditors — Effect of mortgagor's retention of possession.**

Cited in *Benedict v. Renfro*, 75 Ala. 121, 51 A. R. 429, holding that chattel mortgage on perishable goods where mortgagor retains possession with implied authority to dispose of same and appropriate proceeds, is void as to creditors;

Marks v. Miller, 21 Or. 317, 14 L.R.A. 190, 28 Pac. 14, holding presumption of fraud created from mortgagor's retention of possession of property, where mortgage is not filed; **Davis v. Bowman**, 25 Or. 189, 35 Pac. 264, to point that filed chattel mortgage is not presumptively fraudulent because mortgagor retains possession of property.

Cited in reference note in 6 A. S. R. 34, on validity to subsequent attaching creditors of chattel mortgage authorizing mortgagor to obtain possession of property.

— **Effect of provision authorizing mortgagor to dispose of property.**

Cited in **Re Rasmussen**, 136 Fed. 704; **Eckman v. Mannerlyn**, 32 Fla. 367, 37 A. S. R. 109, 13 So. 922; **Jacobs v. McCalley**, 8 Or. 124; **Jacobs v. Ervin**, 9 Or. 52; **Aiken v. Pascall**, 19 Or. 493, 24 Pac. 1039; **Fisher v. Kelly**, 30 Or. 1, 46 Pac. 146; **Sabin v. Wilkins**, 31 Or. 450, 37 L.R.A. 405, 48 Pac. 425,—holding chattel mortgage authorizing mortgagor to dispose of property in usual course of trade for own benefit, void as to attaching creditors.

Cited in reference note in 39 A. R. 160, on validity, as against creditors, of mortgage of retail stock reserving in mortgagor power to sell in ordinary course of trade.

Cited in notes in 22 L. ed. U. S. 758; 15 A. S. R. 914,—on validity of chattel mortgage permitting mortgagor to retain and sell the property; 18 L.R.A. 606, on effect upon validity of mortgage of stipulation that mortgagor may dispose of proceeds; 18 L.R.A. 622, on analysis of law as to validity of mortgage of merchandise giving mortgagor possession with power of sale.

Reservation of benefit by partner as avoiding firm assignment for creditors.

Cited in **Marks v. Bradley**, 69 Miss. 1, 10 So. 922, holding that reservation by partner of money which legally belongs to firm and which in general terms assignment purports to convey, will avoid assignment.

33 AM. REP. 721, PHILADELPHIA & R. R. CO. v. ADAMS, 89 PA. 31.

Duty of steam vessel to change course for sail or row boat.

Cited in **Fischer v. Camden & P. S. S. Ferry Co.** 124 Pa. 154, 16 Atl. 634, 23 W. N. C. 224, 19 Pittsb. L. J. N. S. 385, holding that steam vessel is not bound to change her course for row boat, under federal navigation laws.

Cited in notes in 121 A. S. R. 49, on duty of steamers to keep out of way of sailing vessels; 121 A. S. R. 58, on duty of larger vessel as to rowboats; 5 L.R.A. (N.S.) 303, on relative duties of steamers and small craft propelled by oars on rivers and in narrow channels.

Law of road as applied to bicycles.

Cited in **Rowland v. Wanamaker**, 7 Pa. Dist. R. 249, 20 Pa. Co. Ct. 621, holding duty of wheelman to turn out of way of vehicle of greater bulk or weight.

General instruction as to damages as reversible error.

Cited in **McCloskey v. Bells Gap R. Co.** 156 Pa. 254, 27 Atl. 246, 32 N. W. C. 535; **Lake Shore & M. S. R. Co. v. Frantz**, 127 Pa. 297, 4 L.R.A. 389, 18 Atl. 22, 24 W. N. C. 321, 46 Phila. Leg. Int. 478,—holding misleading general instruction not reversible error where followed by correct enumeration of items of damages recoverable

33 AM. REP. 726, PHILADELPHIA & R. R. CO. v. ERVIN, 89 PA. 71.**Liability for breach of municipal ordinance.**

Cited in *Sanders v. Southern Electric R. Co.* 147 Mo. 411, 48 S. W. 855, holding that city cannot under its police power adopt ordinance creating civil duty enforceable at common law; *Rubin v. Miller*, 30 Pittsb. L. J. N. S. 351, holding that ordinance cannot make that negligence which was not before; *Caughlin v. Campbell-Sell Baking Co.* 39 Colo. 148, 121 A. S. R. 158, 8 L.R.A. (N.S.) 1001, 89 Pac. 53, to point that municipal ordinance cannot create or abrogate civil duty enforceable at common law; *Early v. Ashworth*, 17 Phila. 248, 41 Phila. Leg. Int. 24; *Munn v. L. Wolff Mfg. Co.* 94 Ill. App. 122,—to point that ordinance cannot create civil duty enforceable at common law; *Gibson v. Leonard*, 143 Ill. 182, 36 A. S. R. 376, 17 L.R.A. 588, 32 N. E. 182, on right of municipality to create by ordinance civil duty enforceable at common law.

Cited in reference note in 56 A. S. R. 550, on liability incurred by breach of municipal ordinance.

Cited in note in 5 L.R.A. (N.S.) 260, 264, 265, 266, on violation of police ordinance as ground for private action.

— Ordinance as to speed of street railways.

Cited in *Davidson v. Schuylkill Traction Co.* 4 Pa. Super. Ct. 86, holding that street railway company's violation of speed ordinance does not create civil liability for injuries caused thereby; *Sleider v. St. Louis Transit Co.* 189 Mo. 107, 5 L.R.A. (N.S.) 186, 88 S. W. 648 (dissenting opinion), on right to hold street railway company's violation of municipal speed ordinance creates civil liability for injury sustained thereby.

Disapproved in *Memphis Street R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374, holding that failure of street railway company to comply with city speed ordinance renders company liable to individual injured thereby.

— Ordinance as to operation of railroads.

Distinguished in *Jackson v. Kansas City, Ft. S. & M. R. Co.* 167 Mo. 621, 80 A. S. R. 660, 58 S. W. 32, holding that violation of speed ordinance by railroad company creates civil liability for injuries caused thereby.

— Ordinance as to use of streets.

Cited in *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 56 A. S. R. 543, 33 L.R.A. 755, 36 S. W. 659, holding that municipal ordinance requiring lot owner to fill and fence excavations cannot create civil liability against person violating it, for injuries sustained thereby; *Koch v. Fox*, 71 App. Div. 288, 75 N. Y. Supp. 913, holding that breach of ordinance requiring covering over side walk while adjoining lot is being built upon does not make owner liable for injuries to passerby by brick falling from scaffolding suspended over walk, through negligence of contractor's employees; *Ziegler v. Philadelphia*, 19 Phila. 400, 46 Phila. Leg. Int. 78, to point that breach of municipal ordinance regulating fences imputes to city or landowner no civil liability to third persons injured thereby.

— Ordinance as to unfastened horses.

Cited in reference note in 12 A. S. R. 700, on liability for injury caused by leaving team unfastened in street in violation of ordinance.

Distinguished in *Bott v. Pratt*, 33 Minn. 323, 53 A. R. 47, 23 N. W. 237, holding that violation of ordinance against leaving horse unhitched in street entitles action for injury suffered by such violation.

— Ordinance as to fire escapes.

Cited in *Schmalzried v. White*, 97 Tenn. 36, 32 L.R.A. 782, 36 S. W. 393; *Weeks v. McNulty*, 101 Tenn. 495, 70 A. S. R. 693, 43 L.R.A. 185, 48 S. W. 809,— as to whether civil liability arises from breach of municipal ordinance requiring fire escapes on hotels.

Municipal ordinance as evidence in negligence action.

Cited in *McNerney v. Reading*, 150 Pa. 611, 25 Atl. 57, 30 W. N. C. 534, holding ordinance requiring areaways to be properly guarded properly admitted in action for injuries sustained by falling into unguarded areaway.

Cited and explained in *Becker v. Schutte*, 85 Mo. App. 57, to point that city ordinance is admissible in evidence in negligence action where it enforces common-law duty.

Validity of municipal ordinances.

Cited in note in 41 L. ed. U. S. 520, on validity of municipal ordinances.

Limitations on power of municipality to pass by-laws.

Cited in note in 34 A. D. 631, on limitations on power of municipality to pass by-laws.

Liability for defect in wharf.

Cited in reference note in 30 A. S. R. 692, on liability of wharf owner for injuries caused by improper condition.

Cited in note in 61 L.R.A. 950, on liability for defect in surface of wharf.

Effect of failure to demur for insufficiency of plea.

Cited in *Cheraw & S. R. Co. v. Broadnax*, 109 Pa. 432, 58 A. R. 733, 1 Atl. 228, 16 W. N. C. 529, 42 Phila. Leg. Int. 522, holding that failure to demur for insufficiency of plea defects objection to trial of issue therein tendered.

33 AM. REP. 731, AUDENREID'S APPEAL, 89 PA. 114.**Validity of transactions between those in confidential relation.**

Cited in *Doran v. McConlogue*, 150 Pa. 98, 24 Atl. 357, 30 W. N. C. 296, 22 Pittsb. L. J. N. S. 452, holding that mere relation of master and servant not such confidential relation as forbids conveyance of land by former to latter, as gift.

Cited in reference notes in 41 A. R. 742, on validity of gift to family physician; 42 A. R. 635, on validity of gift to confidential friend; 55 A. R. 482, on validity of conveyances from patient to physician; 2 A. S. R. 361, on undue influence in gift from patient to physician.

Cited in notes in 6 L.R.A. 369, on purchase of trust property by fiduciary; 6 E. R. C. 877, 878, on degree of proof necessary on part of one who occupies position of trust or sustains position of legal or natural authority over another, to establish validity of gift or benefit from latter to former or any financial settlement between them; 39 A. R. 257, on acquiescence by ward, after reaching majority, in settlement with guardian as estoppel to action against surety.

Presumption of undue influence.

Cited in note in 21 A. S. R. 103, on presumption of undue influence.

Avoidance of gift by constructive fraud.

Cited in reference note in 38 A. R. 388, on avoidance of gifts by constructive fraud.

Evidence required where answer is responsive.

Cited in *Kennedy v. Wentz*, 10 Luzerne Leg. Reg. 229; *Nulton's Appeal*, 163

Pa. 286, 13 W. N. C. 430; *Freeman v. Stine*, 15 Phila. 37, 38 Phila. Leg. Int. 268,—to point that answer which is responsive must prevail unless overcome by two witnesses or one witness and strong corroborative evidence.

Parol evidence to explain receipts.

Cited in *Guhl v. Frank*, 20 Lanc. L. Rev. 249, holding receipt prima facie evidence of payment of amount therein stated; *Long v. Reed*, 4 Pa. Dist. R. 71, 16 Pa. Co. Ct. 110, holding that price mentioned in deed is not conclusive; *Sargeant v. National L. Ins. Co.* 189 Pa. 341, 41 Atl. 351, 43 W. N. C. 490, 29 Pittsb. L. J. N. S. 327, holding that rule that all receipts may be explained by parol evidence is applicable to life insurance policy which contains receipt for premiums.

33 AM. REP. 740, SPARK'S APPEAL, 89 PA. 148.

Construction of will where general words precede or follow enumerated articles.

Cited in *Re Long Island Loan & T. Co.* 92 App. Div. 5, 87 N. Y. Supp. 318, holding that bequest of law business, books "and all property pertaining to my business" does not include debt due testator for legal services; *Re Reynolda*, 124 N. Y. 388, 26 N. E. 954, holding that general words will be confined to articles of same general character as those enumerated; *MacConnell v. Wright*, 150 Pa. 275, 24 Atl. 517, 30 W. N. C. 421, 22 Pittsb. L. J. 473, to point that circumstances surrounding testator when will made, may be considered in construing it. When auditor's report on decedent's estate will not be reopened.

Cited in *Bear's Estate*, 11 Lanc. L. Rev. 65, holding that bill of review is not grantable after fund is actually paid to distributees.

33 AM. REP. 745, HEISKELL v. FARMERS' & M. NAT. BANK, 89 PA. 155.

Bill of lading as evidence of title.

Cited in note in 38 A. D. 419, on effect of bill of lading as evidence of title.

— Effect of unauthorized delivery.

Cited in *Pennsylvania R. Co. v. Stern*, 119 Pa. 24, 4 A. S. R. 626, 45 Phila. Leg. Int. 105, 21 W. N. C. 50, 12 Atl. 756, 18 Pittsb. L. J. N. S. 374, holding that title to property remains in consignor when common carrier makes unauthorized delivery; *Bank of Batavia v. New York L. E. & W. R. Co.* 33 Hun. 539, to point that unauthorized delivery of bill of lading is ineffectual to vest title; *Second Nat. Bank v. Cummings*, 89 Tenn. 609, 24 A. S. R. 618, 18 S. W. 115, holding that unauthorized delivery of bill of lading without payment of draft attached gives third persons dealing with goods shipped, though bona fide and for value, no better rights than drawee.

Negotiability of bill of lading.

Cited in *Pierson v. Mac Nutt*, 23 Lanc. L. Rev. 338, holding that title to property may pass by endorsement and delivery of bill of lading; *Mitchell v. Baker*. 208 Pa. 377, 57 Atl. 760, holding that bills of lading, properly endorsed, operate as delivery of property itself; *National Bank v. Atlanta & C. Air Line R. Co.* 25 S. C. 216, holding that bill of lading is so far negotiable as to pass to its endorser all right to possession of goods therein mentioned; *General Electric Co. v. Southern R. Co.* 72 S. C. 251, 110 A. S. R. 600, 51 S. E. 695, to point that right to goods mentioned in bill of lading may pass by endorsement.

Cited in notes in 38 A. D. 422, on indorsement and transfer of bills of lading; 25 L. ed. U. S. 893, on negotiability and transfer of bill of lading.

Rights of pledgee of bills of lading.

Cited in *Ratzer v. Burlington, C. R. & N. R. Co.* 64 Minn. 245, 58 A. S. R. 530, 66 N. W. 988, holding that common carrier which delivers goods without production of bill of lading is liable to innocent pledgee thereof.

Right of court to refuse to submit irrelevant points.

Cited in *Philadelphia & R. R. Co. v. Reading & P. R. Co.* 12 Pa. Co. Ct. 513, 2 Pa. Dist. R. 857, holding proper for court to refuse to submit points which are irrelevant or not supported by evidence.

33 AM. REP. 748, AMERICAN S. S. CO. v. YOUNG, 89 PA. 186,
Affirmed in 105 U. S. 41, 26 L. ed. 966.

Recovery of illegal fees paid.

Cited in *Marcotte v. Allen*, 91 Me. 74, 40 L.R.A. 185, 39 Atl. 346, holding that officer may be required to restore fees collected, to which he is not entitled; *Wayne County v. Reynolds*, 126 Mich. 231, 86 A. S. R. 541, 85 N. W. 574, holding that county may recover back money paid public officer upon illegal claim for services; *Price v. Lancaster County*, 17 Lanc. L. Rev. 353, 24 Pa. Co. Ct. 225, holding that county can recover from constable fees paid him in excess of amount he is legally entitled to; *Bollinger v. Gettysburg*, 6 Pa. Co. Ct. 369, holding that action will not lie to recover money voluntarily paid under ordinance afterwards declared void, notwithstanding penalty provided for violation of ordinance; *Allegheny County v. Grier*, 179 Pa. 639, 36 Atl. 353, 27 Pittsb. L. J. N. S. 427, holding that county may compel county comptroller to refund sum which he has received in excess of his legal salary.

Cited in notes in 15 L.R.A.(N.S.) 183, on recovery of fees exacted by public officer for performing act for which he was not authorized to demand compensation; 45 A. D. 168, on right to recover illegal fees exacted *colore officii*.

Extortion by public officer.

Cited in note in 116 A. S. R. 452, on necessity of demand or exaction of fee by officer to constitute extortion.

What amounts to compulsory payment of illegal fees.

Cited in *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244, holding that payment made to public officer in discharge of fee or tax illegally exacted, is not such voluntary payment as precludes recovery; *Lewis v. San Francisco*, 2 Cal. App. 112, 82 Pac. 1106, holding compulsory payment, where county clerk refused to file executor's inventory and appraisal unless illegal fees exacted were paid; *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434, holding compulsory payment, where shipper pays illegal rates to railroad company which is only outlet for his product; *Leggatt v. Prideaux*, 16 Mont. 205, 50 A. S. R. 498, 40 Pac. 377, as to whether payment of illegal costs taxed against party to suit upon rendering of judgment is voluntary.

— Validity of promise to pay illegal fees.

Cited in *Jackson v. Siglin*, 10 Or. 93, holding that promise to pay illegal fees is void.

Liability of Federal officer to suit in state court for acts done under color of Federal court process.

Cited in note in 42 A. D. 58, on liability of United States officer to be sued in state court for acts done under color of process of United States court.

33 AM. REP. 753, SCOTT v. KITTANNING COAL CO. 89 PA. 231.**When contract is severable.**

Cited in *Miller v. Blessing*, 17 Phila. 307, 41 Phila. Leg. Int. 253, holding contract to furnish specified amount of brick as required, severable; *Fullmer v. Poust*, 155 Pa. 275, 35 A. S. R. 881, 26 Atl. 543, holding that agreement stipulating for sale of lot at certain price and for erection of house thereon at certain price, is severable contract; *Valley Nat. Bank v. Mylin*, 18 Pa. Dist. R. 414, holding contract for lumber at certain price per thousand feet is severable; *Gilmore & Co. v. Samuels & Co.* 135 Ky. 706, 123 S. W. 271, as to what constitutes severable contract with broker to sell manufactured product.

Cited in reference note in 35 A. S. R. 882, on severability of contract.

Cited in notes in 54 A. R. 630, on whether contract is entire or severable; 6 L.R.A. 375, on severable nature of contract for sale and delivery from time to time; 31 A. D. 521, on apportionment of contracts.

Breach of instalment contract.

Cited in reference note in 54 A. R. 159, on contract of sale by successive deliveries and payments as affected by default as to one or more.

Cited in notes in 59 A. S. R. 279, as to when complete performance is essential to cause of action *ex contractu* on divisible contract; 3 L.R.A.(N.S.) 1042, on right of buyer to maintain separate action for nondelivery of each instalment under entire contract; 8 L.R.A.(N.S.) 1111, on notice to vendor as condition of vendee's right to refuse subsequent deliveries after breach as to earlier deliveries.

—Measure of damages.

Cited in *Mayer Brick Co. v. Kennedy Co.* 57 Pittsb. L. J. 601, holding measure of damages for breach of contract for whole manufactured product is contract price less cost of manufacture and delivery.

Right to rescind contract for default of other party.

Cited in *Harding v. York Knitting Mills*, 142 Fed. 228, holding that one who accepts number of shipments of yarn, to be delivered in weekly installments, cannot thereafter rescind contract as to yarn undelivered, because of inferior quality of part delivered; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12, holding that failure of vendor to make monthly shipments to amount required by contract justifies rescission of contract; *Worthington v. Gwin*, 119 Ala. 44, 43 L.R.A. 382, 24 So. 739, holding fact that small quantity of ore delivered under contract calling for successive shipments, was not satisfactory does not justify abandonment of entire contract; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 A. R. 159, 1 Atl. 27, holding that contract for bark to be delivered in weekly installments cannot be rescinded because of that already delivered and paid for; *Philadelphia v. Bickley*, 18 W. N. C. 53, 2 Sadler. (Pa.) 214, 3 Atl. 586, 17 Phila. 379, 41 Phila. Leg. Int. 257, holding that one having yearly contract for removal of ashes, to be paid by city warrants issued monthly, may, upon refusal of controller to countersign warrants issued for any month, consider contract rescinded and sue for amount due.

Distinguished in *Rugg v. Moore*, 110 Pa. 236, 17 W. N. C. 183, 1 Atl. 320, 16 Pittsb. L. J. N. S. 158, 43 Phila. Leg. Int. 27, holding that refusal without sufficient cause, to pay for any delivery, where by contract goods are to be paid for at each delivery, authorizes rescission of contract by vendor.

When title to chattels passes.

Cited in *Gill v. Benjamin*, 64 Wis. 362, 54 A. R. 619, 25 N. W. 445, holding that title to lumber to be delivered upon one's vessel and to be paid for when piled and measured on his dock, passes as soon as delivered upon vessel.

Condition precedent to performance of contract.

Cited in *Hoffman v. Ring*, 70 Wis. 372, 36 N. W. 25, holding agreement to keep lumber from accumulating on skids not condition precedent to performance of agreement to deliver lumber on skids as fast as sawed.

Evidence admissible under plea of nonassumpsit.

Cited in *Jackson v. Utz*, 18 Pa. Dist. R. 1163, 36 Pa. Co. Ct. 629; *Walls v. Walls*, 170 Pa. 48, 32 Atl. 649,—holding that in action on promissory note, plea of nonassumpsit entitles any evidence showing payment.

33 AM. REP. 757, PEABODY BLDG. & L. ASSO. v. HOUSEMAN, 89 PA. 261.**Who may sue for negligence.**

Cited in reference notes in 32 A. S. R. 565, as to what privity of contract will justify recovery for negligence; 52 A. S. R. 93, on who may sue for negligence; 54 A. S. R. 209, on necessity of privity of contract to liability for negligence.

Attorney's liability for negligence.

Cited in reference notes in 52 A. S. R. 93, on recovery for attorney's negligence; 57 A. S. R. 668, on attorney's liability to client for negligence.

Contractor's liability to third person for negligence.

Cited in reference note in 57 A. S. R. 208, on contractor's liability to third person for negligence.

Liability of abstractor for errors.

Cited in *Symms v. Cutter*, 9 Kan. App. 210, 59 Pac. 671, holding that abstractor's liability for errors in abstract and damages resulting therefrom extends only to person for whom abstract is made; *Mallory v. Ferguson*, 50 Kan. 685, 22 L.R.A. 99, 32 Pac. 410, holding that liability is to person for whom abstract made and not his grantee.

Cited in reference note in 54 A. S. R. 209, on negligence of searchers of record.

Cited in notes in 72 A. S. R. 319, on liability of abstractors; 95 A. S. R. 87, on liability of registers of deeds and recorders for misfeasance and nonfeasance in searching titles; 22 L.R.A. 99, on liability of officer for defect in abstract of title.

Right of trustee to delegate power to sell.

Cited in *Greensboro Ferry Co. v. New Geneva Ferry Co.* 34 Pa. Co. Ct. 33, holding that partner who holds partnership land as trustee, with power to sell, cannot delegate such power to another as attorney in fact.

33 AM. REP. 767, FIRST NAT. BANK v. REX, 89 PA. 308.**Duty and liability of bank as to special deposit.**

Cited in *Merchants' Nat. Bank v. Guilmartin*, 88 Ga. 797, 17 L.R.A. 322, 15 S. E. 831, holding bank not liable for loss of gratuitous special deposit, by theft of cashier, provided it was not guilty of negligence.

Cited in notes in 38 A. S. R. 781, on liability of banks as bailees of special

deposits; 32 L.R.A. 771, on measure of care required in keeping special deposit; 3 E. R. C. 623, on liability of bank for loss of property received for gratuitous safe keeping.

Liability of bailee for misappropriation by servant.

Cited in note in 29 L.R.A. 95, on liability of bailee for wrongful appropriation by his servant of things bailed where servant's duties give him some control of them.

Meaning of gross negligence.

Cited in *Trexler v. Baltimore & O. R. Co.* 28 Pa. Super. Ct. 207, to point that gross negligence implies something more than omission to exercise extraordinary care.

33 AM. REP. 769, FIRST NAT. BANK v. HOCH, 89 PA. 324.

Authority of national bank.

Cited in *Grow v. Cockrill*, 63 Ark. 418, 36 L.R.A. 89, 39 S. W. 60, holding that national bank is not authorized to act as broker in lending money of others; *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 A. S. R. 595, 47 N. W. 123, holding national bank has no power to enter into contracts of suretyship in which they have no interest; *Com. ex rel. Stewart v. First Nat. Bank*, 36 Pittsb. L. J. N. S. 118, 14 Pa. Dist. R. 721, holding national bank not authorized by law to hold and exercise office of borough treasurer; *Searle v. First Nat. Bank*, 2 Walk. (Pa.) 395, holding that national banks have no power to buy and sell stock for their customers.

Power of president to bind company.

Cited in *Templin v. Chicago, B. & P. R. Co.* 73 Iowa, 548, 35 N. W. 634, holding president of railroad company has no inherent power to let contract in behalf of company for construction of road, when same is already under contract by directors; *Beyer v. Rathfon*, 23 Lanc. L. Rev. 251, holding that president of trust company without general or specific authority cannot bind company by agreement to release mortgage; *Leachey v. Lancaster Development Co.* 24 Lanc. L. Rev. 275, holding that manager of land corporation, in charge of development of land, without authority to permit gratuitous use for raising of crops with agreement to pay for damages thereto caused by development of land; *Clarkson v. Keystone Oil Cloth Co.* 15 Montg. Co. L. Rep. 169, 23 Pa. Co. Ct. 189, 8 Pa. Dist. R. 593, holding that president of corporation cannot without authority bind company for agent's commissions in sale of its stock; *Campbell v. Pittsburg Bridge Co.* 23 Pa. Super. 138, holding president of corporation without authority to employ counsel to defend action against corporation and bind company for his compensation; *Bangor & P. R. Co. v. American Bangor Slate Co.* 203 Pa. 6, 52 Atl. 40 (affirming 8 North. Co. Rep. 141), holding that president of slate company has no inherent authority to bind company by contract to ship all its productions in certain way or by certain line; *National Bank & L. Co. v. Petrie*, 189 U. S. 423, 47 L. ed. 879, 23 Sup. Ct. Rep. 512, to point that bank is not bound by illegal contracts of its officers; *Simons v. Fisher*, 20 L.R.A. 554, 5 C. C. A. 311, 17 U. S. App. 1, 55 Fed. 905 (dissenting opinion), on right of president of bank, who is sole managing officer to borrow money for use of bank in regular course of business.

Cited in notes in 14 L.R.A. 357, on powers of president and vice president of corporation as to contracts; 12 L.R.A. 715, on liability of corporations for acts and contracts of its officers and agents.

Power of corporations to deal in other corporate stock.

Cited in note in 18 L.R.A. 253, on power of corporation to deal in stock of other corporations.

33 AM. REP. 771, WALSH v. COM. 89 PA. 419.**When vacancy in office exists.**

Cited in *Re Stavens*, 94 Pa. 281, to point that county election is void where incumbents of offices had been appointed within three months before such election; *Com. ex rel. Jones v. Dickert*, 195 Pa. 234, 45 Atl. 1058, holding that "vacancy" may occur by expiration of incumbent's term of office without successor appointed or elected; *Moreland v. Millen*, 126 Mich. 381, 85 N. W. 882, holding that appointing power of municipal officer by governor under new law being void, "vacancy" occurs which mayor should fill.

Cited in reference note in 19 A. S. R. 95, on vacancy in office.

— In new office.

Cited in *Knight v. Trigg*, 16 Idaho, 256, 100 Pac. 1060, holding "vacancy" applies to new office before it is filled; *Com. ex rel. Snyder v. Machamer*, 18 Pa. Co. Ct. 92, 5 Pa. Dist. R. 500, holding that "vacancy" exists on creation of new office, and in proper case governor's right to appoint thereto attaches; *People ex rel. Tucker v. Rucker*, 5 Colo. 455, holding that "vacancy" exists in office of criminal judge, immediately upon its creation by legislature; *State ex rel. Smith v. Askew*, 48 Ark. 82, 2 S. W. 349; *State ex rel. Hadley v. Burkhead*, 187 Mo. 14, 85 S. W. 901,—holding that "vacancy" existed in office of judge in new judicial district created, which should be filled in manner provided by legislature; *State ex rel. Faussett v. Harris*, 1 N. D. 190, 45 N. W. 1101, holding that "vacancy" in newly created office of district assessor, exists upon the creation thereof; *Cline v. Greenwood*, 10 Or. 230, holding that "vacancy" exists in office of judge immediately upon creation thereof by legislature; *State v. Scott*, 36 W. Va. 704, 15 S. E. 405, holding that "vacancy" exists in office of jury commissioner upon creation by legislature of said office; *Merchant's Nat. Bank v. McKinney*, 2 S. D. 106, 48 N. W. 841, holding that "vacancies" occurred in county offices by creation by legislature of new county and authority to county commissioners to fill offices; *Re 11th Ward Constable*, 7 North. Co. Rep. 187, holding that vacancy which may be filled, exists in office of constable of new ward in city; *State ex rel. Brown v. McMillan*, 108 Mo. 153, 18 S. W. 784, holding that "vacancy" exists in office of alderman upon legal creation of new wards in city.

— On change of classification of city.

Cited in *Wright v. Jacobs*, 12 Okla. 138, 70 Pac. 193, holding that offices exist and are vacant where city is proclaimed by governor a city of the first class.

— On acceptance of new constitution.

Cited in *Driscoll v. Jones*, 1 S. D. 8, 44 N. W. 726, holding that "vacancy" existed in office of court clerk, upon acceptance of new constitution, and incumbent should be appointed by lawful authority.

Nature of appointment to fill vacancy.

Cited in *Monash v. Rhodes*, 11 Colo. App. 404, 53 Pac. 236, holding that appointment by governor to vacancy during adjournment of legislature is for balance of term without confirmation by Senate.

33 AM. REP. 778, LANCASTER F. INS. CO. v. LENHEIM, 89 PA. 497.**Construction of insurance contract.**

Cited in reference note in 38 A. R. 687, on construction of written and printed conditions in fire insurance policy; 51 A. S. R. 107, on prevailing of written over printed conditions of insurance policy.

Cited in note in 14 E. R. C. 14, on rules of construction of contracts of insurance.

Avoidance of policy by violation of condition against keeping explosives.

Cited in *Szymkus v. Eureka F. & M. Ins. Co.* 114 Ill. App. 401, holding keeping of small quantity of benzine on insured premises for use in cleaning metals will not invalidate policy; *Norwaysz v. Thuringia Ins. Co.* 204 Ill. 334, 68 N. E. 551, holding violation of restriction as to use of gasoline avoids policy; *White v. Western Assur. Co.* 18 W. N. C. 279, 3 Sadler (Pa.) 267, 6 Atl. 113, 43 Phila. Leg. Int. 518, holding that keeping of petroleum on premises voids policy though for habitual use as fuel; *Heron v. Phoenix Mut. F. Ins. Co.* 180 Pa. 257, 57 A. S. R. 638, 36 L.R.A. 517, 40 W. N. C. 55, 36 Atl. 740, holding that violation of condition against keeping fire works voids policy though such articles part of "customary stock" of goods insured.

Annotation cited in *Ackley v. Phenix Ins. Co.* 25 Mont. 272, 64 Pac. 665, holding policy insuring "articles usually kept for sale in retail drug stores" permits keeping of benzine, though printed condition prohibits keeping it without consent; *Mascott v. Granite State F. Ins. Co.* 68 Vt. 253, 35 Atl. 75, holding that keeping of benzine without consent will not void policy, if such article included in general clause "and such other articles as are usually kept in signpainter's shop."

Cited in reference notes in 56 A. R. 810, on effect of provision against keeping gun powder, on insurance policy covering general merchandise in which powder is usually kept; 51 A. S. R. 107; 13 A. S. R. 585,—on conditions in insurance policies against combustibles and dangerous substances.

Disapproved in *Yoch v. Home Mut. Ins. Co.* 111 Cal. 503, 34 L.R.A. 857, 44 Pac. 189, holding that violation of printed condition against keeping of gasoline will not invalidate policy insuring stock "such as is usually kept in country store."

Effect of special clause upon general clause in policy.

Cited in *Mitchell Furniture Co. v. Imperial F. Ins. Co.* 17 Mo. App. 627, holding that special clause in policy of fire insurance which creates exception to general clause, governs latter clause; *Snyder v. Groff*, 8 Pa. Dist. R. 291, to point that construction of insurance policy is to proceed upon view of entire instrument.

33 AM. REP. 784, RICHARDSON v. CLEMENTS, 89 PA. 503.**Construction and effect of conditions in contract.**

Cited in *Reading v. United Traction Co.* 202 Pa. 571, 52 Atl. 106 (affirming 24 Pa. Co. Ct. 629), holding that fact that condition for use of street requires railway company to have right of way with specified pavement, does not preclude city from thereafter requiring more expensive pavement to correspond with rest of street; *McMillin v. Titus*, 222 Pa. 500, 72 Atl. 240, holding contract should be construed in light of surrounding circumstances.

—Reservations in deed.

Cited in *Corey v. Edgewood*, 18 Pa. Super. Ct. 216, holding that reservation in deed of right of way of railroad used to transport coal from mines will not

be construed as importing condition that it should not be used for other purposes; *Philadelphia v. Peters*, 18 Pa. Super. Ct. 388, holding that exception or reservation in deed should be construed most favorably to grantee when language doubtful; *Lehigh Coal & Nav. Co. v. Gluck*, 5 Pa. Co. Ct. 662, to point that condition in deed is to be construed most favorably to grantee only when language is doubtful.

—Restrictions in deed.

Cited in *Ogonts Land & Improv. Co. v. Johnson*, 36 W. N. C. 307, 11 Lanc. L. Rev. 324, 3 Pa. Dist. R. 642, 14 Pa. Co. Ct. 86, holding that restriction in deed that building shall be erected certain space back from fence line is violated by encroachment on space by porch extending entire width of house.

—Effect of conditions in contract of agency.

Cited in *New Idea Pattern Co. v. Whitner*, 215 Pa. 193, 64 Atl. 518, holding that clause in contract to sell certain dress patterns that agents should "endeavor at all times to conserve best interests of agency" does not prohibit selling of other patterns; *Kendall v. Klapperthal Co.* 202 Pa. 596, 52 Atl. 92, to point that contract must be considered in light of surrounding circumstances and objects manifestly to be accomplished.

Creation and conveyance of easements.

Cited in reference note in 47 A. R. 188, on right to make changes as to subject-matter of easement.

Cited in notes in 136 Am. St. Rep. 691, 693, on creation and conveyance of easements appurtenant; 10 E. R. C. 178, on change in dominant tenant as affecting easement.

Effect of vacancy stipulation where house is insured while vacant.

Cited in *Moore v. Niagara F. Ins. Co.* 109 Pa. 49, 85 A. S. R. 771, 48 Atl. 869, holding that stipulation as to vacancy will be rejected where company insures house it knows to be vacant.

Extent of right conferred by grant of easement.

Cited in *Patterson v. Fair*, 8 North Co. Rep. 111, holding that grant of privilege to have water conducted by pipes confers right of entry upon premises; *Bryn Mawr Hotel Co. v. Baldwin*, 12 Montg. Co. L. Rep. 145, holding that right to drain upon another's land sewage from private dwellings does not permit augmenting of sewage by conversion of property into boarding school.

33 AM. REP. 787, KANE v. COM. 89 PA. 522.

Power of jurors as to law in criminal cases.

Cited in *State v. Koch*, 33 Mont. 490, 85 Pac. 272, 8 A. & E. Ann. Cas. 804, holding that jurors are judges of law; *Com. v. Goldberg*, 4 Pa. Super. Ct. 142, holding that in criminal case jury has right to determine law and facts under direction of court; *Com. v. McManus*, 143 Pa. 64, 14 L.R.A. 89, 21 Atl. 1018, 28 W. N. C. 497, 21 Pittsb. L. J. N. S. 467, 48 Phila. Leg. Int. 476, holding that jurors are not judges of law; *Com. v. Havrilla*, 38 Pa. Super. Ct. 292, holding court cannot instruct jury to convict prisoner on criminal trial for failure of election officer to deliver returns; *State v. Daley*, 54 Or. 514, 103 Pac. 502, holding jury should apply law in criminal case as given them by court.

Annotation cited in *Sparf v. United States*, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, holding jurors not judges of law in criminal cases.

Cited in reference notes in 35 A. R. 8; 36 A. R. 120,—as to whether jury in

criminal case are judges of law and facts; 36 A. S. R. 802, on jury as judges of law.

Cited in note in 42 A. S. R. 294, on jury as judges of law and fact in criminal libel.

Distinguished in *Com. v. Costello*, 1 Pa. Dist. R. 745, holding that jury has no right to judge of law separately from facts according to its own motion.

Disapproved in *State v. Burpee*, 65 Vt. 1, 36 A. S. R. 775, 19 L.R.A. 145, 25 Atl. 964, holding that jurors are not paramount judges of law in criminal cases; *State v. Dickey*, 48 W. Va. 325, 37 S. E. 695, holding jury in criminal case not judge of law contrary to court's instructions.

Meaning of day as used in statutes.

Cited in *Eureka v. Diaz*, 89 Cal. 467, 26 Pac. 961, holding that "day" is period of time between any midnight and midnight following in construction of prohibitory statutes; *Rose v. State*, 107 Ga. 697, 33 S. E. 439, holding that period of time contemplated by "days of election" as used in Penal Code with reference to sale of liquors is day of twenty four hours commencing and ending at midnight; *State v. Meagher*, 124 Mo. App. 333, 101 S. W. 634, holding that "day" is twenty four hours beginning and ending at midnight; *Lucas v. Lycoming County*, 34 Pa. Co. Ct. 302, holding that "day" as used in personal registry act of 1896 means day as defined at common-law; *Marquette v. Berks County*, 39 W. N. C. 325, 3 Pa. Super. Ct. 36, holding that meaning of "day" in statute providing for return of assessments is day of twenty-four hours; *Lucas v. Lycoming County*, 17 Pa. Dist. R. 752, holding day as used in eight hour law means common law day.

Cited in note in 78 A. S. R. 385, on meaning of "day" in computation of time.

33 AM. REP. 793, STEPHENS v. SHAFER, 48 WIS. 54, 3 N. W. 835.

Effect against sureties on official bond of judgment against principal.

Cited in *Ingle v. BATESVILLE Grocery Co.* 89 Ark. 378, 117 S. W. 241, holding judgment against insurance company is prima facie evidence in suit upon bond given by company under statute; *Henry v. Heldmaier*, 129 Ill. App. 86, holding judgment against principal competent evidence against surety; *Blyth v. People*, 16 Colo. App. 526, 66 Pac. 680, holding in action upon sheriff's bond to recover money collected upon execution, order of court stating amount to be turned over to judgment plaintiff conclusive upon sureties; *Beauchaine v. McKinnon*, 55 Minn. 318, 43 A. S. R. 506, 56 N. W. 1065; *Barker v. Wheeler*, 60 Nev. 470, 83 A. S. R. 541, 83 N. W. 678,—holding judgment against principal prima facie evidence against sureties when sued upon official bond; *Ihrig v. Scott*, 13 Wash. 559, 43 Pac. 633, holding judgment obtained against surety upon statutory bond prima facie sufficient to warrant recovery against sureties; *McConnell v. Poor*, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968, to point that judgment against principal is binding on sureties on official bond; *Grafton v. Hinkley*, 111 Wis. 46, 86 N. W. 859, to point that surety who contracts with reference to conduct of party to suit or proceeding is concluded by judgment against principal.

Cited in reference notes in 37 A. R. 236, on force on evidence against sureties of judgment against principal; 38 A. S. R. 631, as to when judgments are conclusive upon indemnitors.

Cited in notes in 83 A. D. 387, on conclusiveness of judgment against officer

for misconduct of deputy on sureties of deputy; 37 A. R. 252; 3 A. S. R. 750; 34 A. S. R. 447; 37 A. S. R. 258,—on judgment against principal as evidence against surety; 22 A. S. R. 207, on effect of judgment on indemnitor when notice of suit not given; 52 L.R.A. 185, as to when judgment against officer is prima facie evidence in action on bond of deputy officer.

Evidence admissible against surety in action on bond.

Cited in *Clark v. Wilkinson*, 59 Wis. 543, 18 N. W. 481, holding guardian's account to court admissible against surety to show amount on hand when contract of suretyship entered into; *Goldman v. Fidelity & D. Co.* 125 Wis. 390, 104 N. W. 80, holding that in action against surety for principal's embezzlement, entries, reports and statements made in course of duties of guaranteed employment are admissible.

33 AM. REP. 804, WALLACE v. MENASHA, 48 WIS. 79, 4 N. W. 101.

Liability of municipal corporation for torts of its officers.

Cited in *Naumburg v. Milwaukee*, 77 C. C. A. 67, 146 Fed. 641, holding city which maintains drawbridge, liable for negligence of tender in operation thereof; *Howard v. Brooklyn*, 30 App. Div. 217, 51 N. Y. Supp. 1058, holding municipality is not liable for failure of its officers to pass ordinance forbidding bicycle riding on walks; *Schultz v. Milwaukee*, 49 Wis. 254, 35 A. R. 779, 5 N. W. 342, holding that failure of police officers to suppress coasting on public streets does not render city liable for injuries suffered by pedestrian; *Durkee v. Kenosha*, 59 Wis. 123, 48 A. R. 480, 17 N. W. 677, holding city liable for acts of its officers in seizing and selling property to pay void special assessment for benefits for opening of street; *Robinson v. Rohr*, 73 Wis. 436, 9 A. S. R. 810, 2 L.R.A. 366, 40 N. W. 668, holding city not liable for negligence or wrong of street commissioners in repairing bridge; *Crandon v. Forest County*, 91 Wis. 239, 64 N. W. 847, holding county not liable for wrongful or illegal act of county board in canceling or remitting tax; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420, holding city not liable for death of pupil caused by sewer gas escaping into school building, due to neglect in keeping sewer open; *Uren v. Walsh*, 57 Wis. 98, 14 N. W. 902, to point that municipal corporation is not liable for unlawful acts of its officers where they act within scope of their authority.

Cited in reference notes in 100 A. D. 358, on liability of city for unauthorized acts of its officers; 100 A. D. 359, on liability of city for acts of its officers or agents within the scope of the powers of the corporation and of their employment; 13 A. S. R. 686, on liability of municipal corporation for torts of its police officers and other agents.

Cited in notes in 30 A. S. R. 410, on municipal liability for wrongful acts of officers and agents not authorized by municipality; 1 L.R.A. 608, on necessity that officer's acts be within scope of his employment to render corporation liable.

Distinguished in *King v. Oshkosh*, 75 Wis. 517, 44 N. W. 745, holding city liable for dangerous obstruction unnecessarily left upon street, after notice of its existence and time to remove same.

33 AM. REP. 809, SENSENBRENNER v. MATTHEWS, 46 WIS. 250, 3 N. W. 599.

When lien abandoned.

Cited in *Citizens' Bank v. Dows*, 68 Iowa, 400, 27 N. W. 459, holding lien of pledge abandoned by pledgee's attachment of property; *Kearney Mill. & Elevator*

Co. v. Union P. R. Co. 97 Iowa, 719, 59 A. S. R. 434, 66 N. W. 1059, holding that election to rescind sale by stopping goods in transitu waiver of right to enforce vendor's lien.

Who may maintain replevin.

Cited in **Button v. Hoffman**, 61 Wis. 20, 50 A. R. 131, 20 N. W. 667, holding that owner, by purchase or otherwise, of all capital stock of private corporation cannot maintain replevin for corporate property in own name.

33 AM. REP. 811, MORTON v. SMITH, 48 WIS. 265, 4 N. W. 330.

Liability of lot owner for defective sidewalk.

Cited in **Lincoln v. Janesch**, 63 Neb. 707, 93 A. S. R. 478, 56 L.R.A. 762, 89 N. W. 280, holding that neglect of lawfully imposed duty to repair sidewalk, renders lotowner liable for injuries sustained thereby.

Cited in reference note in 1 A. S. R. 433, on liability of landowner for defective or dangerous condition of sidewalk.

Contributory negligence as question for jury.

Cited in **Richards v. Oshkosh**, 81 Wis. 226, 51 N. W. 256, holding that question of contributory negligence in action for injuries sustained by falling upon icy walk, is for jury.

Discretion of court as to view by jury.

Cited in note in 42 L.R.A. 374, as to how discretion by court as to view by jury is exercised.

33 AM. REP. 815, NORTHRUP v. GERMANIA F. INS. CO. 48 WIS. 420, 4 N. W. 350.

Agent's authority to represent both insurer and insured.

Cited in **British Ins. Co. v. Lambert**, 26 Or. 199, 37 Pac. 909, holding that oral contract of insurance made by agent of insurance company, while acting as assured's agent, and not assuming to represent company in contract, but dealing with its officers who had full authority to act, is binding upon company; **Todd v. German American Ins. Co.** 2 Ga. App. 789, 59 S. E. 94; **Johnson v. North British & M. Ins. Co.** 66 Ohio St. 6, 63 N. E. 610,—to point that agent can properly represent both parties so long as duties are consistent.

Adverse interest in contract estopping agent to bind principal.

Cited in **German Ins. Co. v. Independent School Dist.** 25 C. C. A. 492, 49 U. S. App. 271, 80 Fed. 366, holding contract for insurance on school property made by agent, who is also member of school board, binding on company; **Wildberger v. Hartford F. Ins. Co.** 72 Miss. 338, 48 A. S. R. 558, 28 L.R.A. 220, 17 So. 282, holding policy issued by local agent to himself insuring stock of goods held by him as receiver, void without insurer's ratification.

Cited in note in 9 L.R.A.(N.S.) 1086, on power of insurance agent to bind company by insuring property in which he is interested personally or as agent without knowledge of the company.

33 AM. REP. 817, IRVINE v. ADAMS, 48 WIS. 468, 4 N. W. 573.

Parol evidence as to true relation of parties to note.

Cited in **American & G. Mortg. & Invest. Corp. v. Marquam**, 62 Fed. 960, holding that liability of accommodation signer as surety may be shown by parol in action by pay to foreclose mortgage; **Drescher v. Leif**, 11 Colo. App. 62,

52 Pac. 685, holding parol evidence admissible to show that one appearing to be maker of note is in reality, surety; *Ritter v. Bruss*, 116 Wis. 55, 92 N. W. 361, holding error to exclude testimony to show that married woman signed note as surety for husband, with payees knowledge.

Cited in reference notes in 34 A. R. 816, on parol evidence to show character in which party signed negotiable instrument; 11 A. S. R. 726, on admissibility of parol evidence to show that apparent joint maker of note is surety; 60 A. S. R. 897, on parol evidence as to real character of apparent maker of note.

Cited in notes in 55 A. S. R. 843, on parol evidence as to true relation of parties to note; 20 L.R.A. 712, on parol evidence to show who is principal and who surety on note not under seal.

Extension of time for payment of debt which releases surety.

Cited in *Omaha Nat. Bank v. Johnson*, 111 Wis. 372, 87 N. W. 237, holding that extension of time for payment by taking of new notes and payment of interest in advance without surety's knowledge discharges surety; *Fanning v. Murphy*, 126 Wis. 538, 110 A. S. R. 946, 4 L.R.A.(N.S.) 666, 105 N. W. 1056, 5 A. & E. Ann. Cas. 435, holding that mere request for extension of due date of debt at contract rate of interest and consent thereto does not discharge surety.

Cited in reference note in 22 A. S. R. 567, on void extension of time as release of surety.

33 AM. REP. 821, QUAIFE v. CHICAGO & N. W. R. CO. 48 WIS. 513, 4 N. W. 658.

Admissibility of statements of injured party.

Cited in *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227, holding that declarations in action for personal injuries, subsequent to injury, as to pains in his back, are admissible.

Annotation cited in *Steel v. Shafer*, 39 Ill. App. 185, to point that statements of injured party made subsequently and not substantially at time of occurrence, as to circumstances, are not admissible.

Cited in reference notes in 54 A. R. 312, on competency of declarations of person injured; 2 A. S. R. 39, on admissibility of statements of plaintiff as to his injuries in action for damages; 3 A. S. R. 240, on admissibility as part of *res gestæ* of declarations of person injured.

Cited in notes in 19 L. ed. U. S. 438, on admissibility of declarations of injured party as to injury, expressions of pain, suffering, etc.; 2 A. S. R. 39, on contemporaneous expressions and exclamations as part of the *res gestæ*; 11 E. R. C. 293, on the doctrine of *res gestæ*.

— When made to physician.

Cited in *Union P. R. Co. v. Novak*, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 573, holding that physician, in describing physical injuries, may testify as to what patient said as to bodily conditions; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572; *Indiana Union Traction Co. v. Jacobs*, 167 Ind. 85, 78 N. E. 325, holding that declarations of patient to her physician concerning injury are admissible; *Gulf, C. & S. F. R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608, holding that medical expert who has treated injured party may testify to statements such person made as to sufferings or symptoms past as well as present; *Bridge v. Oshkosh*, 71 Wis. 363, 37 N. W. 409, holding that evidence of complaints made by injured person to attending physicians or others is admissible; *Abbot v. Heath*, 84 Wis. 314, 54 N. W. 574, holding that physician

Am. Rep. Vol. XVII.—47.

who examined injured party for sole purpose of testifying in his behalf as expert, cannot testify as to statements made by injured party as to his symptoms; *Gulf, C. & S. F. R. Co. v. Moore*, 28 Tex. Civ. App. 603, 68 S. W. 559; *Stone v. Chicago, St. P. M. & O. R. Co.* 88 Wis. 98, 59 N. W. 457; *Block v. Milwaukee Street R. Co.* 89 Wis. 371, 46 A. S. R. 849, 27 L.R.A. 365, 61 N. W. 1101,—holding that physician's testimony of patient's statements made for purpose of receiving advice and treatment are admissible; *Stewart v. Everts*, 76 Wis. 35, 20 A. S. R. 17, 44 N. W. 1092, holding testimony of physician as to declarations of injured party, as to feelings, made between time of injury and trial, is incompetent; *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 204, 54 A. R. 312, 3 N. E. 836; *State v. Blydenburg*, 135 Iowa, 284, 112 N. W. 634, 14 A. & E. Ann. Cas. 443; *Atchison, T. & S. F. R. Co. v. Johns*, 36 Kan. 769, 59 A. R. 609, 14 Pac. 237,—to point that statements made to physician or surgeon while examining party as patient are admissible.

Cited in reference note in 35 A. R. 372, on admissibility of declarations of patient to physician.

Cited in note in 21 L.R.A.(N.S.) 827, 828, on admissibility as *res gestæ* of statements or declarations by injured person to physician examining him in order to qualify witness.

Exclamation of pain as evidence.

Cited in *West Chicago Street R. Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996, holding statements of pain, not made to physician, inadmissible not part of *res gestæ*; *Jackson v. Missouri, K. & T. R. Co.* 23 Tex. Civ. App. 319, 55 S. W. 376, holding that witness may testify to exclamation of pain made by injured party, though after suit filed; *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298, holding that testimony as to expressions of pain uttered by deceased at time of injury, and from that time to her death, and indicating where such pains were located, is admissible; *Rideout v. Winnebago Traction Co.* 123 Wis. 297, 69 L.R.A. 601, 101 N. W. 672, holding that witnesses may testify to exclamations or statements of injured party shortly after accident indicating pain and suffering; *Goss v. Missouri P. R. Co.* 50 Mo. App. 614, to point that expressions of bodily feeling are competent evidence.

Cited in note in 13 L.R.A. 466, on admissibility of declarations of pain and suffering as evidence.

—Admissibility of conclusions of physician.

Cited in *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389; *Louisville, N. A. & C. R. Co. v. Snyder*, 117 Ind. 435, 10 A. S. R. 60, 3 L.R.A. 434, 20 N. E. 284,—holding that physician testifying as expert may give opinion as to nature and extent of injury, where based in part on injured party's statements; *Brown v. Third Ave. R. Co.* 19 Misc. 504, 43 N. Y. Supp. 1094, to point that medical expert may give opinion as to whether subjective symptoms were feigned or real; *Federal Betterment Co. v. Reeves*, 73 Kan. 107, 4 L.R.A.(N.S.) 460, 84 Pac. 560 (dissenting opinion), on right to exclude conclusions of physician, testifying as expert, as to permanency of injury based upon patient's statements and own examination.

Degree of proof required in negligence action.

Cited in *Whitney v. Clifford*, 57 Wis. 156, 14 N. W. 927, holding that issue is to be determined by jury upon weight or preponderance of evidence.

Duty of railroad company to light station platform.

Cited in *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 6 L.R.A. 193,

21 N. E. 968, holding that railroad company must provide lights if passengers are discharged after dark.

Duty of railroad company as to place of stopping trains.

Cited in *Hartwig v. Chicago & N. W. R. Co.* 49 Wis. 358, 5 N. W. 805, on duty of railroad company as to proper place of stopping train.

33 AM. REP. 830, BLUMER v. PHOENIX INS. CO. 48 WIS. 535, 4 N. W. 674.

Answers in application as continuing warranty.

Cited in *Baker v. German F. Ins. Co.* 124 Ind. 490, 24 N. E. 1041, holding that stipulation will not be construed as continuing warranty unless language clearly indicates such intention; *Chrisman v. State Ins. Co.* 10 Or. 283, 18 Pac. 466, holding answers and statements in application, made part of policy by reference, are warranties; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.* 74 Wis. 470, 5 L.R.A. 779, 43 N. W. 487, holding that stipulation in application for fire insurance that building is "dwelling house" constitutes continuing warranty that it should not be used for other purpose; *Straker v. Phenix Ins. Co.* 101 Wis. 413, 77 N. W. 752, holding that stipulation in application for fire insurance that there is no exposure is continuing warranty; *McGowan v. Supreme Court, I. O. F.* 107 Wis. 462, 83 N. W. 775, holding that positive answers of insured to material questions in application for insurance constitute continuing warranties; *Hart v. Niagara F. Ins. Co.* 9 Wash. 620, 27 L.R.A. 86, 38 Pac. 213, on distinction between promissory representations and continuing warranties.

Construction of term "vacant and unoccupied" used in policy.

Cited in reference notes in 29 A. S. R. 773, on signification of term "vacant and unoccupied" in policy; 34 A. S. R. 598, on condition in policy against premises becoming "vacant and unoccupied."

33 AM. REP. 838, KNAGGS v. GREEN, 48 WIS. 601, 4 N. W. 760.

Right of infant to disaffirm contract without return of consideration.

Cited in *Kellogg v. Adams*, 51 Wis. 138, 37 A. R. 815, 8 N. W. 115, holding gift from father to minor child, fully executed by delivery will be upheld and is irrevocable; *Grauman, M. & C. Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50, on right of infant to avoid contract of accommodation maker of note on coming of age without returning consideration.

Cited in notes in 18 A. S. R. 661, on disaffirmance by infant of part of transaction; 26 L.R.A. 178, on necessity of infant paying purchase money if property remains in his possession.

Validity of gift to minor child.

Cited in *Thormachlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089, to point that infant cannot disaffirm contract because of infancy when made, without returning any consideration received.

33 AM. REP. 841, JENKINS v. McCURDY, 48 WIS. 628, 4 N. W. 807.

Wooden addition to building as part of realty.

Cited in *Lipsky v. Borgmann*, 52 Wis. 256, 38 A. R. 735, 9 N. W. 158, holding wooden addition to building intended to be permanent is part of realty.

Cited in note in 54 A. D. 589, on ownership of property affixed to realty.

When findings of fact will not be disturbed.

Cited in *Althouse v. Baldwin*, 56 Wis. 398, 14 N. W. 441, holding that findings of fact, by trial court or referee will not be disturbed unless records show them to be clearly against preponderance of evidence.

NOTES

ON THE

AMERICAN REPORTS.

CASES IN 34 AM. REP.

34 AM. REP. 1, HUTCHINSON v. STATE, 62 ALA. 3.

What constitutes concealed weapon.

Cited in *Redus v. State*, 82 Ala. 53, 2 So. 712, holding that person might be convicted of carrying concealed pistol though mainspring was broken and it could not be discharged in usual way.

Cited in reference notes in 34 A. R. 102, on carrying concealed weapons in parts; 36 A. R. 15, on carrying pistol with parts separated as carrying concealed weapon; 8 A. S. R. 447, on carrying concealed weapons as criminal offense; 61 A. S. R. 833, on carrying concealed weapons.

34 AM. REP. 2, DOTSON v. STATE, 62 ALA. 141.

What constitutes bigamy.

Cited in reference note in 20 A. S. R. 379, on what constitutes crime of bigamy.

Relief of accused as affecting criminal intent.

Cited in *Jones v. State*, 67 Ala. 84, holding that rumor or belief that former husband was dead is no defense to indictment for bigamy; *Towles v. United States*, 19 App. D. C. 471, holding that in prosecution for forgery where defense pleads that he believed that he had authority to use name, jury can only determine whether he had reasonable grounds for so believing; *State v. Cadwallader*, 154 Ind. 607, 57 N. E. 512, holding that presumption that bank president knew of insolvent condition of bank at time deposit was received may be rebutted by evidence that without his fault he was ignorant of its condition.

Cited in reference notes in 38 A. R. 24, on seller's liability for selling liquor to minors though mistakingly supposing them of age; 9 A. S. R. 270, on remarriage without reasonable belief of first wife's death as bigamy.

Cited in notes in 93 A. D. 254; 126 Am. St. Rep. 207; 27 L.R.A. (N.S.) 1098,—on belief in termination of former marriage as defense to prosecution for bigamy; 8 E. R. C. 44, on necessity of guilty intent to make act crime.

Statutes in relation to drawing juries as directory.

Cited in *Ex parte McCoy*, 64 Ala. 201, holding that statutory provisions in relation to drawing and selecting jurors are directory; *Murphy v. State*, 86 Ala. 45, 5 So. 432; *Forney v. State*, 98 Ala. 19, 13 So. 540,—to point that under code of 1886 separate and successive drawing of grand and petit juries is not necessary.

34 AM. REP. 4, HERRING v. SKAGGS, 62 ALA. 180.**Liability of principal upon warranty made by agent.**

Cited in *Alabama G. S. R. Co. v. Carmichael*, 90 Ala. 19, 9 L.R.A. 388, 8 So. 87, to point that person dealing with one not general agent is bound to inform himself of agent's powers; *Cawthon v. Lusk*, 97 Ala. 674, 11 So. 731, holding that telegram to agent stating price, is sufficient authority for him to make completed sale, though his general authority was to sell subject to confirmation; *Troy Grocery Co. v. Potter*, 139 Ala. 359, 36 So. 12, holding that warranty of traveling salesman that fish to be shipped to fill order would keep for one year is not binding upon principal; *Philips & B. Mfg. Co. v. Wild Bros.* 144 Ala. 545, 39 So. 359, holding that burden of proof of agent's authority to make warranty is upon vendee in action upon warranty; *Bierman v. City Mills Co.* 10 Misc. 140, 30 N. Y. Supp. 929, holding that manufacturer is not liable upon agent's warranty, in absence of express authority, unless upon evidence of usage to warrant upon such sales; *Reese v. Bates*, 94 Va. 321, 26 S. E. 865, holding that it is question for jury whether or not agent had authority to warrant article sold where it is shown that warranty is usually given by agents upon like sales; *Pickert v. Marston*, 68 Wis. 465, 60 A. R. 877, 32 N. W. 550, holding that agent employed to sell has no implied power to warrant unless sale is one which is usually attended with warranty.

Cited in reference notes in 55 A. R. 828, on power of sales agent to warrant a safe as burglar proof; 37 A. S. R. 205, on power of selling agent to warrant.

Liability of principal for tort of agent.

Cited in *Burns v. Campbell*, 71 Ala. 271, holding that principal ratifying trespass by agent after suit brought cannot be made defendant; *Herring v. Skaggs*, 73 Ala. 446, holding that principal retaining purchase money cannot claim immunity from agent's fraud on ground that agent's act was unauthorized.

Sufficiency of complaint for false warranty.

Cited in *Herring v. Skaggs*, 73 Ala. 446, holding that complaint in action for false warranty on sale of property which conforms substantially to form prescribed by code for breach of warranty on sale of chattel is sufficient; *Tyler v. Moody*, 111 Ky. 191, 98 A. S. R. 406, 54 L.R.A. 417, 63 S. W. 433, holding that buyer of gas machine, warranted not to explode, need not allege in action on warranty that seller knew warranty was false.

Remedy of vendee upon breach of warranty.

Cited in *Pacific Guano Co. v. Mullen*, 66 Ala. 582, holding that purchaser of article manufactured for him for special purpose may refuse to pay for same if not adapted for purpose.

Measure of damages for breach of warranty.

Cited in *Higgins v. Mansfield*, 62 Ala. 267, to point that in action for breach of warranty only such damages as are natural and proximate consequence of act complained of can be recovered; *Bell v. Reynolds*, 78 Ala. 511, 56 A. R. 52,

to point that amount of damages may be aggravated by fraud or bad faith in making warranty; *Western R. Co. v. Mutch*, 97 Ala. 194, 38 A. S. R. 179, 21 L.R.A. 316, 11 So. 894, to the point that proximate cause of event is that which in natural and continuous sequence, unbroken by any new cause, and produces that event; *Jones v. Ross*, 98 Ala. 448, 13 So. 319, holding that purchaser of horse, falsely warranted to be gentle, may recover for personal injury caused by horse running away; *Deane v. Michigan Stove Co.* 69 Ill. App. 106, holding that purchaser of safe, with warranty that it was burglar proof, might in action on warranty recover amount taken from same by burglars; *Bruce v. Fiss, D. & C. Horse Co.* 47 App. Div. 273, 62 N. Y. Supp. 96, holding that purchaser of horse with warranty of gentleness cannot recover for injury caused by viciousness after his discovery of same.

Cited in notes in 40 A. D. 303, on measure of damages for breach of warranty of soundness; 3 L.R.A.(N.S.) 1048, on personal injuries as element of damages for breach of warranty; 6 E. R. C. 623, on measure of damages recoverable on breach of a contract.

Distinguished in *Dayton v. Hooglund*, 39 Ohio St. 671, holding that authority without restrictions to agent carries with it authority to warrant that article manufactured is equal to sample.

Admissibility of evidence of witness's mental operations.

Cited in *Wheless v. Rhodes*, 70 Ala. 419; *Adams v. Thornton*, 82 Ala. 260, 3 So. 20,—holding that party testifying cannot state uncommunicated reasons or motive for doing act; *City Nat. Bank v. Jeffries*, 73 Ala. 183, holding that mental suffering is not subject of direct proof, but is inference for jury to draw; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 30 A. S. R. 65, 9 So. 722, to the point that reasons which conduced to act on omission to which witness deposes is inadmissible; *Willis v. Western U. Teleg. Co.* 69 S. C. 531, 104 A. S. R. 628, 48 S. E. 538, 2 A. & E. Ann. Cas. 52, holding that in action for mental anguish for failure to receive telegram party's statement of his particular apprehensions from such failure are inadmissible.

Cited in note in 23 L.R.A.(N.S.) 368, 370, on right of one to testify as to his uncommunicated belief, motive or intention.

Construction of warranty as insurance.

Cited in *Denison v. Taylor*, 6 Ont. L. Rep. 93, holding that warranty that safe is burglar proof will not be construed as insuring contents.

Implied warranty of fitness.

Cited in note in 22 L.R.A. 190, on implied warranty of fitness of articles by one manufacturing them for special purpose.

False representations.

Cited in note in 40 L. ed. U. S. 546, on fraud and false representations and their effect.

34 AM. REP. 15, NATIONAL COMMERCIAL BANK v. MOBILE, 62 ALA. 284.

Taxation of national banks by state.

Cited in *Stapylton v. Thaggard*, 33 C. C. A. 353, 62 U. S. App. 638, 91 Fed. 93, holding that assessment in lump sum of all personal property of national bank to bank itself cannot be regarded as one against stockholders on their shares; *Sumter County v. National Bank*, 62 Ala. 464, 34 A. R. 30, to point that capital

stock of national bank cannot be subject of state taxation; *Pollard v. State*, 65 Ala. 628, holding that state can only tax national banks at rate and in manner and on conditions authorized by Congress; *Maguire v. Revenue & Road Comrs.* 71 Ala. 401, holding that prior to act of 1880 there was no statute authorizing assessment of shares in national banks for taxes; *State Bank v. Board of Revenue*, 91 Ala. 217, 8 So. 852, holding that under statute state and national banks, or shareholders in them, are equally entitled to deduct from value of shares when assessed for taxation, amount of shareholder's indebtedness; *State v. Thomas Cruse Sav. Bank*, 21 Mont. 50, 45 L.R.A. 760, 52 Pac. 733, holding that statute which imposes license fees does not conflict with constitution although national banks are not subject thereto; *First Nat. Bank v. Greig*, 21 Nev. 404, 32 Pac. 641, holding that national banks are only taxable upon shares of stock owned by shareholder's therein, and upon real estate.

Cited in reference note in 34 A. R. 31, on validity of tax on stock of national bank.

Cited in notes in 96 A. D. 292, on right of state to tax realty of national bank; 96 A. D. 292, 293, 295, on right of state to tax shares of stock of national bank; 13 L.R.A. 616; 96 A. D. 291,—on right of state to tax capital stock of national banks; 69 A. S. R. 41; 96 A. D. 296,—on right of state to require bank to pay for shareholder's tax on their shares; 69 A. S. R. 40, on state taxation of national banks; 69 A. S. R. 43, on state taxation of shares and capital stock of national bank; 45 L.R.A. 741, on right of state to require national bank to pay tax on shares.

When injunction lies to restrain collection of taxes.

Cited in *New Decatur v. Nelson*, 102 Ala. 556, 15 So. 275; *Ensley v. McWilliams*, 145 Ala. 159, 117 A. S. R. 26, 41 So. 296,—holding that unless there are special circumstances bringing it within some recognized head of equity jurisprudence injunction will not lie to restrain collection of taxes.

Cited in note in 96 A. D. 297, on right to enjoin collection of taxes assessed against national banks.

Proceedings to enforce tax on land without reference to owner.

Cited in *Hadley v. Hadley*, 114 Tenn. 156, 87 S. W. 250, to the point that where tax is imposed on land without reference to ownership proceedings to enforce payment are against land itself.

Running of limitation against action to redeem from tax sale.

Cited in *Jones v. Randle*, 68 Ala. 258, holding that statutory bar to actions brought to recover land sold for taxes begins to run from time deed is executed.

34 AM. REP. 22, BUCKALEW v. STATE, 62 ALA. 334.

What constitutes lottery.

Cited in *Johnson v. State*, 83 Ala. 65, 3 So. 790, holding that person taking part in raffle by throwing dice in distribution of prizes in public place mentioned in statute is guilty of violation of gaming laws; *Yellow-Stone Kit v. State*, 88 Ala. 196, 16 A. S. R. 38, 7 L.R.A. 599, 7 So. 338, holding that person distributing by lot a few prizes among large number of ticket holders is not guilty of running lottery unless valuable consideration was paid for tickets; *Paulk v. Jasper Land Co.* 116 Ala. 178, 22 So. 495, to point that lottery is scheme whereby person upon giving valuable consideration becomes entitled to chance to get something for nothing in return; *Reeves v. State*, 105 Ala. 120, 17 S. 104; *Cross*

v. People, 18 Colo. 321, 36 A. S. R. 292, 32 Pac. 821,—holding that valuable consideration must be paid for chance to draw prize by lot to bring transaction within statute concerning lotteries; **Reilly v. Gray**, 77 Hun, 402, 28 N. Y. Supp. 811, holding that lottery is scheme for distribution of prizes by chance, either in money or in specific articles.

Cited in reference note in 48 A. R. 171, on guessing at number as lottery.

Cited in notes in 7 L.R.A. 599, on what constitutes lottery; 10 L.R.A. 60, on lotteries and lottery tickets.

Modified in **Loiseau v. State**, 114 Ala. 34, 62 A. S. R. 84, 22 So. 138, holding that general assembly has no authority to authorize use of slot machine for purpose of giving to person paying certain amount chance to win as against other persons paying all of property of certain value.

34 AM. REP. 24, WRIGHT v. PAINE, 62 ALA. 340.

Sufficiency of demand for payment of notes payable "on call."

Cited in **Brockway v. Gadsden Mineral Land Co.** 102 Ala. 620, 15 So. 431, holding that demand must be made upon all stockholders alike where each gave note payable to corporation payable "subject to call of directors."

Admissibility of evidence excusing failure to make demand of payment.

Cited in **Bills v. Silverking Min. Co.** 106 Cal. 9, 39 Pac. 43 (dissenting opinion), on right of party to give evidence excusing delay in making demand of payment.

Partial payment as revival of debt barred by limitations.

Cited in **Chapman v. Barnes**, 93 Ala. 433, 9 So. 589, holding that partial payments on debt barred by statute are not sufficient to remove bar.

Presumption as to demand setting limitations running.

Cited in **Massie v. Byrd**, 87 Ala. 672, 6 So. 145, holding that demand necessary to set statute running against note payable thirty days after demand will be presumed.

Necessity of demand to set limitations running.

Cited in notes in 57 A. R. 97; 136 Am. St. Rep. 486; 15 L.R.A. 387; 29 L.R.A. (N.S.) 688; 33 L. ed. U. S. 185,—as to when demand is necessary to put statute of limitations in motion.

Laches in demanding deposit.

Cited in reference note in 60 A. R. 85, on laches in claiming property deposited for keeping.

34 AM. REP. 30, SUMTER COUNTY v. NATIONAL BANK, 62 ALA. 464.

State taxation of national bank stock.

Cited in **Stapylton v. Thaggard**, 33 C. C. A. 353, 62 U. S. App. 638, 91 Fed. 93, holding that assessment in lump sum of all personal property of national bank to itself cannot be regarded as one against stockholders on their shares; **Pollard v. State**, 65 Ala. 628, holding that prior to act of 1880 no valid assessment could be made upon shares of stock in national bank; **Maguire v. Revenue & Road Comrs.** 71 Ala. 401, on liability of shares in national banks to state taxation; **State Bank v. Board of Revenue**, 91 Ala. 217, 8 So. 852, holding that state and national banks or shareholders in them are equally entitled to deduct

from value of shares when assessed for taxation, amount of shareholder's indebtedness.

Cited in reference notes in 34 A. R. 15, on taxing stock of national bank; 12 L.R.A. 766, on right of state to tax Federal securities held by national banks.

Cited in notes in 45 L.R.A. 744; 96 A. D. 292,—on right of state to tax shares of stock of national bank; 13 L.R.A. 616; 96 A. D. 291, 292,—on right of state to tax capital stock of national banks; 69 A. S. R. 43, on state taxation of shares and capital stock of national bank; 96 A. D. 296; 69 A. S. R. 45; 45 L.R.A. 741,—on right of state to require national bank to pay tax on shares; 57 L.R.A. 57, on interference with Federal agencies and burdens on Federal grants by taxation on bank franchises.

Liability of agent of foreign corporation for corporation tax.

Cited in *State v. Sloss*, 83 Ala. 93, 3 So. 745, holding that legislature may provide for enforcement of collection of taxes from agent where levied against foreign corporation.

Application of general tax law where special law is inadequate.

Cited in *State v. Kidd*, 125 Ala. 413, 28 So. 480, to the point that general tax law provisions will govern where specially devised plan is inadequate.

34 AM. REP. 35, JOHN v. CITY NAT. BANK, 62 ALA. 529.

Sufficiency of notice of protest.

Cited in *Brennan v. Vogt*, 97 Ala. 647, 11 So. 893, holding that where indorser resides at place of protest which is city having free postal delivery, notice of protest may be sent through mail; *German Secur. Bank v. McGarry*, 106 Ala. 633, 17 So. 704, holding that testimony that party mailed notice of protest of note "about" certain date is not sufficient evidence of mailing it in time.

Cited in notes in 38 A. D. 608, on notice of dishonor of notes and bills between residents of same city or town; 38 A. D. 614, on service of notice of dishonor at place of business.

34 AM. REP. 39, HONNETT v. HONNETT, 33 ARK. 156.

What constitutes duress in procuring marriage.

Cited in *Marvin v. Marvin*, 52 Ark. 425, 20 A. S. R. 191, 12 S. W. 875, holding that man lawfully arrested for seduction who marries woman to procure discharge cannot avoid marriage on ground of duress; *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 So. 836, holding that if threats used to bring about marriage were only of doing such things as party had right to do, they would not invalidate marriage.

Cited in reference note in 20 A. S. R. 192, on what constitutes marriage under duress.

Cited in note in 43 L.R.A. 816, on sufficiency of duress by arrest or imprisonment to avoid marriage.

Personal indignities as grounds for divorce.

Cited in *Kurtz v. Kurtz*, 38 Ark. 119, holding that to constitute grounds for divorce personal indignities referred to in statute must be habitual, permanent and continuous.

Cited in note in 18 L.R.A. (N.S.) 308, on making charges of adultery as ground for divorce.

34 AM. REP. 44, LITTLE ROCK & FT. S. R. CO. v. BARKER, 33 ARK. 350.**Measure of damages for death of child.**

Cited in *Davis & St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801, holding that parent can only recover value of services during period intervening between injury and death in action for loss of services caused by negligence of third person; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 18 A. S. R. 248, 24 Pac. 305; *Schnable v. Providence Public Market*, 24 R. I. 477, 53 Atl. 634,—holding that under statute nothing can be given for loss of child's society in action by father for death of child, caused by negligence; *Gunderson v. Northwestern Elevator Co.* 47 Minn. 161, 49 N. W. 694, on measure of damages recoverable by parent for death of child caused by negligence; *Re Birmingham R. Light & P. Co.* 161 Ala. 135, 135 A. S. R. 118, 49 So. 755, 18 A. & E. Ann. Cas. 477, holding that loss of society of child four months old is not element of damages; *Scherer v. Schlager*, 18 N. D. 421, 24 L.R.A. (N.S.) 520, 122 N. W. 1000, holding that measure of damages for death of child is probable value of services during minority, considering cost of support.

Cited in reference note in 62 A. S. R. 316, on damages for negligent killing of minor child.

Cited in notes in 48 A. D. 637, 639, 640, on damages for death of relative; 12 A. S. R. 375, on elements and measure of damages in actions for causing death of human beings; 12 A. S. R. 381, on deduction of amount of policy from amount recoverable for causing death; 17 L.R.A. 80, on loss of services as element of damages in action by parent for death of child; 8 E. R. C. 426, on measure of damages for death of person negligently killed.

Distinguished in *St. Louis, I. M. & S. R. Co. v. Davis*, 55 Ark. 462, 18 S. W. 628, holding that in estimating pecuniary injury to father caused by son's death by negligence of another, jury is not confined to period of minority, where son manifested intent to aid father after that time.

Right to damages for mental suffering.

Cited in *Peay v. Western U. Teleg. Co.* 64 Ark. 538, 39 L.R.A. 463, 43 S. W. 965, holding damages for mental pain and anguish not recoverable for negligent failure of telegraph company to deliver telegram; *Texarkana & Ft. S. R. Co. v. Anderson*, 67 Ark. 123, 53 S. W. 673, holding that no recovery can be had for mental suffering where personal injury does not constitute basis of action; *Beaulieu v. Great Northern R. Co.* 103 Minn. 47, 19 L.R.A. (N.S.) 564, 114 N. W. 353, 14 A. & E. Ann. Cas. 462, holding damages for mental anguish not recoverable for breach of contract by railroad to transport corpse.

Cited in notes in 13 L.R.A. 860, on consideration of mental anguish in action for injuries causing death; 7 L.R.A. (N.S.) 519, on parent's mental anguish as element of damages at common law for personal tort to minor child.

What constitutes ordinary care.

Cited in *Little Rock & Ft. S. R. Co. v. Pankhurst*, 36 Ark. 371, to the point that ordinary care means such care as persons of ordinary prudence would use in similar circumstances.

Contributory negligence of infant.

Cited in *St. Louis, I. M. & S. R. Co. v. Tomlinson*, 78 Ark. 251, 94 S. W. 613, holding that question of whether or not child of tender years exercised care required, is for jury; *Elwood Electric Street R. Co. v. Ross*, 26 Ind. App. 258, 58

N. E. 535, to the point that contributory negligence cannot be imputed to child of such tender years as to be incapable of discretion.

When court can direct verdict.

Cited in *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491; *Doherty v. Arkansas & O. R. Co.* 5 Ind. Terr. 537, 82 S. W. 899,—holding that court cannot direct jury to find verdict, except in cases where there is no evidence to sustain cause of action or defense.

Death as basis of civil action.

Cited in *Earnest v. St. Louis, M. & S. E. R. Co.* 87 Ark. 65, 112 S. W. 141, holding that by common law death of human being could not be made subject of civil action; *St. Louis, I. M. & S. R. Co. v. Needham*, 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371, holding that at common law no action could be maintained for negligent killing of person.

Cited in note in 41 L.R.A. 809, on parent's common-law right of action for loss of services of child killed.

New trial for excessive damages.

Cited in *Hurt v. St. Louis, I. M. & S. R. Co.* 94 Mo. 255, 4 A. S. R. 374, 7 S. W. 1, holding that in action for injury to child by negligence verdict of \$4,500 is excessive where testimony showed boy's services to be worth \$100 per year from tenth year until majority attained.

Cited in notes in 11 L.R.A. 48, on setting aside verdict for personal injuries because excessive; 26 L.R.A. 391, on granting of new trial by appellate court for excessive damages.

34 AM. REP. 49, BRODIE v. WATKINS, 33 ARK. 545.

Measure of damages for wrongful discharge.

Cited in *Gibney v. Turner*, 52 Ark. 117, 12 S. W. 201, on measure of damages where mechanic is prevented by employer from completing performance of contract to do specific work at specified price; *Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568, holding that where attorney is prevented from carrying out agreement by client measure of damages is agreed compensation less expenses he would have incurred in performing services; *Hall v. Gunter*, 157 Ala. 375, 47 So. 155; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797,—holding that attorney may recover on quantum meruit for services rendered where complete performance of agreement is prevented by client; *School Dist. v. McDonald*, 68 Neb. 610, 94 N. W. 829, holding that in action for breach of entire contract for personal services measure of damages is what party would have earned, less what it would have cost him to perform.

Cited in notes in 53 L.R.A. 60, on effect of employer or owner preventing performance of contract on right to recover loss of profits from breach; 53 L.R.A. 80, on loss of profits as damages for breach of contract between attorney and client; 6 L.R.A.(N.S.) 84, on actual loss, or value of contract, as measure of damages for wrongful discharge of servant; 6 L.R.A.(N.S.) 92, 93, on measure of damages for wrongful discharge from employment in case of contracts for legal services; 6 L.R.A.(N.S.) 98, 100, on other employment of wrongfully discharged servant in mitigation or reduction of damages.

Distinguished in *Gates v. School Dist.* 57 Ark. 370, 38 A. S. R. 249, 21 S. W. 1060, holding that school teacher who went to work upon his farm after wrongful discharge must submit to deduction of value of his services there, in action upon contract.

Validity of agreement by attorney for contingent fee.

Cited in *Davis v. Webber*, 66 Ark. 190, 74 A. S. R. 81, 45 L.R.A. 196, 49 S. W. 822, holding that contract between attorney and client allowing former contingent interest in subject matters is not void for champerty.

Cited in notes in 16 A. S. R. 593; 83 A. S. R. 176,—on contracts between attorneys and clients for contingent fees.

34 AM. REP. 52, WILSON v. STATE, 33 ARK. 557.**Necessity of negating exceptions.**

Cited in *Walker v. State*, 35 Ark. 386, holding that indictment under act of 1875 making it unlawful to carry pistol as weapon need not negative exception in proviso of act; *Wilson v. State*, 35 Ark. 414, holding that exception not in enacting clause of statute defining criminal offense need not be negated in indictment; *Halliburton v. State*, 71 Ark. 474, 75 S. W. 929; *State v. Ring*, 77 Ark. 139, 91 S. W. 11; *McDonald v. State*, 83 Ark. 26, 102 S. W. 703,—holding that where exception in enacting clause of statute defining criminal offense it must be negated in indictment.

Power of legislature to regulate carrying of arms.

Cited in *Com. v. Murphy*, 166 Mass. 171, 32 L.R.A. 606, 44 N. E. 138, to point that legislature may regulate and limit mode of carrying arms.

Cited in notes in 78 A. S. R. 264, on power of legislature to make the bearing of arms criminal; 115 A. S. R. 203, on effect of state constitution on right to keep and bear arms when carried concealed; 14 L.R.A. 601, on constitutionality of laws restricting right to carry weapons; 3 L.R.A.(N.S.) 170, on constitutional right to bear arms.

34 AM. REP. 55, LITTLE ROCK & FT. S. R. CO. v. PAYNE, 33 ARK. 816.**Powers of legislature to declare what is conclusive evidence.**

Cited in *Nind v. Meyers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335 (dissenting opinion), on right of legislature to make tax deed conclusive of complete title; *Scott v. Brackett*, 89 Ind. 413, to point that legislature cannot declare what shall be conclusive evidence; *Missouri, K. & T. R. Co. v. Simonson*, 64 Kan. 802, 91 A. S. R. 248, 57 L.R.A. 765, 68 Pac. 653 (dissenting opinion), on right of legislature to declare that killing of livestock by railroad raises conclusive presumption of company's negligence; *Oliver v. Chicago, R. I. & P. R. Co.* 89 Ark. 466, 117 S. W. 238, on construction of demurrage act so as to make failure to furnish cars prima facie evidence of liability.

Cited in reference notes in 31 A. S. R. 501; 91 A. S. R. 254,—on power of legislature to prescribe rule of conclusive evidence.

Cited in notes in 36 A. S. R. 689, on validity of statutes creating conclusive presumptions; 2 L.R.A. 774, on invalidity of statute making tax deed conclusive evidence of title.

Distinguished in *Yazoo & M. Valley R. Co. v. Bent*, 94 Miss. 681, 22 L.R.A.(N.S.) 821, 47 So. 805, holding valid statute providing that bill of lading shall be conclusive evidence in hands of bona fide holder of receipt of property by carrier.

Presumption of negligence of railroad company.

Cited in *Eddy v. Lafayette*, 1 C. C. A. 432, 4 U. S. App. 243, 49 Fed. 798; *St. Louis, I. M. & S. R. Co. v. Hendricks*, 53 Ark. 201, 13 S. W. 699; *Barringer v. St. Louis, I. M. & S. R. Co.* 73 Ark. 548, 85 S. W. 94,—holding that

proof of injury by operation of railroad train makes *prima facie* case of negligence against company; *St. Louis, I. M. & S. R. Co. v. Neely*, 63 Ark. 636, 37 L.R.A. 616, 40 S. W. 130, holding that presumption arises that injury to person on street by fall of car door from moving train, was caused by company's negligence; *Little Rock & Ft. S. R. Co. v. Daniels*, 68 Ark. 171, 56 S. W. 874, to point that under statute railroad company is presumptively guilty of negligence where property is injured by operation of trains; *Huddleston v. St. Louis, I. M. & S. R. Co.* 90 Ark. 378, 119 S. W. 280, holding that presumption of negligence arises from injury by being hit with mail sack.

— **From injury to live stock.**

Cited in *Little Rock & Ft. S. R. Co. v. Henson*, 39 Ark. 413; *St. Louis, I. M. & S. R. Co. v. Hagan*, 42 Ark. 122,—holding that presumption of negligence of railway company arises upon proof of injury of animal by train; *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136, 20 S. W. 1083, holding that presumption arises that injury to team of mules by train while upon railway company's land for purpose of drawing freight, was caused by company's negligence; *St. Louis, I. M. & S. R. Co. v. Bragg*, 66 Ark. 248, 50 S. W. 273, holding that presumption of railroad company's negligence arises where mule was run into trestle by train and injured; *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 567, 11 So. 926, holding that under statute proof of killing of live stock by railway engine is sufficient to sustain judgment against company for negligently killing them.

— **Injury by fire.**

Cited in *Tilley v. St. Louis & S. F. R. Co.* 49 Ark. 535, 6 S. W. 8; *St. Louis, I. M. & S. R. Co. v. Coombs*, 76 Ark. 132, 88 S. W. 595, 6 A. & E. Ann. Cas. 151,—holding that presumption of negligence arises upon proof that building was set on fire by railroad company's engine.

Burden of proof in action for live stock killed on railroad.

Cited in *Memphis & L. R. R. Co. v. Jones*, 36 Ark. 87; *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562; *Kansas City Southern R. Co. v. Wayt*, 80 Ark. 382, 97 S. W. 656,—holding that burden is shifted to railroad company where killing of stock by train is established.

Liability of railroad company for negligent injury.

Cited in *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243, to the point that under statute providing that railroad companies will be liable for injury to property caused by operation of trains no liability exists unless because of negligence; *St. Louis, I. M. & S. R. Co. v. Pitcock*, 82 Ark. 441, 118 A. S. R. 84, 101 S. W. 725, 12 A. & E. Ann. Cas. 582, holding that provisions in statute relating to liability of railroad companies for injury to person or property mean that such companies are liable when guilty of actionable negligence; *Little Rock R. & Electric Co. v. Newman*, 77 Ark. 599, 92 S. W. 864, holding that statute relating to liability of railroad company for injury to live stock, does not apply to street railway companies.

Cited in note in 9 L.R.A.(N.S.) 348, on liability of railroad for injury to live stock resulting from violation of statute requiring railroads to fence right of way.

Validity of statute making railroad liable for damages.

Cited in *Memphis & L. R. R. Co. v. Horsfall*, 36 Ark. 651, holding that statute making railroad companies liable for double damages on failure to

post notice of stock killed by trains is constitutional; *Bannon v. State*, 49 Ark. 167, 4 S. W. 656; *Dow v. Beidelman*, 49 Ark. 455, 5 S. W. 718,—to the point that statute providing for double damage against railway company for failing to give notice of injury to live stock is constitutional; *St. Louis & S. F. R. Co. v. Shore*, 89 Ark. 418, 117 S. W. 515, 16 A. & E. Ann. Cas. 939, holding that act making railroad responsible for all damages caused by fire communicated from engines is constitutional; *St. Louis, I. M. & S. R. Co. v. Wynne*, 90 Ark. 538, 119 S. W. 1127, 17 A. & E. Ann. Cas. 631, holding valid statute making railroad liable for double damages and attorney's fee for injury to stock.

Cited in note in 32 A. R. 375, on constitutionality of law making railroad companies liable for double damages for injuries to stock caused by failure to erect fence.

Right of wife to testify for husband.

Cited in *Miles v. St. Louis, I. M. & S. R. Co.* 90 Ark. 485, 119 S. W. 837, holding that wife can testify in behalf of husband suing as administrator of child.

34 AM. REP. 62, DENVER v. CAPELLI, 4 COLO. 25.

Liability of city for negligent injury.

Cited in *Denver v. Spencer*, 34 Colo. 270, 114 A. S. R. 158, 2 L.R.A.(N.S.) 147, 82 Pac. 590, 7 A. & E. Ann. Cas. 1042, holding that city is liable for negligence of its park commissioners in constructing platform to be occupied by persons for purpose of furnishing entertainment; *Watters v. Omaha*, 76 Neb. 855, 110 N. W. 981, 14 A. & E. Ann. Cas. 750, holding that city is not liable for damages caused by reason of defective plan of public improvement where it employed competent engineers; *Lyons v. Watt*, 43 Colo. 241, 18 L.R.A.(N. S.) 1135, 95 Pac. 949, holding city not liable for injury to woman falling into unguarded excavation two feet from sidewalk.

Cited in note in 30 A. S. R. 380, on municipal liability for errors of officers and agents in plan of work.

—As to sewers.

Cited in *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729, holding that city is liable for injury resulting from negligence in constructing sewer whereby surface water is prevented from flowing in natural channels; *Knostman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887, holding city not liable for mere mistake in judgment as to sufficiency of drain; *Springfield v. Spence*, 39 Ohio St. 665, holding that municipality is not liable to action for simply failing to provide drainage for surface water.

Cited in reference note in 1 A. S. R. 673, on municipal liability for defective sewers.

Cited in notes in 66 A. D. 436, on nonliability of municipality for damages occasioned by sewers or lack thereof; 54 A. R. 672, on municipal liability for insufficiency of sewers; 29 A. S. R. 738, on municipal liability for defect in plan for sewers; 29 A. S. R. 743, on municipal liability for injury by surface water; 1 L.R.A. 298; 9 L.R.A. 206,—on liability of city for failure in exercise of duty in construction and repair of sewers; 61 L.R.A. 684, on liability of municipality for failure to drain; 61 L.R.A. 686, on who is to exercise discretion with respect to drainage by municipality; 61 L.R.A. 696, on liability of city for flooding of premises during storm from want or repair

of sewer; 65 L.R.A. 275, on rights and duties of municipality with respect to plans for surface water.

—Flood as defense.

Cited in note in 61 L.R.A. 709, on flood as defense available to municipal corporation for injury by drains.

Right of court to annul ordinance establishing sewer districts.

Cited in *Wolff v. Denver*, 20 Colo. App. 135, 77 Pac. 364, holding that city council, in establishing sewer district, exercises legislative power for police purposes, and ordinance in respect thereto cannot be annulled because of error of judgment.

Reversal of judgment for erroneous instruction.

Cited in *Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632, holding that judgment will be reversed where court in one instruction lays down a law correctly and in another incorrectly.

Municipal acts as judicial or ministerial.

Cited in note in 79 A. D. 475, on municipal acts as to sewers as judicial or ministerial.

34 AM. REP. 66, LOCKE v. CENTRAL, 4 COLO. 65.

Compensation of public officer.

Cited in *Garfield County v. Leonard*, 26 Colo. 145, 57 Pac. 693, holding that county clerk cannot recover for services performed for which no compensation is allowed by statute; *Durango v. Hampson*, 29 Colo. 77, 66 Pac. 883; *Taylor v. Big Horn County*, 11 Wyo. 106, 70 Pac. 835,—holding that unless compensation is by law attached to public office, none can be recovered.

34 AM. REP. 68, HAGER v. RICE, 4 COLO. 90.

Parol evidence as to liability on negotiable paper.

Cited in *La Salle Nat. Bank v. Tolu Rock & Rye Co.* 14 Ill. App. 141, holding that parol evidence is admissible between parties to show bill of exchange purporting to be executed in representative capacity was binding on corporation and not upon agent.

Cited in reference notes in 37 A. R. 143, on evidence to explain character of signature to note where unintelligible; 56 A. R. 106, on parol evidence to show liability of one signing company note as agent; 76 A. S. R. 633, on parol evidence to show that acceptance of bill or draft was in official capacity.

Cited in notes in 21 L.R.A.(N.S.) 1084, on parol evidence of liability of principal on negotiable paper executed by agent; 4 E. R. C. 284, on parol evidence to show personal liability of one signing written instrument as agent.

34 AM. REP. 72, COLLINS v. DAWLEY, 4 COLO. 138.

Assignability of insurance policy.

Cited in *Mutual L. Ins. Co. v. Hagerman*, 10 Colo. App. 33, 72 Pac. 889, holding that wife can only assign her contingent interest in life insurance policy upon husband's life, payable to her if she survives or otherwise to children; *Crocker v. Hogin*, 103 Iowa, 243, 72 N. W. 411, holding that certificate of mutual benefit association is assignable unless statute prevents and action may be brought thereon in name of assignee.

Cited in notes in 56 A. D. 753, on assignment of insurance by beneficiaries;

87 A. S. R. 488, on validity of assignment of part of proceeds of life insurance policy; 87 A. S. R. 503, on right of married woman to assign or pledge policy as security for her husband's debt.

Effect of change of contract on lien on collateral.

Cited in *Case v. Fant*, 3 C. C. A. 418, 10 U. S. App. 415, 53 Fed. 41; *California Nat. Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38,—holding that property pledged for payment of note remains as security although new note is given; *Reed v. Cramb*, 22 Ill. App. 34, holding that where debtor places collateral of third person with creditor, ownership of which is known to creditor, any change in contract for valuable consideration releases collateral.

Cited in note in 32 A. S. R. 717, on right to hold collateral security for satisfaction of renewal note.

Note as payment.

Cited in *First Nat. Bank v. Newton*, 10 Colo. 161, 14 Pac. 428, to the point that giving of debtor's own note to meet antecedent indebtedness is *prima facie* not payment.

34 AM. REP. 76, BOYLE v. PEOPLE, 4 COLO. 176.

Interest disqualifying juror.

Cited in *Imboden v. People*, 40 Colo. 142, 90 Pac. 608, holding that in prosecution of bank officers for conspiracy to defraud bank creditor of bank is not necessarily disqualified to act as juror; *Guy v. State*, 96 Md. 692, 54 Atl. 879, holding that members of league to prosecute violation of liquor law should not be permitted to act as jurors where league hires special counsel to prosecute; *State v. Hoxsie*, 15 R. I. 1, 2 A. S. R. 838, 22 Atl. 1059, holding that in trial for keeping liquor nuisance court may refuse to permit prospective juror to be asked if he contributed money for prosecution of persons generally who are charged with keeping such nuisance; *Starke v. State*, 17 Wyo. 55, 96 Pac. 148, 17 A. & E. Ann. Cas. 222, holding that membership in association of stock growers does not disqualify juror in prosecution for stealing sheep.

Cited in reference note in 36 A. D. 532, on prejudice against particular offense as disqualifying juror.

Cited in notes in 58 A. R. 128; 9 A. S. R. 759; 2 A. S. R. 843,—on competency of member of voluntary organization founded to prosecute certain laws, as juror in prosecution for such violation.

34 AM. REP. 80, DUGGAN v. BLISS, 4 COLO. 223.

Validity of assignment for creditors containing reservations for assignor.

Cited in *Claffin v. Iseman*, 23 S. E. 416, holding that assignment for creditors in which interest is reserved to assignor without provision for all creditors is fraudulent; *Temple Grocer Co. v. Clabaugh*, 18 Tex. Civ. App. 655, 45 S. W. 482, holding that assignment for creditors which provides for payment first of preferred creditors and then for payment of such others as would release debtor from balance of claim is void.

Cited in reference note in 38 A. R. 176, on validity of assignment for benefit of creditors conditioned upon full release.

Cited in note in 58 A. S. R. 86, on effect of exacting releases on validity of assignment for creditors.

Am. Rep. Vol. XVII.—48.

34 AM. REP. 89, PULLMAN v. PALACE CAR CO. v. BARKER, 4 COLO. 344.**Proximate cause of injury to passenger.**

Cited in *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 A. R. 790, holding that negligence in carrying passenger past station was not proximate cause of his falling into culvert.

Cited in reference notes in 36 A. R. 382, as to what consequential damages can be recovered in tort actions; 10 A. S. R. 66, as to whether disease of person injured or killed is admissible in evidence as defense or to mitigate damages.

Cited in notes in 97 A. D. 500, on duty owed by railroads to sick, aged, or feeble passengers; 41 A. R. 53, as to when injury is too remote to recover therefor; 47 A. R. 381, 383, 384, on proximate cause; 52 A. R. 159, on proximate and remote cause as applicable to carrier's liability; 36 A. S. R. 829, on predisposition to disease as defense against liability for injury due to wrongful act; 16 L.R.A. 268, on effect of previous disease of person injured on liability for causing the injuries; 16 L. R. A. 270, on limitations and exceptions to rule relating to liability for causing injuries to diseased person; 21 L.R.A. 297, on necessity of injury being proximate result of negligence of sleeping car company.

Distinguished in *Denver v. Hyatt*, 28 Colo. 29, 63 Pac. 403, sustaining instructions that jury were to give damages for any acceleration of a disease existing in passenger at time of injury; *Colorado Springs & I. R. Co. v. Nichols*, 41 Colo. 272, 20 L.R.A.(N.S.) 215, 92 Pac. 691, holding that woman who has suffered miscarriage as result of injuries sustained through negligence of street car company may recover damages therefor; *Southern R. Co. v. Webb*, 116 Ga. 152, 59 L.R.A. 109, 42 S. E. 395, holding proximate cause of death of passenger, sudden jolt of train throwing him to track where he was run over by engine of independent company; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 A. R. 790, 19 N. W. 744, denying recovery against railroad company carrying passenger past station and giving erroneous information of location, when injury was caused by falling from culvert he knew of; *Trigg v. St. Louis, K. C. & N. R. Co.* 74 Mo. 147, 41 A. R. 305, denying recovery by passenger carried past station, for mental anguish etc., where no bodily injury was sustained; *Colorado Springs & I. R. Co. v. Nichols*, 41 Colo. 272, 20 L.R.A.(N.S.) 215, 92 Pac. 691, holding that pregnant passenger can recover for miscarriage from being thrown violently to floor.

Disapproved in *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474, 48 A. R. 179, holding proper part of damages for carrying passenger beyond destination, sickness resulting from exposure and mental strain; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 A. R. 168, holding carrier liable for death of passenger caused by disease which system was unable to ward off on account of injuries from carrier's negligence; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, sustaining instruction that passenger was entitled to recover for aggravation to predisposed tendency to disease, resulting from injuries caused by carrier; *Lapleigne v. Morgan's L. & T. R. & S. S. Co.* 40 La. Ann. 661, 1 L.R.A. 378, 4 So. 875, holding carrier liable for aggravation of hereditary hysterical diathesis, resulting from accident caused by its negligence; *Ehrgott v. New York*, 96 N. Y. 264, 48 A. R. 622, sustaining recovery for disease caused from necessary exposure incident to accident, though not

caused by accident itself; *St. Louis, S. W. R. Co. v. Ferguson*, 26 Tex. Civ. App. 460, 64 S. W. 797, sustaining recovery for miscarriage resulting from injury to pregnant woman by carrier's negligence; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 A. R. 41, 11 N. W. 356, holding carrier liable for negligently directing pregnant woman to leave train before reaching station, causing severe illness, although no injury would have resulted but for her pregnancy which fact was unknown to carriers' employees.

Right to refuse to accept sick person as passenger.

Cited in *Connors v. Cunard S. S. Co.* 204 Mass. 310, 134 A. S. R. 662, 26 L.R.A.(N.S.) 171, 90 N. E. 601, 17 A. & E. Ann. Cas 1051, holding that steamship company may refuse to accept as passenger person suffering from cancer.

Cited in notes in 107 A. S. R. 302, on carrier's right to refuse to transport sick or infirm persons; 26 L.R.A.(N.S.) 172, on duty to accept as passenger one physically or mentally disabled.

34 AM. REP. 94, REVIERE v. POWELL, 61 GA. 30.

Admissibility of account books as evidence.

Cited in *Bracken v. Dillon*, 64 Ga. 243, 37 A. R. 70, holding that books of account are secondary evidence and are only admissible *ex necessitate rei*; *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401, holding that entry made in party's books in presence of other party at time of transaction is admissible as original evidence; *Athens Mfg. Co. v. Malcolm*, 134 Ga. 600, 68 S. E. 329, holding entry of agreement as to extension of time of option admissible to corroborate party.

Cited in reference note in 1 A. S. R. 451, on what are account books so as to be admissible in evidence.

Cited in notes in 95 A. D. 76, on admissibility of entries and books of account as part of *res gestæ*; 52 L.R.A. 599, on effect of exhibition of account books to, and admissibility of correctness by, person charged, on their admissibility in party's own favor.

34 AM. REP. 95, AUGUSTA v. HAFERS, 61 GA. 48.

Liability of municipality for defects or obstructions in streets.

Cited in reference note in 37 A. R. 814, on liability of municipality for negligence in allowing defect in street.

Cited in notes in 61 L.R.A. 590, on question for jury as to municipal liability for injuries to travelers caused by persons using space under street; 20 L.R.A. (N.S.) 637, 669, on liability of municipality for defects or obstructions in streets.

Admissibility of evidence of similar conditions or accidents.

Cited in *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; *Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933,—holding that in action against city for injury caused by falling because of defective sidewalk evidence of similar accidents is admissible; *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42, holding that for purpose of showing that elevator door was left open because defective evidence that at previous times it was left open is admissible; *Delphi v. Lowery*, 74 Ind. 520, 39 A. R. 98, holding that for purpose of showing that city had notice of dangerous place in streets evidence that other persons had previously been injured there is admissible; *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 A. R. 82, 7 N. E. 743, holding that in action against city for injury caused by defective sewer,

evidence of break 100 feet from place where sewer broke and caused injury is admissible as showing knowledge of condition of sewer; *Bemis v. Temple*, 162 Mass. 342, 26 L.R.A. 254, 38 N. E. 970, holding that in action for injury caused by horse becoming frightened at flag suspended across street, evidence is admissible to show that ordinarily gentle horses were frightened by it on other occasions; *Smith v. Sherwood Twp.* 62 Mich. 159, 28 N. W. 806; *Thomas v. Springville*, 9 Utah, 426, 35 Pac. 503,—holding that in action for injury resulting from horse becoming frightened at hole in bridge, evidence that other horses shied at same thing about same time is admissible.

Cited in notes in 11 E. R. C. 245, 246; 44 A. R. 695,—on admissibility of former accidents as evidence of negligence.

34 AM. REP. 97, HOLLY v. ATLANTA STREET R. CO. 61 GA. 215.

Liability for injury to passenger.

Cited in *City & Suburban R. Co. v. Findley*, 76 Ga. 311, holding that where passenger is injured upon street car presumption is that company was negligent; *Grimsley v. Atlantic Coast Line R. Co.* 1 Ga. App. 557, 57 S. E. 943; *Exton v. Central R. Co.* 62 N. J. L. 7, 56 L.R.A. 508, 42 Atl. 486,—holding that railroad company is liable for injury to passenger caused by strangers if company could by exercise of high degree of care have prevented injury; *Chicago, R. I. & P. R. Co. v. Barrett*, 16 Ill. App. 17, holding that railroad company is liable to passenger caused by maltreatment by company's servant; *Pray v. Omaha Street R. Co.* 44 Neb. 167, 48 A. S. R. 717, 62 N. W. 447, holding that street railway company is presumptively liable for concurrent negligence of its servants and third persons resulting in injury to passenger.

Cited in notes in 41 A. D. 482, on rule prohibiting disorderly conduct on cars and excluding disorderly passengers; 43 A. D. 363, on liability of carrier of passengers for negligent management of vehicles by servants; 6 A. S. R. 736, on liability of one engaged in public employment for personal injuries sustained by customer from third person; 32 A. S. R. 95, on liability of carrier for assault on passenger by fellow passenger; 118 A. S. R. 462, on liability of street railway company to passengers; 118 A. S. R. 468, on street railway company's duty to passenger as affected by acts of fellow passengers or other third persons; 16 L.R.A. 629, on duty of carrier to protect passenger from assault by fellow passenger.

Liability for injury due to fellow servant's negligence.

Cited in *Savannah, T. & I. H. R. Co. v. Williams*, 117 Ga. 414, 61 L.R.A. 249, 43 S. E. 751, holding that under code street railroad company is liable to one servant for injury inflicted by negligence of fellow servant.

34 AM. REP. 99, CALHOUN v. MARSHALL, 61 GA. 275.

Validity of agreement for interest on interest.

Cited in *Tillman v. Morton*, 65 Ga. 386; *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806; *Union Sav. Bank & T. Co. v. Dottenheim*, 107 Ga. 606, 34 S. E. 217; *Hooper v. Hooper*, 81 Md. 155, 48 A. S. R. 496, 31 Atl. 508,—holding that agreement between parties that interest due shall be considered principal and carry interest is valid.

Annotation cited in *Levens v. Briggs*, 21 Or. 333, 14 L.R.A. 188, 28 Pac. 15, holding that agreement is void as against public policy which provides that interest thereon shall be compounded unless paid at certain times.

Cited in reference note in 58 A. S. R. 211, as to when interest is allowed on interest.

Right to collect interest due prior to maturity of note.

Cited in *Ray v. Pease*, 97 Ga. 618, 25 S. E. 360; *Scott v. Liddell*, 98 Ga. 24, 25 S. E. 935,—holding that interest due and payable upon note prior to maturity of note may be collected by suit.

34 AM. REP. 102, WILLIAMS v. STATE, 61 GA. 417.

What are concealed weapons.

Cited in *Redus v. State*, 82 Ala. 53, 2 So. 712; *Com. v. Murphy*, 166 Mass. 171, 32 L.R.A. 606, 44 N. E. 138; *State v. Tapit*, 52 W. Va. 473, 44 S. E. 231,—holding that person may be convicted of carrying concealed revolver although instrument is out of repair; *Mathews v. Caldwell*, 5 Ga. App. 336, 63 S. E. 250, holding question for jury whether toy pistol is pistol within prohibition against sale to minors.

Cited in reference notes in 34 A. R. 1, on defective weapon as defense to carrying concealed weapons; 8 A. S. R. 447, on carrying concealed weapons as criminal offense.

34 AM. REP. 103, RAY v. BURBANK, 61 GA. 505.

Liability of druggist.

Cited in reference note in 4 A. S. R. 564, on degree of care and skill required of apothecaries.

Cited in notes in 55 A. S. R. 258, on liability of druggists and apothecaries; 29 L.R.A.(N.S.) 901, on duty of druggist or apothecaries in sale or compounding of drugs or medicines.

34 AM. REP. 104, MAHER v. MILLERS, 61 GA. 556.

Validity of contract.

See *Gallagher v. Christopher & T. St. R. Co.* 13 N. Y. S. R. 80, upholding contract by street railway with conductor for forfeiture of specified amount for failure to register fares or for receiving fares directly from conductor, and making detective's report conclusive against conductor.

34 AM. REP. 106, PHOENIX INS. CO. v. TUCKER, 92 ILL. 64.

Construction of contract of insurance.

Cited in *Provident Sav. Life Assur. Soc. v. Cannon*, 103 Ill. App. 534, holding that construction of contract of insurance policy is for court; *Detroit F. & M. Ins. Co. v. Chetlain*, 61 Ill. App. 450; *Hardesty v. Forest City Ins. Co.* 77 Ill. App. 413; *Teutonia Ins. Co. v. Bonner*, 81 Ill. App. 231,—holding that forfeiture clauses in insurance policy should be strictly construed against forfeitures; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 36 L.R.A. 374, 45 N. E. 1078, holding that meaning of term "vacant and unoccupied" as used in insurance policies is question of law; *Rockford Ins. Co. v. Storig*, 137 Ill. 646, 24 N. E. 674 (affirming 31 Ill. App. 486); *Schuermann v. Dwelling House Ins. Co.* 161 Ill. 437, 52 A. S. R. 377, 43 N. E. 1093; *Carr v. Roger Williams Ins. Co.* 60 N. H. 513,—holding that whether premises are vacant or unoccupied, is question of fact to be determined by trier of facts.

—What constitutes "vacancy or unoccupancy."

Cited in *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285, holding that

house is vacant within meaning of policy where occupant stored goods in one room without intention to eat or sleep in house in future; *Insurance Co. of N. A. v. Coombs*, 19 Ind. App. 331, 49 N. E. 471, holding that policy is not avoided where tenant began removing effects in forenoon intending to return for balance in afternoon; *Eddy v. Hawkeye Ins. Co.* 70 Iowa, 472, 59 A. R. 444, 30 N. W. 808, holding that policy was not made void because of unoccupancy where owner took possession after tenant left, for purpose of cleaning, preparatory to making it permanent home; *Feshe v. Council Bluffs Ins. Co.* 74 Iowa, 676, 39 N. W. 87, holding that policy was void where owner who lived short distance away only went to house in day time leaving it unoccupied at night; *Shackelton v. Sun Fire Office*, 55 Mich. 288, 54 A. R. 379, 21 N. W. 343; *Springfield F. & M. Ins. Co. v. McLimans*, 28 Neb. 846, 45 N. W. 171,—holding that temporary absence of occupant of building will not render policy void; *Agricultural Ins. Co. v. Frith*, 21 Ill. App. 593; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 19 A. S. R. 77, 9 L.R.A. 81, 24 N. E. 727; *Huber v. Manchester F. Assur. Co.* 92 Hun, 223, 36 N. Y. Supp. 873,—holding that “occupation” as used in fire insurance policy means that human beings are present in dwelling house as their customary place of abode; *Hanover F. Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375, holding that mere temporary absence of watchman will not avoid policy where application stated watchman was kept on duty while mill was not in operation.

Cited in reference note in 42 A. S. R. 515, on violation of condition against unoccupied premises in insurance policy.

Cited in notes in 35 A. R. 443, on when premises are vacant or unoccupied within provision of insurance policy; 10 A. S. R. 391, 392, 393, on phrase “vacant and unoccupied” in insurance policies; 8 L.R.A. 79, on when dwelling house is occupied within meaning of insurance policy.

Effect of vacancy or unoccupancy of insured building.

Cited in *Germania F. Ins. Co. v. Klewer*, 27 Ill. App. 590, to point that insurance policy is void where building was vacant for more than ten days; *Schuermann v. Dwelling House Ins. Co.* 57 Ill. App. 200, holding that policy of insurance containing usual provisions against vacancy is suspended during vacancy without permission.

Cited in note in 8 L.R.A. 80, on object of stipulation against vacancy in insurance policy.

Waiver of condition for proofs of loss.

Cited in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 A. S. R. 121, 20 N. E. 77; *Suppiger v. Covenant Mut. Ben. Asso.* 20 Ill. App. 595; *Omaha F. Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740,—holding that denial of all liability under insurance policy is waiver of necessity for furnishing proofs of loss; *Millers' Nat. Ins. Co. v. Jackson County Mill. & Elevator Co.* 60 Ill. App. 224, holding that all objections to proofs of loss are waived except such as are pointed out; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408, holding that insurance company is bound to state true grounds for refusal to pay loss; *Schmurr v. State Ins. Co.* 30 Or. 29, 46 Pac. 363, holding that insurance company must state definitely its objections to proofs of loss where honest attempt is made to furnish them.

Effect of false answers inserted by agent.

Cited in notes in 107 A. S. R. 109, on effect of false answer inserted in application for insurance by agents and medical examiners; 16 L.R.A. 37, on effect of agent's perversion of information by the insured.

34 AM. REP. 112, CAIRO & ST. L. R. CO. v. PEOPLES, 92 ILL. 97.

Validity of police regulations.

Cited in *Christy v. Elliott*, 216 Ill. 31, 108 A. S. R. 196, 1 L.R.A.(N.S.) 215, 74 N. E. 1035, 3 A. & E. Ann. Cas. 487, holding that statute which limits speed of automobiles on highways is police regulation and is constitutional.

—As to fencing railroad right of way.

Cited in *Wadsworth v. Union P. R. Co.* 18 Colo. 600, 36 A. S. R. 309, 23 L.R.A. 812, 33 Pac. 515, to the point that railway company may be required to fence its railway; *Terre Haute & L. R. Co. v. Salmon*, 161 Ind. 131, 67 N. E. 918, holding that provision of statute authorizing recovery of attorney's fees in addition to value of fence constructed by adjoining owner along railroad right of way is constitutional.

Cited in notes in 111 A. S. R. 665; 34 A. R. 55; 52 A. R. 375,—on constitutionality of law making railroad companies liable for double damages for injuries to stock caused by failure to erect fence; 34 A. R. 115, on validity of statute compelling railroads to fence their roads; 9 L.R.A.(N.S.) 350, on private action for violation of statute requiring railroads to fence right of way; 31 L.R.A.(N.S.) 861, 863, 864, on constitutionality of statutes requiring railroad to fence tracks and build cattle guards.

34 AM. REP. 116, IRVIN v. NASHVILLE, C. & ST. L. R. CO. 92 ILL. 103.

What constitutes a partnership.

Cited in *Griffen v. Cooper*, 50 Ill. App. 257, holding that community of interests is very essence of partnership; *Atchison, T. & S. F. R. Co. v. Roach*, 35 Kan. 740, 57 A. R. 199, 12 Pac. 93, holding that sale of through ticket for single fare to point on connecting line is insufficient to show partnership between company selling and such connecting lines.

Cited in note in 115 A. S. R. 427, on effect of owners of separate business pooling their interests or proceeds ratably or otherwise constituting them partners.

Liability to third persons of carriers having traffic agreement.

Cited in *Citizens' Ins. Co. v. Kountz Line*, 48 Fed. 838, holding that several steamboat lines not in partnership, but having common agent, are not liable for torts or contracts of each other; *Illinois C. R. Co. v. Foulks*, 191 Ill. 57, 60 N. E. 890, holding that if one railroad company is acting as agent for another in handling freight shipments, it is liable to third parties for its employee's misfeasance; *State v. Railroad*, 62 N. H. 375, to the point that accidental loss happening on either of two roads having traffic agreement may be decided to be loss of one or other by adjuster duly appointed.

Cited in notes in 72 A. D. 239, on when associated carriers liable as partners; 31 L.R.A.(N.S.) 49, on liability of connecting carrier for loss beyond own line.

Right of carrier to designate stopping places for trains.

Cited in *Noble v. Atchison, T. & S. F. R. Co.* 4 Okla. 534, 46 Pac. 483, to point that railroad company in absence of statutory provisions has right to make regulations providing that part of regular trains shall not stop at designated stations.

34 AM. REP. 122, CONTINENTAL INS. CO. v. HULMAN, 92 ILL. 145.**Effect of violation of forfeiture clause on validity of policy.**

Cited in *North British & M. Ins. Co. v. Steiger*, 13 Ill. App. 482; *Hughes v. Insurance Co. of N. A.* 40 Neb. 626, 59 N. W. 112,—holding that under usual stipulation against other insurance, additional policy makes first policy voidable; *Phenix Ins. Co. v. Lamar*, 106 Ind. 513, 55 A. R. 764, 7 N. E. 241, holding that provision in insurance policy that it would be void if insured procured other insurance whether valid or not, is not against public policy.

Cited in reference notes in 9 A. S. R. 788; 4 A. S. R. 123,—on effect of breach of condition against other insurance.

—As against mortgagee.

Cited in *Scania Ins. Co. v. Johnson*, 22 Colo. 476, 45 Pac. 431; *Boyd v. Thuringia Ins. Co.* 25 Wash. 447, 55 L.R.A. 165, 65 Pac. 785,—to the point that insurance policy making loss if any payable to mortgagee is avoided by subsequent alienation by mortgagor; *Union Bldg. Asso. v. Rockford Ins. Co.* 83 Iowa, 647, 32 A. S. R. 323, 14 L.R.A. 248, 49 N. W. 1032, holding that nonpayment of premium is defense to action on insurance policy by mortgagee, where policy was mailed to mortgagor upon his promise to remit upon receipt of policy; *Smith v. Union Ins. Co.* 25 R. I. 260, 105 A. S. R. 882, 55 Atl. 715, holding that mortgagee's interest in insurance policy where "loss if any is payable to him" is dependent upon existence of valid contract between insured and company; *Gillett v. Liverpool & L. & G. Ins. Co.* 73 Wis. 203, 9 A. S. R. 784, 41 N. W. 78, holding that insurance policy procured by mortgagee containing usual clause against other insurance is avoided by mortgagor obtaining other insurance without consent; *Carberry v. German Ins. Co.* 86 Wis. 323, 56 N. W. 920, to point that mortgagee to whom loss under insurance policy is payable is bound by all stipulations in policy.

Cited in note in 58 A. S. R. 668, 670, 671, on applicability against mortgagee to whom loss is payable of condition of forfeiture in insurance policy.

Who is party assured under policy payable "as interest may appear."

Cited in *Elgin Lumber Co. v. Langman*, 23 Ill. App. 250, to the point that where mortgagor procures policy of insurance payable to mortgagee, former is person assured; *Donaldson v. Sun Mut. Ins. Co.* 95 Tenn. 280, 32 S. W. 251, holding that clause in insurance policy making loss payable to one who is creditor, "as interest may appear" refers to interest as creditor and not to interest in property; *Christenson v. Fidelity Ins. Co.* 117 Iowa, 77, 94 A. S. R. 286, 90 N. W. 495, holding that mortgagee can recover on policy payable to mortgagee as "interest may appear;" *Gardner v. Continental Ins. Co.* 125 Ky. 464, 101 S. W. 908, holding mortgagee agent of insured to receive insurance money to extent of his interest; *Mitchell v. London Assur. Co.* 15 Ont. App. Rep. 262, holding that mortgagee cannot recover on policy as insurance contract with him, but he is mere appointee to receive insurance money.

Cited in notes in 54 A. D. 700, on effect of mortgagor's procurement of insurance pursuant to agreement; 135 Am. St. R. 747, on fire insurance as security for a mortgagee or other lien holder.

34 AM. REP. 128, CHICAGO & A. R. CO. v. KELLAM, 92 ILL. 245.**Liability of railroad company for killing cattle.**

Cited in *Wabash, St. L. & P. R. Co. v. Krough*, 13 Ill. App. 431; *Chicago, M.*

& *St. P. R. Co. v. Phillips*, 14 Ill. App. 265,—holding that railroad company is liable for killing cattle on road if servants could by ordinary care have avoided killing although owner was negligent; *Terre Haute & I. R. Co. v. Jenuine*, 16 Ill. App. 209, holding that if cattle come suddenly upon railroad track so as to render all efforts to save their lives unavailing, no action for negligence can be maintained.

Cited in reference note in 5 A. S. R. 841, on railroad's liability for injury to animals straying on track.

Cited in notes in 49 A. D. 266, on what constitutes negligence by railroad company as to trespassing animals; 20 A. S. R. 161, on duty of railroad companies towards cattle on track.

Doctrine of last clear chance.

Cited in *Missouri P. R. Co. v. Vandeventer*, 28 Neb. 112, 44 N. W. 93; *Louisville, N. A. & C. R. Co. v. Patchen*, 167 Ill. 204, 47 N. E. 368; *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, 22 A. S. R. 902, 12 S. E. 77,—to point that though person injured was negligent yet if injury might have been avoided by exercise of reasonable care on part of defendant latter is liable.

Cited in note in 38 A. R. 637, on railroad's responsibility for negligence to trespasser on track stricken down by fit.

34 AM. REP. 130, RYHINER v. FEICKERT, 92 ILL. 305.

Possession of note as evidence of ownership.

Cited in *Frorer v. Rowley*, 84 Ill. App. 446, holding that possession of note payable to "bearer" or to "order" is prima facie evidence of legal ownership.

Assignment of note payable to two or more.

Cited in *Gordon v. Anderson*, 83 Iowa, 224, 32 A. S. R. 302, 12 L.R.A. 483, 49 N. W. 86, to point that note made payable to several persons not partners can only be transferred by joint action of all of them; *Kaufman v. State Sav. Bank*, 151 Mich. 65, 123 A. S. R. 259, 18 L.R.A.(N.S.) 630, 114 N. W. 863; *Haydon v. Nicoletti*, 18 Nev. 290, 3 Pac. 473; *Rosenstock v. New York*, 87 App. Div. 335; *Gardner v. Wiley*, 46 Or. 96, 39 Pac. 341,—holding that note payable to more than one payee cannot be assigned except by joint action of all unless payees are partners.

Cited in reference note in 123 A. S. R. 262, on authority of one of two joint payees to indorse copayee's name.

Cited in notes in 7 A. S. R. 887; 18 L.R.A.(N.S.) 631,—on indorsement by one of two joint payees or indorsees of a bill or note.

Presumption of partnership where note is payable to two or more.

Cited in *Logan v. Oklahoma Mill Co.* 14 Okla. 402, 79 Pac. 103, to point that no presumption of partnership arises because note is made payable to two or more payees.

34 AM. REP. 134, AMERICAN INS. CO. v. FOSTER, 92 ILL. 334.

"Vacancy" under insurance policy as question of fact.

Cited in *Carr v. Roger Williams Ins. Co.* 60 N. H. 513, holding that whether or not premises are vacant or unoccupied is question of fact.

Cited in notes in 35 A. R. 443, on when premises are vacant or unoccupied within provision of insurance policy; 10 A. S. R. 395, on phrase "vacant and unoccupied" in insurance policies.

Effect of violation of vacancy clause in policy.

Cited in *Germania F. Ins. Co. v. Kleiver*, 27 Ill. App. 590, to the point that under usual vacancy clause, insurance policy is void where provisions thereof are violated.

34 AM. REP. 136, FUNK v. EGGLESTON, 92 ILL. 515.**When power is considered executed.**

Cited in *Warner v. Connecticut Mut. L. Ins. Co.* 109 U. S. 357, 27 L. ed. 962, 3 Sup. Ct. Rep. 221, holding that extinction of mortgage debt by donee of power under will should be considered as execution of power; *Lee v. Simpson*, 134 U. S. 572, 33 L. ed. 1038, 10 Sup. Ct. Rep. 631 (affirming 39 Fed. 235), holding that where will refers to power and describes subject of power in general terms, power will be considered executed; *Gindrat v. Montgomery Gaslight Co.* 82 Ala. 596, 60 A. R. 769, 2 So. 327, holding that power is executed when trustee with power to sell land with assent in writing of beneficiary, joins with latter in conveyance; *Lanigan v. Sweany*, 53 Ark. 185, 13 S. W. 740, holding that deed by assignee of equitable interest under mortgage containing power of sale, purporting to convey fee will be construed to take effect under power; *Griffin v. Griffin*, 141 Ill. 373, 31 N. E. 131 (Earlier action to remove cloud on title in 125 Ill. 430, 17 N. E. 782), holding that under devise to wife for life with right to sell for support deed by wife will execute power; *Harvard College v. Balch*, 171 Ill. 275, 49 N. E. 543; *Mason v. Wheeler*, 19 R. I. 21, 61 A. S. R. 734, 31 Atl. 426,—holding that where will made no reference to power nor to property subject thereof intention to execute power cannot be inferred from residuary clause; *Clark v. Middlesworth*, 82 Ind. 240, holding that under devise to wife for life and if anything was left at her death to children wife executed power by deed of property; *Hogle v. Hogle*, 49 Hun, 313, 2 N. Y. Supp. 172; *Sewall v. Wilmer*, 132 Mass. 131,—holding that general devise of all estate real and personal is good execution of power reserved in trust settlement of property of which testator had life use.

—Necessity for showing intention by express terms.

Cited in *Young v. Sheldon*, 139 Ala. 444, 101 A. S. R. 44, 36 So. 27; *Goff v. Pensenhauer*, 190 Ill. 200, 60 N. E. 110; *South v. South*, 91 Ind. 221, 46 A. R. 591; *Ladd v. Chase*, 155 Mass. 417, 29 N. E. 637; *Hill v. Conrad*, 91 Tex. 341, 43 S. W. 789; *Walke v. Moore*, 95 Va. 729, 30 S. E. 374,—holding that intention to execute power need not appear by express terms of instrument where intention is demonstrated by words, acts, or deeds; *Foster v. Grey*, 96 Ill. App. 38, holding that gift of that which testator cannot dispose of, except in execution of power, necessarily manifests intention to execute power; *Payne v. Johnson*, 95 Ky. 175, 24 S. W. 238, holding that deed to be treated as execution of power of appointment, must clearly evidence intention; *Cotting v. De Sartiges*, 17 R. I. 668, 16 L.R.A. 367, 24 Atl. 530, holding that when nothing appears to show intention to exercise power of appointment, such intention cannot be inferred; *Young v. Mutual Ins. Co.* 101 Tenn. 311, 47 S. W. 428, holding that deed purporting to convey fee made by life tenant with power of sale remainder will be deemed exercise of power of sale though deed does not refer to power.

Cited in note in 64 L.R.A. 881, on evidencing intent to exercise power of appointment by general provision in donee's will.

—Where donee of power has personal interest in subject matter.

Cited in *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117, 90 A. S. R. 22,

30 So. 466; *Morffew v. San Francisco & S. R. Co.* 107 Cal. 587, 40 Pac. 810; *Feaster v. Fagan*, 135 Iowa, 633, 113 N. W. 479; *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303,—holding that deed of donee of power who has personal interest will be construed as execution of power where intention to convey is apparent from conveyance.

Effect of failure of life tenant to execute power of disposal.

Cited in *Dalrymple v. Leach*, 192 Ill. 51, 61 N. E. 443, to the point that if land is devised to person for life with power to dispose of reversion, heirs of testator take if power is not exercised; *McCullough v. Anderson*, 90 Ky. 126, 7 L.R.A. 836, 13 S. W. 353, holding that under will creating life estate with remainder to another, and giving life tenant power to dispose of property by deed or will, remainder will take effect in case of no disposition under power; *Weir v. Smith*, 62 Tex. 1, holding that where wife has life interest under will with power of disposal at death, upon failure to make will testator's wish contained in will must be carried out.

Intention of testator as governing in construction of will.

Cited in *Crerar v. Williams*, 44 Ill. App. 497, holding that in construction of will intention of testator to be gathered from entire will must govern.

When legacy is a charge on land.

Cited in *Larkin v. Larkin*, 17 R. I. 461, 23 Atl. 19, holding that legacy is not charge upon land where testator directed son to whom land was devised to give fifty dollars yearly to daughter.

Effect of acceptance of devise where legacy is personal charge on devisee.

Cited in *Spearman v. Foote*, 126 Ill. App. 370; *Zimmer v. Sennott*, 134 Ill. 505, 25 N. E. 774; *Morrison v. Schorr*, 197 Ill. 554, 64 N. E. 545,—to point that where legacy is made personal charge on devisee, acceptance of devise imposes personal liability on devisee who takes fee as purchaser.

Effect of charging legacy upon devisee personally.

Cited in *McFarland v. McFarland*, 177 Ill. 208, 52 N. E. 281, to the point that at common law devise passed fee if payment of legacy was charged upon devisee personally.

Cited in note in 129 Am. St. R. 1061, on personal liability of devisees for charges imposed by the will.

Limiting remainder upon life estate with power of sale.

Cited in *Kaufman v. Breckinridge*, 117 Ill. 305, 7 N. E. 666, holding that life estate may be created, with power to sell and convey fee, and remainder limited after termination of life estate; *Wardner v. Seventh Day Baptist Memorial Board*, 232 Ill. 606, 122 A. S. R. 138, 83 N. E. 1077, holding that under devise to wife for life and directing disposal of remainder after paying legacies, wife cannot sell fee.

Cited in notes in 6 L.R.A.(N.S.) 1193, on power to create remainder after life estate with absolute power of disposal where such power of disposal is not considered property; 21 E. R. C. 564, on merger of power where one with life estate is empowered to appoint remainder.

Competency of husband or wife as witness.

Cited in *Ledford v. Weber*, 7 Ill. App. 87, holding that husband is competent witness in behalf of administrator of deceased wife, in proceedings relating to her separate property; *Pain v. Farson*, 179 Ill. 185, 53 N. E. 579; *Cassem v.*

Heustis, 201 Ill. 208, 94 A. S. R. 160, 66 N. E. 283; *Linkemann v. Knepper*, 226 Ill. 473, 80 N. E. 1009,—holding that husband is competent witness for or against wife, where litigation concerns wife's separate property; *Baldwin v. Smith*, 143 Ill. App. 56, holding wife competent witness in action by husband involving her separate property.

Life estate with power of disposition as fee.

Cited in note in 49 A. D. 116, on when life estate in property with power of disposition amounts to a fee.

34 AM. REP. 151, RICHARDS v. RAYMOND, 92 ILL. 612.

Constitution as limitation on power of legislature.

Cited in *Powell v. Board of Education*, 97 Ill. 375, 37 A. R. 123; *Burritt v. State Contract Comrs.* 120 Ill. 322, 11 N. E. 180; *Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203,—holding that state constitution is not regarded as grant of power to legislature, but as limitation upon its power; *Chicago & A. R. Co. v. Dumser*, 163 Ill. 190, 43 N. E. 698, to point that legislature can do any legislative act that is not prohibited by state or Federal constitution.

Power of legislature to prescribe series of school books.

Cited in *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946, holding that discretionary power of legislature to designate series of school books cannot be controlled by courts; *Campana v. Calderhead*, 17 Mont. 548, 36 L.R.A. 277, 44 Pac. 83, holding that constitution does not require legislature to adopt uniform series of text books throughout state.

Constitutionality of statute providing for special school tax.

Cited in *Southern R. Co. v. St. Clair County*, 124 Ala. 491, 27 So. 23; *Werner v. Galveston*, 72 Tex. 22, 12 S. W. 159,—holding that statute providing for special school tax is constitutional.

Cited in notes in 8 L.R.A. 283; 14 L.R.A. 474,—on support of schools as public purpose for which money may be appropriated or raised by taxation.

Right of school district to establish high school.

Cited in *Russell v. High School Bd. of Education*, 212 Ill. 327, 72 N. E. 441, holding that high school department may be established by school district.

Cited in reference note in 25 A. S. R. 605, on validity of statute authorizing establishing township high schools.

High school as part of common schools.

Cited in *People v. Moore*, 240 Ill. 408, 88 N. E. 979, holding that high school is a department of common or free schools.

34 AM. REP. 155, PEOPLE EX REL. MCCREA v. UNITED STATES, 93 ILL. 30.

Right of state to tax United States property.

Cited in *McLean County v. Bloomington*, 106 Ill. 209, on right of state to enforce taxation against United States property; *Tyler v. Cass County*, 1 N. D. 369, 48 N. W. 232, holding that state cannot tax property of United States in absence of special provisions; *Van Brocklin v. Anderson*, 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670, holding that land bought by United States for non-payment of taxes is exempt from state taxation.

Cited in reference note in 35 A. S. R. 113, on taxation of public property.

Cited in notes in 33 A. S. R. 402, 403, on exemption of United States prop-

erty from taxation; 29 A. S. R. 389, as to when property of municipality is exempt from taxation; 10 L.R.A. 376, on liability of public property to taxation; 132 Am. St. Rep. 294, 318, 349, on exemption from taxation or assessment of lands owned by government bodies, or in which they have an interest; 2 L.R.A. 148; 22 E. R. C. 446,—on exemption of public property from taxation.

34 AM. REP. 160, NICHOLS v. SCHOOL DIRECTORS, 93 ILL. 61.

Religious services in public schools.

Cited in *North v. University of Illinois*, 137 Ill. 296, 27 N. E. 54, holding that constitution did not prohibit daily chapel services in state university; *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 29 L.R.A.(N.S.) 442, 92 N. E. 251, 19 A. & E. Ann. Cas. 220, holding that children attending public school cannot be compelled to join in religious worship.

Cited in notes in 8 A. S. R. 412, on what constitutes a sectarian institution or school; 33 L.R.A. 120; 31 L.R.A.(N.S.) 593; 105 A. S. R. 156,—on use of schoolhouse for religious purposes.

34 AM. REP. 163, KELLOGG v. TURPIE, 93 ILL. 265.

Rescission of contracts.

Cited in *Stromberg v. Western Teleph. Const. Co.* 86 Ill. App. 270, holding that contract cannot be rescinded in part and in part affirmed.

Cited in note in 74 A. D. 661, on right to affirm contract in part and disaffirm in part.

— **Necessity for return of consideration.**

Cited in *Haden v. Lang*, 110 Ga. 392, 36 S. E. 100; *Graybeal v. Gardner*, 146 Ill. App. 307, 34 N. E. 528; *Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683, 19 A. & E. Ann. Cas. 74; *Rigdon v. Walcott*, 141 Ill. 649,—holding that right to rescind contract can be exercised only upon returning consideration received; *Star Accident Co. v. Sibley*, 57 Ill. App. 315, holding that person fraudulently induced to compromise claim may sue for balance without returning amount received.

Remedies of person whose goods were procured through fraud.

Cited in *Derk P. Yonkerman Co. v. Charles H. Fuller's Advertising Agency*, 135 Fed. 613, to point that person from whom goods are taken by fraud may elect to waive tort and sue in assumpsit; *Landis v. Wolfe*, 106 Ill. App. 533, holding that person whose goods have been wrongfully taken cannot sue wrongdoer in assumpsit unless goods have been converted into money; *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 23, holding that action for damages for taking of land is inconsistent with claim to land; *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535, to point that rescission of contract of sale, because of fraud is inconsistent with subsequent action on contract; *Crane v. Murray*, 106 Mo. App. 697, 80 S. W. 280, to point that where property is wrongfully taken and disposed of by sale, owner may ratify sale and sue as for money had and received; *Wilson v. Lehman*, 2 Lack. Leg. News, 352, on right of person to waive tort and sue on implied contract where goods were procured through fraud.

Person who procures goods by fraud as purchaser.

Cited in *Farwell v. Hanchett*, 19 Ill. App. 620, to point that person who obtains goods by fraud is not considered purchaser; *Ashlock v. Vivell*, 29 Ill. App. 388, holding that action to recover damages against infant for procuring goods upon

false pretenses is not attempt to enforce contract indirectly, no contract having existed.

Cited in note in 2 L.R.A. 153, on fraudulent purchase of goods.

Coexistence of express and implied contract.

Cited in *Wolf v. Booker*, 97 Ill. App. 139, to point that express and implied contract cannot co-exist.

34 AM. REP. 168, CHICAGO & N. W. R. CO. v. MORANDA, 93 ILL. 302.

Who are fellow servants.

Cited in *Chicago & A. R. Co. v. O'Bryan*, 15 Ill. App. 134, holding that when servants are engaged in same line of service and are necessarily brought into frequent contact with each other in performance of work they are coservants; *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 15 Ill. App. 85; *Lincoln Coal Min. Co. v. McNally*, 15 Ill. App. 181; *Wells v. O'Hare*, 110 Ill. App. 7,—holding that servants of common master are coservants where such servants are so employed that they can exercise an influence upon each other promotive of proper caution; *Chicago & A. R. Co. v. May*, 108 Ill. 288; *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572,—holding that general agent of corporation with power to hire and discharge servants and to direct work is not fellow servant with latter; *Chicago, & E. I. R. Co. v. Geary*, 110 Ill. 383; *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186; *Chicago City R. Co. v. Leach*, 208 Ill. 198, 100 A. S. R. 216, 70 N. E. 222,—holding that servants of common master are fellow servants where they are co-operating, at time of injury in particular business in hand; *Swisher v. Illinois C. R. Co.* 182 Ill. 533, 55 N. E. 555 (dissenting opinion), on what constitutes fellow servant in action for injury by negligence against employer; *Illinois Steel Co. v. Ziemkowski*, 220 Ill. 324, 4 L.R.A. (N.S.) 1161, 77 N. E. 190 (affirming 123 Ill. App. 285), holding that to constitute fellow servants, they must be directly co-operating with each other in particular business in same line of employment; *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 362, 18 L.R.A. 802, 19 S. W. 1119, to point that servants in separate and distinct departments are not fellow servants; *Broduer v. Valley Falls Co.* 16 R. I. 448, 17 Atl. 54, holding that second foreman in machine shop of cotton mill is fellow servant with foreman in slashing room; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 38 N. E. 946; *Ashley Wire Co. v. Mercier*, 163 Ill. 486, 45 N. E. 222,—to point that to be coservants employees must have been so associated as to be able to exercise constant caution upon each other in performance of respective duties.

Cited in notes in 36 A. D. 288; 53 A. R. 46; 1 A. S. R. 33; 41 L.R.A. 137; 67 A. D. 589,—on who are fellow servants in common employment; 50 L.R.A. 442, on identity of department as test of common employment; 50 L.R.A. 445, 448, on consociation of duties as test of common employment; 25 L. ed. U. S. 612, on who are coservants within rule that the master is not responsible for injuries to servant occasioned by negligence of coservant.

—As between railroad employees.

Cited in *Pike v. Chicago & A. R. Co.* 41 Fed. 95, holding that bridge watchman is not fellow servant with conductor of train; *St. Louis & S. F. R. Co. v. Furry*, 52 C. C. A. 518, 114 Fed. 898, holding that under statute fireman on train was not coservant with train-despatcher; *South Florida R. Co. v. Weese*, 32 Fla. 212, 13 So. 436, to the point that section foreman and fireman on passing

train are not fellow servants; *Chicago & N. W. R. Co. v. Bliss*, 6 Ill. App. 411, holding that track man and engineer are not fellow-servants; *Ohio & M. R. Co. v. Robb*, 36 Ill. App. 627, holding that two railroad engineers each running over same track are fellow-servants; *O'Leary v. Wabash R. Co.* 52 Ill. App. 641; *Klees v. Chicago & E. I. R. Co.* 68 Ill. App. 244,—holding that crews of switch and road engines whose employment requires them to do switching in same yard, are fellow-servants; *Terre Haute & I. R. Co. v. Leeper*, 60 Ill. App. 194, holding that employees of railroad company operating different sections of freight train are fellow-servants; *Indiana, I. & I. R. Co. v. Otstot*, 212 Ill. 429, 72 N. E. 387, holding that hostler whose duty is to run engines from depot to roundhouse is not coservant of section hand; *Capper v. Louisville, E. & St. L. R. Co.* 103 Ind. 305, 2 N. E. 749, holding that employee of railroad company engaged in repairing tunnel is fellow-servant of engineer in charge of train which conveys him to his work; *Neal v. Northern P. R. Co.* 57 Minn. 365, 59 N. W. 312, holding that telegraph lineman and railroad roadbed repairing crew are fellow servants; *Bateman v. Peninsular R. Co.* 20 Wash. 133, 54 Pac. 996, holding that section foreman is not fellow-servant of locomotive fireman; *Brown v. Central P. R. Co.* 68 Cal. 171, 8 Pac. 828 (dissenting opinion), on engineer and switchman as fellow servants; *Chicago City R. Co. v. Leach*, 104 Ill. App. 30, holding that gripman and conductor are not fellow servants; *Union P. R. Co. v. Erickson*, 41 Neb. 1, 29 L.R.A. 137, 59 N. W. 347, holding that sectionman and fireman are not fellow servants.

Cited in notes in 46 L.R.A. 359, on relation of conductor to members of crews of other train; 50 L.R.A. 458, on servants handling ordinary trains and servants employed in repair or construction of permanent way as engaged in common employment under doctrine of consociation of duties.

Disapproved in *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, holding that laborer on railroad track is coservant with conductor and engineer on train.

—As question of law. z

Cited in *Chicago & A. R. Co. v. Hoyt*, 16 Ill. App. 237; *Chicago, B. & Q. R. Co. v. Fitzgerald*, 40 Ill. App. 476,—holding that question of whether or not parties are fellow-servants is mixed one of law and fact; *Hobbold v. Chicago Sugar Ref. Co.* 44 Ill. App. 418, holding that instructions stating that certain circumstances being parties within relation of fellow-servants, are bad; *Blah v. West Chicago Street R. Co.* 100 Ill. App. 393, holding that where facts are undisputed question whether relation of fellow servants exist is one of law; *Spring Valley Coal Co. v. Patting*, 112 Ill. App. 4, holding coal miner and mine engineer are not as matter of law fellow servants; *Bennett v. Chicago C. R. Co.* 141 Ill. App. 560, holding that conductor of cable car and motorman of intersecting electric line of defendant, were not fellow-servants as matter of law; *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951, holding that if jury found section foreman to be in different department from those running train and not associated with them, they were not fellow-servants; *Chicago & A. R. Co. v. O'Brien*, 155 Ill. 630, 40 N. E. 1023, holding that member of section force on railroad is not as matter of law coservant of members of fence gang; *Chicago & A. R. Co. v. Swan*, 176 Ill. 424, 52 N. E. 916 (affirming 70 Ill. App. 331), holding that baggageman and engineer of same train are not as matter of law, fellow-servants.

— As question of law.

Cited in *Illinois C. R. Co. v. Ring*, 119 Ill. App. 294, holding that operating crews of two trains on same road may be fellow servants; *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576, holding that whether or not section foreman is co-servant with railroad fireman is question of fact; *Lake Erie & W. R. Co. v. Middleton*, 142 Ill. 550, 32 N. E. 453, holding that question of whether fireman who was killed in collision with freight train was fellow servant with those on freight train was question of fact; *Lehigh v. World's Columbian Exposition*, 67 Ill. App. 27; *Louisville, E. & St. L. Consol. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. 534,—holding that whether relation of fellow servants exists between employees of common master is question of fact; *Chicago & E. I. R. Co. v. Kneirim*, 152 Ill. 458, 43 A. S. R. 259, 39 N. E. 324, holding that whether helper in yard is fellow servant with train brakeman is question of fact; *Bennett v. Chicago City R. Co.* 243 Ill. 420, 90 N. E. 735, holding question of fact whether conductor on cable train and motorman on electric car are fellow servants.

Cited in note in 50 L.R.A. 452, on consociation of duties or servant as primarily a question of fact for the jury.

Evidence of pecuniary condition in action for negligence.

Cited in *John Morris Co. v. Burgess*, 44 Ill. App. 27, holding that in action for death by negligence evidence to show plaintiff had no means of support except deceased's earnings was improper; *Chicago & A. R. Co. v. Pearson*, 82 Ill. App. 605, holding that in action for death caused by negligence, evidence as to earning capacity, financial condition, age and family is proper; *Warren v. Wright*, 5 Ill. App. 429, holding that in action against village for injuries arising from negligence evidence that plaintiff is poor man is inadmissible; *Heyer v. Salisbury*, 7 Ill. App. 93; *Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 322; *Beard v. Skeldon*, 13 Ill. App. 54; *Pennsylvania Co. v. Keane*, 143 Ill. 172, 32 N. E. 260 (affirming 41 Ill. App. 317); *Chicago, P. & St. L. R. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701 (reversing 72 Ill. App. 551),—holding that in estimating damages sustained by kindred from death by wrongful act wealth or poverty of such kindred is not to be considered; *Illinois C. R. Co. v. Atwell*, 198 Ill. 200, 64 N. E. 1095, holding that testimony tending to show that widow of deceased had no pecuniary means is inadmissible in action for death of husband through defendant's negligence.

Cited in notes in 48 A. D. 639, on what is to be considered in determining damages for death of relative; 67 A. D. 568, on admissibility of evidence of pecuniary circumstances of plaintiff in action for negligently causing death; 67 L.R.A. 91, on pecuniary condition of plaintiffs as affecting damages for wrongful death.

Distinguished in *Aurora v. Seidelman*, 34 Ill. App. 285, holding that in action against city for death of child caused by negligence evidence of pecuniary condition of parents was proper on question of ability to provide attendant for child; *Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216, holding that in action against dram shop keeper by wife for injury to means of support, evidence of wife's means of support is admissible.

Admissibility of evidence to show dependence for support in negligence action.

Cited in *Chicago & A. R. Co. v. Few*, 15 Ill. App. 125, holding that in action against railroad company for injury by negligence evidence that plaintiff has wife and family dependent upon him for support is inadmissible; *Kelly v. Twenty-Third Street R. Co.* 14 Daly, 418, to point that in action for death caused

by negligence of defendant, proof should be made that collateral kindred had been supported by deceased; *Brennen v. Chicago & C. Coal Co.* 241 Ill. 610, 89 N. E. 756, holding evidence of deceased's earnings and dependence upon him of wife and children, admissible.

Cited in note in 85 A. S. R. 840, on evidence of domestic relations in suits by widows for death of husbands.

Disapproved in *Swift v. Foster*, 55 Ill. App. 280, holding that in action for death caused by negligence plaintiff should be permitted to show that wife and children depended upon deceased for support.

Right to recover for injury due to negligence of fellow servant.

Cited in *Hobson v. New Mexico & A. R. Co.* 2 Ariz. 171, 11 Pac. 545, to point that employer is not liable for injury to one servant caused by negligence of co-servant; *Springfield Iron Co. v. Gould*, 11 Ill. App. 439, holding that master is not liable to servant for injury caused by negligence of fellow-servant; *World's Columbian Exposition v. Bell*, 76 Ill. App. 591, holding that employer is not insurer of servant against every injury which may result from accident; *Frost Mfg. Co. v. Smith*, 98 Ill. App. 308, holding that master is liable for damages caused to one servant by negligence of another where relation of co-servant does not exist; *Stafford v. Chicago, B. & Q. R. Co.* 114 Ill. 244, 2 N. E. 185; *Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. 569; *Bier v. Jeffersonville, M. & I. R. Co.* 132 Ind. 78, 31 N. E. 471,—holding that employer cannot be held liable for injury to one employee caused by negligence of co-employee; *Pagels v. Meyer*, 193 Ill. 172, 61 N. E. 1111; *Chicago City R. Co. v. Leach*, 80 Ill. App. 354,—holding that common master is liable where servant is injured through negligence of another servant where they are not co-operating as fellow servants; *The Clatsop Chief*, 7 Sawy. 274, 8 Fed. 163, holding that vessel owners were liable for injury to fireman for injury caused by negligence of master.

Cited in notes in 67 A. D. 593, on liability of master for negligence of fellow servants as affected by nature of their duties; 17 E. R. C. 242, on liability of master for injury to servant through negligence of another employee.

— When in employ of railroad company.

Cited in *St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 289, 11 L.R.A. 773, 15 S. W. 831; *Chicago & T. R. Co. v. Simmons*, 11 Ill. App. 147,—holding that railroad company is not liable to servant for injury caused by negligence of foreman; *Wabash, St. L. & P. R. Co. v. Gordon*, 17 Ill. App. 63, holding that railroad company is not liable for injury to one servant caused by negligence of another; *Clark v. Wabash R. Co.* 52 Ill. App. 104, holding that member of crew of one train cannot recover for injury caused by negligence of crew of another train on same track; *Indianapolis & G. Rapid Transit Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145, holding that track repairer cannot recover against electric railway company for injury caused by negligence of motorman while former was riding to place of work; *Murray v. St. Louis, C. & W. R. Co.* 98 Mo. 573, 14 A. S. R. 661, 5 L.R.A. 735, 12 S. W. 252, holding that recovery cannot be had for injury to watchman caused by negligence of gripman in operating cable car; *Card v. Eddy*, 129 Mo. 510, 36 L.R.A. 806, 28 S. W. 979, holding that receiver of railroad company was not liable to track foreman for injury caused by negligence of trainman in delivering order of roadmaster; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 549, holding that negligence of fellow servant in enforcing unreasonable order of railroad superintendent for management of particular train is no defense in action for injury.

34 AM. REP. 187, PRATT v. BAPTIST SOC. 93 ILL. 475.**Revocation of subscriptions.**

Cited in *Vierling v. Horton*, 27 Ill. App. 263, holding that note given in payment of subscription to funds of church is upon valuable consideration; *Augustine v. Methodist Episcopal Soc.* 79 Ill. App. 452, holding that voluntary subscription toward fund to build church may be withdrawn before money has been expended or liability incurred upon strength thereof; *Switzer v. Gertenbach*, 122 Ill. App. 26; *Whitsitt v. Pre-emption Presby. Church*, 110 Ill. 125,—holding that mutual subscriptions for common object, where money has been expended in accomplishment of object are binding; *Hudson v. Green Hill Seminary Corp.* 113 Ill. 618, holding that where money is expended upon strength of subscription in aid of seminary no revocation of subscription can be made; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463; *Smith's Estate*, 23 Lanc. L. Rev. 9; *Beatty v. Western College*, 177 Ill. 280, 69 A. S. R. 242, 42 L.R.A. 797, 52 N. E. 432,—holding that note intended as gift to payee may be revoked at any time; *Hudson Real Estate Co. v. Tower*, 161 Mass. 10, 42 A. S. R. 379, 36 N. E. 680, holding that subscription to stock of proposed corporation may be withdrawn before organization, although associates have taken action on strength of subscription; *McClanahan v. Payne*, 86 Mo. App. 284, holding that gratuitous subscription may be revoked at any time before its acceptance by promisee; *People's Bank & T. Co. v. Weidinger*, 73 N. J. L. 433, 64 Atl. 179, holding that mutual voluntary promises made by two persons, for benefit of third are revocable by either until acted on by other parties; *Grubbs v. Kelly*, 149 Ill. App. 550, holding that performance of subscription contract for location of industrial enterprise need not be shown to recover payment.

Cited in reference note in 8 A. S. R. 771, on enforcement of subscription where promisee assumes no obligation.

Cited in notes in 26 L.R.A. 308, on enforcement of note given for voluntary subscription before liability incurred; 22 E. R. C. 41, on liability of subscriber to stock of a corporation.

—Effect of death or insanity of subscriber.

Cited in *Rapp v. Phoenix Ins. Co.* 113 Ill. 390, 55 A. R. 427, to the point that voluntary subscription is revoked by death of subscriber before it is accepted and acted upon; *Beach v. First M. E. Church*, 96 Ill. 177, holding that insanity of subscriber to common fund before same is accepted or acted upon revokes subscription; *Wallace v. Townsend*, 43 Ohio St. 537, 54 A. R. 829, holding that death of subscriber to stock of railroad company, condition upon construction of line along designated route, before delivery and acceptance revokes subscription.

Cited in reference note in 22 A. S. R. 815, on proposals of decedent as binding upon representatives.

Cited in note in 23 L.R.A. 707, on revocation of subscription contract by death of promisor.

Effect of death of applicant on application for life insurance.

Cited in *Paine v. Pacific Mut. L. Ins. Co.* 2 C. C. A. 459, 10 U. S. App. 256. 51 Fed. 689, holding that death of applicant for life insurance before application reaches home office revokes offer to become insured.

Right to present errors in reply brief.

Cited in *Schumacker v. Bell*, 164 Ill. 181, 45 N. E. 428, holding that errors not insisted upon in opening brief cannot be presented in reply brief.

34 AM. REP. 191, BOSCOWITZ v. ADAMS EXP. CO. 93 ILL. 523.**Right of carrier to limit its liability for loss by negligence.**

Cited in *Southern Exp. Co. v. Owens*, 146 Ala. 412, 119 A. S. R. 41, 8 L.R.A. (N.S.) 369, 41 So. 752, 9 A. & E. Ann. Cas. 1143; *Bowlus v. Phenix Ins. Co.* 133 Ill. 106, 20 L.R.A. 400, 32 N. E. 319,—holding that carrier cannot limit its liability as to amount against its negligence; *Chicago & N. W. R. Co. v. Chapman*, 30 Ill. App. 504; *Cleveland, C. C. & St. L. R. Co. v. Newlin*, 74 Ill. App. 638,—holding that carrier cannot by contract limit its liability for injuries resulting from its failure to use ordinary care; *Cutter v. Wells, F. & Co.* 237 Ill. 247, 86 N. E. 695 (affirming 140 Ill. App. 324), holding that provision in express company's receipt limiting liability for loss to fifty dollars, unless different sum is named violates common carrier's act; *Powers Mercantile Co. v. Wells, F. & Co.* 93 Minn. 143, 100 N. W. 735, to the point that shipper who suffers loss by reason of actionable negligence of carrier may recover full value of goods though receipt limits liability; *Merchants' Despatch Transp. Co. v. Bloch Bros.* 86 Tenn. 392, 6 A. S. R. 847, 6 S. W. 881, holding that contract exempting carrier from liability for loss of goods through agent's negligence is void.

Cited in reference note in 60 A. R. 360, on limitation by express company against negligence.

Cited in notes in 23 A. S. R. 595, on carrier's power to limit amount of liability to sum less than injury sustained; 61 A. S. R. 363, 366, 367, on limitation of liability of express companies; 88 A. S. R. 96, on validity of limitation of carrier's liability for losses caused by negligence of carrier or employees; 6 L.R.A. 854, on power of carrier to stipulate against liability for negligence.

Burden of proof as to consent of shipper to stipulations in bill of lading.

Cited in *Chicago & N. W. R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Chicago & N. W. R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 88 A. S. R. 68, 61 N. E. 1095; *Ryan v. Cudahy*, 49 Ill. App. 568; *Wabash R. Co. v. Thomas*, 222 Ill. 337, 7 L.R.A. (N.S.) 1041, 78 N. E. 777,—holding that burden is on carrier to show that shipper consented to stipulation in bill of lading constituting both receipt and contract; *Webbe v. Western U. Teleg. Co.* 169 Ill. 610, 61 A. S. R. 207, 48 N. E. 670, holding that receiver of telegraph despatch is not bound by provision printed in blank, limiting time to file claim for damages in absence of proof of assent.

Parol evidence as to shipper's assent to limitation of carrier's liability.

Cited in *O'Malley v. Great Northern R. Co.* 86 Minn. 380, 90 N. W. 974, holding that for purpose of showing that shipper did not assent to terms of contract limiting liability parol evidence is admissible.

Necessity of assent of shipper to limitation of liability.

Cited in *Walker-Edmund Co. v. Adams Exp. Co.* 146 Ill. App. 176, to point that assent of shipper to limitation of value in bill of lading is necessary.

Cited in notes in 32 A. D. 507, as to when notice limiting carrier's liability is efficient without assent to limit such liability; 88 A. S. R. 79, on necessity of shipper's assent to limitation of carrier's liability.

Duty of carrier to provide proper facilities.

Cited in *Beard v. Illinois C. R. Co.* 79 Iowa, 518, 18 A. S. R. 381, 7 L.R.A.

280, 44 N. W. 800; *Baker v. Boston & M. R. Co.* 74 N. H. 100, 124 A. S. R. 937, 65 Atl. 386, 12 A. & E. Ann. Cas. 1072,—to point that it is duty of carrier of milk to provide men and conveyances to handle and care for goods while being transported.

Liability of express companies.

Cited in notes in 61 A. S. R. 379, on liability of express company for injury by negligence or delay; 62 A. S. R. 525, on liability of express company for negligence of railroad.

34 AM. REP. 199, WRAGG v. PENN TWP. 94 ILL. 11.

Right to punish same act under general statute and city ordinance.

Cited in *Cassidy v. Texarkana*, 53 Ark. 368, 14 S. W. 38; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *Hankins v. People*, 106 Ill. 628; *Ohio, I. & W. R. Co. v. People*, 39 Ill. App. 473; *Neola v. Reichart*, 131 Iowa, 492, 109 N. W. 5; *State v. Fourcade*, 45 La. Ann. 717, 40 A. S. R. 249, 13 So. 187,—holding that same act may constitute offense against general law and also against municipal ordinance and be punished under both; *Robbins v. People*, 95 Ill. 175, holding that ordinance providing less penalty than general statute for same offense cannot be enforced; *State v. Lee*, 29 Minn. 445, 13 N. W. 913, holding that conviction under city ordinance for keeping house of ill-fame is no bar to prosecution for same act by indictment under general law; *Day v. Clinton*, 6 Ill. App. 476; *Nicholson v. People*, 29 Ill. App. 57; *Arhart v. Stark*, 6 Misc. 579, 27 N. Y. Supp. 301,—to the point that it is competent for legislature to subject any particular offense both to penalty and criminal prosecution.

Cited in reference note in 40 A. S. R. 259, on prosecution by state for violation of city ordinance as bar to subsequent prosecution by city.

Cited in notes in 92 A. S. R. 96, on identity of sovereignties or laws violated. within rule as to former jeopardy; 92 A. S. R. 100, on plea of former jeopardy where act violates both state law and municipal ordinance; 92 A. S. R. 103, on conviction or acquittal of contempt of court or legislature as bar to criminal prosecution; 17 L.R.A.(N.S.) 55, on violation of municipal ordinance as distinct offense from that of violating statute regulating same matter; 17 L.R.A.(N.S.) 57, on concurrent jurisdiction for offenses constituting violation of ordinance and of state statute; 17 L.R.A.(N.S.) 70, on conviction of violation of municipal ordinance as bar to prosecution for violation of state statute; 17 L.R.A.(N.S.) 72, on municipal ordinance without prosecution as bar to prosecution for violation of state statute; 31 L.R.A.(N.S.) 709, on right to convict for several offenses growing out of same facts; 21 L. ed. U. S. 875, on what constitutes former jeopardy.

What constitutes opening of highway.

Cited in *Ottawa v. Yentzer*, 160 Ill. 509, 43 N. E. 601, to point that opening of highway under statute is accomplished by removing obstructions existing at time highway was established; *Richmond v. Henrico County*, 83 Va. 204, 2 S. E. 26, to point that road is established from date of order, and by order of commissioners laying it out.

User and improvement of highway as evidence of dedication.

Cited in *Chicago v. Chicago, R. I. & P. R. Co.* 152 Ill. 561, 38 N. E. 768, holding that owner may show any facts or circumstances to overcome presumption that highway in use was dedicated; *Russell v. Lincoln*, 200 Ill. 511, 65 N. E.

1088, to point that acceptance of street by municipality may be evidenced by use and improvement of same; *Alden Coal Co. v. Challis*, 200 Ill. 222, 65 N. E. 665, holding that acceptance of dedication of ground to public may be implied from user for purposes of dedication.

Repeal of statute by implication.

Cited in *Mettler v. People*, 36 Ill. App. 324, holding that statute making it crime to cut trees in cemeteries does not by implication repeal provisions of criminal code which provide for punishment of such act; *Leischke v. Miller*, 100 Ill. App. 137, holding that later statute will not repeal earlier one by implication unless they are so inconsistent that they cannot stand together.

34 AM. REP. 208, IRVIN v. NEW ORLEANS, ST. L. & C. R. CO. 94 ILL. 105.

Place of taxation of personal property.

Cited in reference note in 8 A. S. R. 521, on where personal property taxable.

Cited in notes in 56 A. D. 533, on where tangible chattels of nonresident taxable; 56 A. D. 535, on taxing property in transitu in jurisdictions through which passes.

— Vessels.

Cited in *Com. ex rel. Lucas v. Ayer & L. Tie Co.* 117 Ky. 161, 77 S. W. 686, to point that enrolled vessel engaged in interstate commerce may be taxed by state at port of registry.

Cited in notes in 56 A. D. 526; 39 A. R. 282; 9 A. S. R. 118,—on place of taxation of vessels; 62 A. S. R. 472, on situs for taxation of property consisting of vessels; 37 L.R.A. 520, on what is home port of vessel for purpose of taxation.

Injunction against collection of taxes.

Cited in *Union School Dist. No. 4 v. New Union School Dist.* 135 Ill. 464, 28 N. E. 49, holding that court of equity has power to enjoin collection of illegal tax; *Searing v. Heavysides*, 106 Ill. 85; *Condit v. Widmayer*, 196 Ill. 623, 63 N. E. 1078,—holding that collection of tax based upon assessment of one man's property in name of another may be enjoined.

34 AM. REP. 213, DUNNE v. PEOPLE, 94 ILL. 120.

Legislation within police power.

Cited in *Ward v. Farwell*, 97 Ill. 593, holding that legislature has authority, under police power of state, to adopt such legislation as will protect people against losses incident to public business conducted by corporation; *Meadowcroft v. People*, 163 Ill. 56, 54 A. S. R. 447, 35 L.R.A. 176, 45 N. E. 303, holding that statute making receipt of deposits by insolvent banker, embezzlement, is within police power of legislature; *Chicago v. Gunning System*, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 A. & E. Ann. Cas. 892, holding that city has power to regulate erection of bill-boards within corporate limits; *Chicago v. Bowman Dairy Co.* 234 Ill. 294, 123 A. S. R. 100, 17 L.R.A. (N.S.) 684, 84 N. E. 913, 14 A. & E. Ann. Cas. 700, holding that ordinance fixing penalty for using milk bottles without having capacity plainly indicated is within police power; *Com. v. Murphy*, 166 Mass. 171, 32 L.R.A. 606, 44 N. E. 138, to point that it is within power of legislature to regulate bearing of arms so as to forbid unauthorized drills or parades; *W. C. Ritchie & Co. v. Wayman*, 244 Ill. 509, 27 L.R.A. (N.S.) 994, 91

N. E. 695, holding that legislation limiting number of hours women shall work in one day is within police power; *O'Donnell v. Riter Conley Mfg. Co.* 124 Ill. App. 544, holding that building ordinance requiring erection of temporary or permanent floor is valid.

State national guard as "troops" or "standing army."

Cited in *State ex rel. Madigan v. Wagener*, 74 Minn. 578, 73 A. S. R. 369, 42 L.R.A. 749, 77 N. W. 424, holding that state national guard organized under military code, not in active duty are not "troops" within meaning of Federal constitution or "standing army" within meaning of state bill of rights.

Right of state to provide for harbor regulations.

Cited in *Harmon v. Chicago*, 110 Ill. 400, 51 A. R. 698, holding that state may legislate in respect to control of harbors where such legislation is not in conflict with valid act of Congress.

34 AM. REP. 229, HAYWARD v. MILLER, 94 ILL. 349.

Conclusiveness of decision of appellate court on question of fact.

Cited in *Belleville v. Citizens' Horse R. Co.* 152 Ill. 171, 26 L.R.A. 681, 38 N. E. 584, holding that in chancery cases supreme court determines controverted questions of fact from record and are not bound by findings of appellate court; *Tenney v. Foote*, 95 Ill. 99; *Massachusetts Mut. L. Ins. Co. v. Robinson*, 98 Ill. 324; *Fitzsimmons v. Cassell*, 104 Ill. 352; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463; *Moerschbaeher v. Supreme Council*, R. L. 188 Ill. 9, 52 L.R.A. 281, 59 N. E. 17; *H. O. Stone & Co. v. Ferry*, 239 Ill. 606, 88 N. E. 186; *Martin v. Martin*, 212 Ill. 301, 72 N. E. 418,—holding that finding of fact by appellate court cannot be reviewed.

Liability of owner for injury due to defective premises.

Cited in *Mauzy v. Kinzel*, 19 Ill. App. 571, holding that guest at lodging house can recover against proprietor for injury caused by neglect of latter to maintain barrier to entrance of elevator; *Fisher v. Jansen*, 30 Ill. App. 91, holding that person while upon premises of another by implied invitation is entitled to due care on part of owner of premises for his protection; *Foren v. Rodick*, 90 Me. 276, 38 Atl. 175, holding that landlord is liable to person coming upon premises by implied invitation for injury caused by defects in approach to building; *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 668, 46 S. W. 63, holding that owner of premises is liable for death of person who came upon premises by invitation and was injured by defective condition of building; *Donaldson v. Wilson*, 60 Mich. 86, 1 A. S. R. 487, 26 N. W. 842; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 A. S. R. 708, 44 Pac. 1050,—to point that owner of premises is liable in damages to person coming thereon at his invitation, for injury caused by unsafe condition of premises; *Anderson v. Seattle-Tacoma Interurban R. Co.* 36 Wash. 387, 104 A. S. R. 962, 78 Pac. 1013, holding that question of railroad company's liability is for jury where passenger was wrongfully ejected and was injured while walking on track by coming in contact with "third" rail; *Speck v. Northern P. R. Co.* 108 Minn. 435, 24 L.R.A.(N.S.) 249, 122 N. W. 497, 17 A. & E. Ann. Cas. 460, holding that passenger opening door not marked for passengers and falling into basement cannot recover.

Cited in reference notes in 48 A. R. 727, on injury by reason of dangerous premises to party rightfully present; 54 A. R. 722, on duty of owner of defective machine toward intruder; 1 A. S. R. 490, on liability of landowner for injuries

to persons coming on premises; 12 A. S. R. 525, on liability for injuries sustained by falling down elevator well; 55 A. S. R. 62; 48 A. S. R. 553,—on liability of owner to one injured while on his premises by invitation.

Cited in notes in 43 A. R. 227; 57 A. S. R. 713,—on duty and liability of owner as to keeping premises safe; 49 A. S. R. 406, on hotel elevator causing injury to child, as dangerous premises.

Sufficiency of instructions as to due care.

Cited in *Bloomington v. Tebballs*, 17 Ill. App. 455, holding that where sufficient general instructions upon element of due care in negligence action has been given, failure to repeat same while instructing as to measure of damages is not ground of error.

34 AM. REP. 236, SCHROEDER v. CRAWFORD, 94 ILL. 357.

Right of action under civil damage act.

Cited in *Stafford v. Levinger*, 16 S. D. 118, 102 A. S. R. 686, 91 N. W. 462, 1 A. & E. Ann. Cas. 732, holding that under statute widow may recover on liquor dealer's bond for loss if support occasioned by death of her husband, caused by sale of liquor to him; *Schulte v. Schleeper*, 210 Ill. 357, 71 N. E. 325, holding that recovery cannot be had under section 8 of "dram-shop" act for care of intoxicated person where injury making care necessary was caused by independent act of third person; *Hedlund v. Geyer*, 234 Ill. 589, 85 N. E. 203, 14 A. & E. Ann. Cas. 1055, holding that tenant of one building and owner of another may be joined in action for injury to support under "dram-shop" act; *Beem v. Chestnut*, 120 Ind. 390, 22 N. E. 303, holding that under statute person who sells liquor to intoxicated person is liable to wife for injury caused by reason of intoxication; *Gardner v. Day*, 95 Me. 558, 50 Atl. 892, holding that under statute wife can maintain action for injury to means of support, against person selling her husband liquor where death resulted from sale; *Mead v. Stratton*, 87 N. Y. 493, 41 A. R. 386, holding that where death of man is result necessarily following and attributable to his intoxication, widow may maintain action under statute against person selling liquor and owner of building; *Hewett v. Commercial Bkg. Co.* 45 Neb. 820, 59 N. W. 693; *Pegram v. Storz*, 31 W. Va. 220, 6 S. E. 485,—to the point that wife might under statute recover damages for injury to means of support, caused by intoxicating liquor sold to husband by defendant; *Johnson v. Gram*, 72 Ill. App. 676, holding that intoxication by treating is within Dram-Shop Act.

Cited in notes in 35 A. D. 338, on constitutionality of civil-damage laws; 36 A. S. R. 830, on liability for causing bodily incapacity by supplying intoxicating liquors.

Intoxication as proximate cause of death.

Cited in *Tetzner v. Naughton*, 12 Ill. App. 148, to point that if intoxicated person should go upon railroad track and there be killed by train on account of his inability to care for himself intoxication would be considered proximate cause of death; *Hart v. Duddleson*, 20 Ill. App. 618; *Meyer v. Butterbrodt*, 146 Ill. 131, 34 N. E. 152,—holding that if intoxicated person should go on railroad and there be killed by train, because of incapacity to care for himself, proximate cause of death would be intoxication; *Meyer v. Butterbrodt*, 43 Ill. App. 312, holding that intoxication will be considered proximate cause of person's death, although independent force is immediate cause where intoxication put person

killed in way of operation of such force; *Triggs v. McIntyre*, 215 Ill. 369, 74 N. E. 400 (affirming 115 Ill. App. 257), holding that whether or not intoxication was proximate cause of death is question of fact in action for injury to support under "dram-shop" act; *Nelson v. State*, 32 Ind. App. 88, 69 N. E. 298, holding that sale of liquor was proximate cause of death where person purchasing while drunk contracted pneumonia which resulted in death; *Currier v. McKee*, 99 Me. 364, 59 Atl. 442, 3 A. & E. Ann. Cas. 57, holding that whether or not person who sells liquor is bound to apprehend that intoxication thereby produced is likely to provoke unjustifiable assault and injury to assailant is question for jury; *McNary v. Blackburn*, 180 Mass. 141, 61 N. E. 885, holding that in action for injury resulting from selling intoxicating liquor to plaintiff's son proof that intoxication was natural and proximate cause of injury is sufficient without showing that it was "necessarily" such.

Cited in notes in 52 A. R. 160, on application of proximate and remote cause to cases arising under civil-damage act; 13 L.R.A.(N.S.) 1159, on necessity. in order to support a recovery under civil-damage act, that intoxication be the proximate cause of the injury.

34 AM. REP. 241, ORELL v. PEOPLE, 94 ILL. 456.

What constitutes "building" under statute defining burglary.

Cited in *Kincaid v. People*, 139 Ill. 213, 28 N. E. 1060, holding that indictment for burglary alleging that defendant entered "engine room of railway company" was bad in failing to allege entry to "building;" *Gillock v. People*, 171 Ill. 307, 49 N. E. 712, holding that "hen-house" is included within meaning of words "other buildings" in statute defining burglary; *Bruen v. People*, 206 Ill. 417, 69 N. E. 24, holding that "hotel" is included within meaning of words "other buildings" in statute relating to crime of burglary; *State v. Haney*, 110 Iowa, 26, 81 N. W. 151, holding that "planing mill" is "building" within meaning of statute defining burglary; *State v. Rogers*, 54 Kan. 683, 39 Pac. 219, holding that "courthouse" is "building" within statute defining burglary in second degree; *Clark v. State*, 69 Wis. 203, 2 A. S. R. 732, 33 N. W. 436, holding that incomplete structure intended for use as dwelling is "building" within meaning of statute defining burglary.

Cited in note in 2 A. S. R. 390, on stables as a building within statute defining burglary.

34 AM. REP. 242, WILMS v. JESS, 94 ILL. 464.

Liability for removal of subjacent support.

Cited in *Campbell v. Louisville Coal Min. Co.* 39 Colo. 379, 10 L.R.A.(N.S.) 822, 89 Pac. 767, to point that where one person owns surface and another mineral thereunder latter must leave sufficient support for surface; *Williams v. Gibson*, 84 Ala. 228, 5 A. S. R. 368, 4 So. 350; *Catlin Coal Co. v. Lloyd*, 109 Ill. App. 122,—holding that mine owner is bound to leave sufficient support for surface where fee of surface is in another; *Lloyd v. Catlin Coal Co.* 210 Ill. 480, 71 N. E. 335, holding that mine owner is liable to surface owner for subsidence of surface caused by removal of subjacent support; *Western Indiana Coal Co. v. Brown*, 36 Ind. App. 44, 114 A. S. R. 367, 74 N. E. 1027, holding that burden is upon mine owner to show that surface subsided because of additional weight of buildings; *Griffin v. Fairmont Coal Co.* 59 W. Va. 480, 2 L.R.A.(N.S.) 1115, 53 S. E. 24 (dissenting opinion), on duty of grantor of land who reserves right to mine

coal on land, to leave pillars sufficient to support surface; *Seitz v. Coal Valley Min. Co.* 149 Ill. App. 85, holding that conveyance of all minerals does not waive obligation to support surface.

Cited in reference note in 6 A. S. R. 724, on duty of owner of right to mine in another's lands to leave sufficient support.

Cited in notes in 24 A. S. R. 556; 135 Am. St. Rep. 134, 139, 141, 149,—on rights of owner of surface to support as against owner of minerals thereunder; 68 L.R.A. 677, on right to subjacent support of land in its natural condition under specific provisions; 68 L.R.A. 681, on right to lateral or subjacent support of soil in its natural condition; 68 L.R.A. 707, on collateral direct injuries from removal of lateral or subjacent support; 2 L.R.A.(N.S.) 1116, on right to subjacent support for coal lands; 17 E. R. C. 421, on duty of miner to leave sufficient support to uphold surface.

Measure of damages for removal of subjacent support.

Cited in *Donk Bros. Coal & Coke Co. v. Slata*, 133 Ill. App. 280, holding that measure of damages for injury to building caused by mine owner removing support, is cost of restoring premises to condition in which they were prior to injury; *Donk Bros. Coal & Coke Co. v. Novero*, 135 Ill. App. 633, holding that surface owner is entitled to damages for value of buildings as well as to soil, where mine owner causes wrongful subsidence of surface.

Cited in note in 33 A. S. R. 475, on consequential damages to buildings by violation of right of support.

34 AM. REP. 245, EAGLE PACKET CO. v. DEFRIES, 94 ILL. 598.

When happening of accident gives rise to presumption of negligence.

Cited in *Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600, holding that proof of accident together with circumstances makes prima facie case of negligence where defendant has control of that which causes accident where such accidents do not usually occur if ordinary care is used.

Cited in note in 6 A. S. R. 795, on presumption of negligence when injury has been suffered and evidence fails to show who was at fault.

— Accident to passenger.

Cited in *Elgin City R. Co. v. Wilson*, 56 Ill. App. 364, holding that presumption of negligence arises where passenger is injured by overturning of train; *West Chicago Street R. Co. v. Kennelly*, 66 Ill. App. 244, holding that burden of showing absence of negligence rests upon railroad company where passenger was injured by operation of train; *North Chicago Street R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087; *Pittsburg, C. C. & St. L. R. Co. v. Campbell*, 116 Ill. App. 356; *Elgin, A. & S. Traction Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436,—holding that proof of injury to passenger by collision of two trains makes prima facie case of negligence on part of company; *New York, C. & St. L. R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, holding that prima facie case of negligence is made upon proof that passenger on freight train in charge of cattle was injured.

Cited in notes in 62 A. D. 685, on presumption of negligence of carrier of passenger from nature of accident; 64 A. D. 524, on presumption of negligence of carriers of passengers by steamships; 20 A. S. R. 493, on accident to passenger as evidence of negligence; 113 A. S. R. 1031, on presumption of negligence from

accident while traveling by stage, livery, steamboat, or the like; 15 L.R.A. 38, on presumption of negligence against carrier from fall of gangway.

Distinguished in *McFadden v. Chicago, R. I. & P. R. Co.* 149 Ill. App. 298, holding that doctrine of *res ipsa loquitur* is not applicable to injury to passenger stepping from car step.

Necessity of pleading permanency of injury.

Cited in *Chicago, B. & Q. R. Co. v. Sullivan*, 21 Ill. App. 580, to the point that permanency of injury need not be alleged in action for personal injury; *Wabash Western R. Co. v. Friedman*, 41 Ill. App. 270, to point that it is not necessary in action for personal injury by negligence to describe injury; *Springer v. Schultz*, 105 Ill. App. 544; *Smythe v. Charles P. Parish & Co.* 140 Ill. App. 405; *West Chicago Street R. Co. v. McCallum*, 169 Ill. 240, 48 N. E. 424,—holding that permanency of injury need not be pleaded in action for injury resulting from negligence.

Validity of release of claim procured by fraud.

Cited in *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120 (affirming 13 Ill. App. 166); *Papke v. G. H. Hammond Co.* 192 Ill. 631, 61 N. E. 910; *Hartley v. Chicago & A. R. Co.* 214 Ill. 78, 73 N. E. 398,—holding that release of all damages is bar to action unless it can be impeached for fraud inhering in execution of instrument; *Indiana, D. & W. R. Co. v. Fowler*, 103 Ill. App. 565, holding that release from liability for personal injury, procured by wilful misrepresentation of facts is ineffective; *Bussian v. Milwaukee, L. S. & W. R. Co.* 56 Wis. 325, 14 N. W. 452, holding that release from liability for personal injuries after action has been commenced, in absence of counsel, may be set aside on ground of fraud unless utmost good faith on part of defendant is shown; *Kelly v. Chicago, R. I. & P. R. Co.* 138 Iowa, 273, 128 A. S. R. 195, 114 N. W. 536, holding that settlement for wrongful death procured by fraud is invalid.

Cited in note in 5 L.R.A.(N.S.) 664, on effect of representations or undue influence by physician to avoid release.

Right to set up in reply that release was procured through fraud.

Cited in *Perry v. M. O'Neil & Co.* 78 Ohio St. 200, 85 N. E. 41; *Sanford v. Royal Ins. Co.* 11 Wash. 653, 40 Pac. 609,—holding that in action on fire insurance policy to which plea of release is set up, insured may set up in reply that release was procured by fraud.

Cited in note in 20 L.R.A.(N.S.) 918, 919, on right, in action at law, to attack release for fraud.

Burden of proof where nature of accident raises presumption of negligence.

Cited in *North Chicago Street R. Co. v. Cotton*, 41 Ill. App. 311, holding that where nature of accident as proved is such as to raise presumption of negligence of defendant latter must show that accident could not have been prevented by greatest degree of care in order to defeat recovery; *Alton R. & Illuminating Co. v. Foulds*, 81 Ill. App. 322, to point that where injury to person using electric lights furnishes presumption of negligence on part of lighting company complaint need only allege agreement to furnish light, negligent breach of it and result together with absence of contributory negligence; *North Chicago Street R. Co. v. Boyd*, 156 Ill. 416, 40 N. E. 955, on burden of proof to show reasonable effort to avoid injury to passenger.

Necessity of restoration of consideration before action where release is procured by fraud.

Cited in *Citizens' Street R. Co. v. Horton*, 18 Ind. App. 335, 48 N. E. 22, on necessity of restoring money received upon compromise of claim procured through fraud before commencing action.

34 AM. REP. 247, STATE v. BLOOM, 68 IND. 54.

Impeachment of accused.

Cited in *State v. Beal*, 68 Ind. 345, 34 A. R. 263, holding that in criminal case where accused testifies in his own behalf his character for truth may be attacked but not his general moral character; *Walker v. State*, 102 Ind. 502, 1 N. E. 856; *Kahlenbeck v. State*, 119 Ind. 118, 21 N. E. 460,—holding that in prosecution for murder general reputation of accused for peace and quietude may be shown but not his reputation for morality; *Drew v. State*, 124 Ind. 9, 23 N. E. 1098, holding that it is competent for state to show general bad character of accused where latter testifies in his own behalf; *People v. Seldner*, 62 App. Div. 357, 71 N. Y. Supp. 35, holding that in prosecution for larceny defendant may present evidence of good character and reputation for honesty and integrity; *State v. Marks*, 16 Utah, 204, 51 Pac. 1089, holding that in criminal case defendant's character for honesty and integrity cannot be inquired into unless he voluntarily places them in issue.

Cited in reference note in 8 A. S. R. 447, on admissibility of evidence of character of defendant.

Cited in notes in 103 A. S. R. 890, on nature of defendant's evidence of good character; 103 A. S. R. 901, on nature of evidence of defendant's good character admissible on trial for larceny and robbery; 8 L.R.A. 302, on good character as defense in criminal law; 20 L.R.A. 612, on necessity that evidence in case of disorderly house be applicable to the trait of character involved.

34 AM. REP. 250, BURNS v. ANDERSON, 68 IND. 202.

Rate of interest after maturity.

Cited in *Kimbrough v. Lukins*, 70 Ind. 373, holding that interest cannot be computed on matured note so as to make it exceed highest legal rate; *Smith v. Tatman*, 71 Ind. 171; *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. 1,—to point that note silent as to interest draws interest after maturity; *Gray v. State*, 72 Ind. 567, holding that bonds issued by state draw interest after maturity though such interest is not provided for therein; *Richards v. McPherson*, 74 Ind. 158, holding that mortgage providing for interest at ten per cent, bears only six per cent after maturity; *Soice v. Huff*, 102 Ind. 422, 26 N. E. 89, on rate of interest payable upon mortgage debt after maturity where rate of interest is specified in mortgage.

Cited in reference note in 69 A. D. 348, on rate of interest on note after due.

Cited in notes in 76 A. D. 602; 37 A. R. 305; 53 A. R. 845; 26 L. ed. U. S. 531,—on rate of interest after maturity; 47 A. R. 70, on rate of interest after maturity of obligation bearing interest at special rate.

Denied in *Kimmell v. Burns*, 84 Ind. 370; *Holmes v. Boyd*, 90 Ind. 332,—holding that note specifying interest at rate of ten per cent, continues to draw interest at that rate after maturity.

Overruled in *Shaw v. Rigby*, 84 Ind. 375, 43 A. R. 96, holding that note not

specifying rate of interest after maturity will draw interest at rate mentioned in note.

34 AM. REP. 254, PATTON v. RANKIN, 68 IND. 245.

Liability of property held in entirety for individual indebtedness.

Cited in *Fogleman v. Shively*, 4 Ind. App. 197, 51 A. S. R. 213, 30 N. E. 909, holding that nonresident husband's interest in proceeds of sale of land held by entirety may be attached in agent's hands to pay husband's debts: *Humberd v. Collings*, 20 Ind. App. 93, 50 N. E. 314; *Carver v. Smith*, 90 Ind. 222, 46 A. R. 210,—holding that lands held by husband and wife are not subject to levy of execution against either while both are living; *Shinn v. Shinn*, 42 Kan. 1, 4 L.R.A. 224, 21 Pac. 813, holding that judgment for alimony in action by husband against wife for divorce, which action was afterwards dismissed, is not lien on land held as tenants by entirety; *Mercer v. Coomler*, 32 Ind. App. 533, 102 A. S. R. 252, 69 N. E. 202; *Morrill v. Morrill*, 138 Mich. 112, 110 A. S. R. 306, 101 N. W. 209, 4 A. & E. Ann. Cas. 1100,—to point that crop raised on land held by husband and wife by entireties is not subject to sale on execution against husband; *Morrison v. Seybold*, 92 Ind. 298, holding that land held by husband and wife by entirety are not subject to lien for taxes upon husband's personalty; *Dodge v. Kinzy*, 101 Ind. 102, to point husband could not encumber land held in entirety without wife's assent; *Dickey v. Converse*, 117 Mich. 449, 72 A. S. R. 568, 76 N. W. 80, holding that crop raised on land held by husband and wife by entirety is exempt from sale on execution against one of tenants.

Cited in reference note in 89 A. D. 477, on liability to execution of husband's interest in land held by entireties.

Cited in notes in 55 A. D. 163, on crops raised on land held by husband and wife by entireties as not subject to execution; 30 L.R.A. 309, on right of spouses and their representatives to emblements on land held by entireties; 9 L.R.A.(N.S.) 1028, on judgment against individual as lien on interest of tenant by entirety; 19 L.R.A.(N.S.) 1037, on respective rights of husband and wife to income or products from estate held by entirety.

Liability of crops grown on wife's land for payment of husband's debts.

Cited in *Stout v. Perry*, 70 Ind. 501, holding that crops grown upon land of married woman are not subject to sale on execution for husband's debts; *Scott v. Hudson*, 86 Ind. 286, holding that crops grown upon land of married woman are not subject to sale for taxes against husband.

Cited in notes in 21 L.R.A. 631, on rights of creditor in profits on farm caused by debtor's labor; 23 L.R.A. 260, on crops raised by husband on wife's land for purpose of levy and sale.

Conveyance to husband and wife as creating tenancy by entirety.

Cited in *Simons v. Bollinger*, 154 Ind. 83, 48 L.R.A. 234, 56 N. E. 23, holding that deed of land to husband and wife containing word "jointly" does not create joint tenancy but estate in entirety; *Baker v. Stewart*, 40 Kan. 442, 10 A. S. R. 213, 2 L.R.A. 434, 19 Pac. 904, holding that deed of land to husband and wife conveys same to them in entirety and survivor takes entire estate.

Cited in notes in 38 A. S. R. 436; 22 L.R.A. 595,—on tenancy by the entireties in personal property; 30 L.R.A. 317, on what subjects, estates, and interests entirety may exist.

34 AM. REP. 256, SMITH v. BETTGER, 68 IND. 254.**Acceptance of negotiable paper as payment.**

Cited in *Campbell v. Nixon*, 2 Ind. App. 463, 28 N. E. 107, to point that note given as collateral security for rent may be cancelled by landlord and action brought for use and occupation; *Mason v. Douglas*, 6 Ind. App. 558, 33 N. E. 1009, holding that acceptance of note governed by law merchant, on antecedent debt, is presumptively taken in payment; *Keck v. State*, 12 Ind. App. 119, 39 N. E. 899, holding that taking of bill of exchange payable in bank operates prima facie as payment of debt for which it is taken; *Davis & R. Bldg. & Mfg. Co. v. Vice*, 15 Ind. App. 117, 43 N. E. 889, holding that acceptance of note payable in bank, for amount of purchase price of land, operates, prima facie, as payment; *Rhodes v. Webb-Jameson Co.* 19 Ind. App. 195, 49 N. E. 283, holding that mechanics' lien is not forfeited by fact that note not shown to be governed by law merchant was accepted; *New Hampshire F. Ins. Co. v. Wall*, 36 Ind. App. 238, 75 N. E. 668, to point that giving of drafts in settlement of loans under insurance policy is payment; *Teal v. Spangler*, 72 Ind. 380, holding that taking of negotiable note by mechanic, for work and labor in erection of building, is payment in absence of agreement; *Albright v. Griffin*, 78 Ind. 182, holding that taking of non-negotiable note in renewal of former note does not operate as extinguishment of former note; *Sutton v. Baldwin*, 146 Ind. 361, 45 N. E. 518, holding that check received, by agreement of parties, as payment of debt extinguishes debt; *Bradway v. Groenendyke*, 153 Ind. 508, 55 N. E. 434, holding that presumption of payment which arises from giving of negotiable note may be rebutted by circumstances attending transaction; *Scott v. Edgar*, 159 Ind. 38, 63 N. E. 452, holding that acceptance by vendor of land of note of vendee's insolvent husband, for part purchase price did amount to waiver of vendor's lien; *Dille v. White*, 132 Iowa, 327, 10 L.R.A.(N.S.) 510, 109 N. W. 909 (dissenting opinion), on effect of taking check as payment where party receiving it negotiates it.

Cited in reference note in 42 A. R. 610, on note of third person as payment.

Cited in notes in 71 A. D. 348; 4 A. S. R. 69,—on taking note for pre-existing debt as payment.

Burden of proving negative.

Cited in *Goodwin v. Smith*, 72 Ind. 113, 37 A. R. 144, holding that person who asserts right dependent for its existence upon negative, must establish truth of negative; *Boulden v. McIntire*, 119 Ind. 574, 12 A. S. A. 453, 21 N. E. 445, to point that where negative is essential to existence of right, party claiming such right has burden of proving such negative.

Cited in reference note in 35 A. S. R. 817, on burden of proof where note of third person taken.

34 AM. REP. 263, STATE v. BEAL, 68 IND. 345.**Impeachment of accused.**

Cited in *Morrison v. State*, 76 Ind. 335, holding that if accused becomes witness he may be impeached in same manner as other witnesses; *State v. Crow*, 107 Mo. 341, 17 S. W. 745, holding that witness for defendant in criminal case who testifies to latter's good character, may on cross-examination be asked as to sources of his knowledge of character of accused although other crimes charged against accused may be thereby disclosed; *State v. Harris*, 209 Mo. 423, 108 S. W. 28, holding that no error was committed by exclusion of cross-

examination tending to show that state's witness made vicious assaults upon others in order to show that he was quarrelsome; *Hanoff v. State*, 37 Ohio St. 178, 41 A. R. 496 (dissenting opinion), on right to show that accused in criminal trial was indicted for another crime; *State v. Marks*, 16 Utah, 204, 51 Pac. 1089, holding that accused's character for honesty and integrity cannot be inquired into unless he voluntarily places them in issue.

Cited in reference note in 36 A. R. 496, on right to impeach character for truth of prisoner who testifies on his own behalf.

Cited in notes in 88 A. D. 323, on inquiry on collateral and irrelevant matter for purpose of discrediting witness; 82 A. S. R. 26, on evidence admissible as bearing on credibility or bias of witness; 41 L. ed. U. S. 470, on admissibility of evidence of character.

Right of accused as witness to claim privilege through counsel.

Cited in *State v. Shockley*, 29 Utah, 25, 110 A. S. R. 639, 80 Pac. 865, holding that accused who testifies in his own behalf may claim privilege against incriminating questions through counsel.

34 AM. REP. 265, DAVENPORT v. FOULKE, 68 IND. 382.

Effect of retention of property on validity of chattel mortgage.

Cited in *Re Soudan Mfg. Co.* 51 C. C. A. 476, 113 Fed. 804; *Rogers v. Munnerlyn*, 36 Fla. 591, 18 So. 669,—holding that mortgage covering personality and land may be valid as to land though mortgagor is permitted to sell and retain proceeds of personality; *Greeley v. Winsor*, 1 S. D. 618, 48 N. W. 214; *Lockwood v. Harding*, 79 Ind. 129; *First Nat. Bank v. Lindenstruth*, 79 Md. 136, 47 A. S. R. 366, 28 Atl. 807,—to point that chattel mortgage containing clause permitting mortgagor to sell property and retain proceeds is void as against creditors; *Lutz v. Kinney*, 24 Nev. 38, 50 Pac. 1031, holding that chattel mortgage containing authority for mortgagor to retain property and to use and enjoy same is void where only use mortgagor could make of it would be to sell.

Cited in reference notes in 39 A. R. 160, on validity, as against creditors, of mortgage of retail stock reserving in mortgagor power to sell in ordinary course of trade; 6 A. S. R. 34, on validity as to subsequent attaching creditors of chattel mortgage authorizing mortgagor to obtain possession of property.

Cited in notes in 54 A. D. 595, on effect of confusion of mortgaged goods: 18 L.R.A. 610, on effect of provision or agreement giving the mortgagor possession and power of sale of merchandise to avoid mortgage in toto; 18 L.R.A. 615, on analysis of law as to validity of mortgage of merchandise giving mortgagor possession with power of sale; 13 L.R.A.(N.S.) 925, as to whether chattel mortgage constructively fraudulent as to part of the property by reason of permission to mortgagor to sell goods may be upheld as to remainder.

Denied in *Donohue v. Campbell*, 81 Minn. 107, 83 N. W. 469, holding that chattel mortgage authorizing retention of property by mortgagor and use and enjoyment of same, but authorizing mortgagee to take possession in case of attempted sale, is not void as matter of law.

34 AM. REP. 269, SMOCK v. PIERSON, 68 IND. 405.

What constitutes failure of consideration.

Cited in *Neidefer v. Chastain*, 71 Ind. 363, 36 A. R. 198, holding that party cannot escape liability on contract where he got article bargained for upon

plea that article was worthless; *Wilson v. Monticello*, 85 Ind. 10, holding that plea of want of consideration is not supported by proof of partial failure of consideration; *Wolford v. Powers*, 85 Ind. 294, 44 A. R. 16; *Fleetwood v. Dorsey Mach. Co.* 95 Ind. 491; *Vigo Agri. Soc. v. Brumfield*, 102 Ind. 146, 52 A. R. 657, 1 N. E. 382,—holding that court will not disturb contract upon ground of inadequacy of consideration where parties agree upon consideration of indeterminate value; *Shade v. Creviston*, 93 Ind. 591; *Chicago & A. R. Co. v. Derkes*, 103 Ind. 520, 3 N. E. 239; *Harlan v. Harlan*, 102 Iowa, 701, 72 N. W. 286; *Adams v. Vanderbeck*, 148 Ind. 92, 62 A. S. R. 497, 47 N. E. 24, to point that where party gets all consideration he contracted for he cannot say he gets no consideration.

Cited in note in 39 A. S. R. 744, on sufficiency of moral obligation as consideration for express promise.

Good will of business as consideration.

Cited in *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713, holding that good will of one's business is adequate consideration for promise of purchaser.

Cited in note in 3 L.R.A. 769, on sale of good will in business.

34 AM. REP. 273, WATKINS v. STATE, 68 IND. 427.

Former jeopardy as bar to criminal prosecution.

Cited in *Sanders v. State*, 85 Ind. 318, 44 A. R. 29, holding that accused is not in jeopardy where only plea filed by him is plea of guilty, and filed because of well-grounded fear of mob violence; *Gresley v. State*, 123 Ind. 72, 24 N. E. 332; *Ice v. State*, 123 Ind. 590, 24 N. E. 682,—holding that bastardy proceedings procured by collusion before justice of peace, in which prosecutrix, being of weak mind was induced to acknowledge that suitable provision was made for her is no bar to action by prosecuting attorney; *Shideler v. State*, 129 Ind. 523, 28 A. S. R. 206, 16 L.R.A. 225, 28 N. E. 537, holding that judgment of acquittal is not void because of fraud, where prosecution was regularly begun by prosecuting attorney, but latter was bribed to procure acquittal.

—Effect of collusion.

Cited in *State v. Caldwell*, 70 Ark. 74, 66 S. W. 150, holding that prosecution of accused before magistrate, begun under circumstances showing collusion, and acquittal therein is no bar to indictment; *De Haven v. State*, 2 Ind. App. 376, 28 N. E. 562, holding that person procuring his own conviction for keeping gambling room, before magistrate cannot set up such conviction in bar of indictment for being common gambler; *Halloran v. State*, 80 Ind. 586; *De Bord v. People*, 27 Colo. 377, 83 A. S. R. 89, 61 Pac. 599; *State v. Smith*, 57 Kan. 673, 47 Pac. 541; *State v. Moore*, 136 N. C. 581, 48 S. E. 573,—holding that conviction of person before justice of peace which is procured by person convicted, is not sufficient to sustain plea of former conviction; *Peters v. Koepke*, 156 Ind. 35, 59 N. E. 33, holding that conviction of person before justice of peace procured by accused while action is pending before another justice for same offense is no bar to latter action.

Cited in reference note in 41 A. R. 269, on fraudulent conviction fraudulently obtained by offender as bar to subsequent prosecution.

Fraud as ground for setting aside judgment.

Cited in *Burnett v. Milnes*, 148 Ind. 230, 46 N. E. 464, holding that judgment refusing to admit will to probate will be set aside for fraud.

34 AM. REP. 277, TOLEDO, W. & W. R. CO. v. WRIGHT, 68 IND. 586.**Right to charge extra fare on train.**

Cited in notes in 41 A. D. 483; 47 A. S. R. 516,—on discrimination between passengers buying tickets and those paying on train; 11 A. S. R. 650, on when discriminations between passengers buying tickets and those paying on train are reasonable; 20 L.R.A. 483, 485, on validity of extra charge for passenger fare when paid upon train.

Ejection from railroad train.

Cited in *Haug v. Great Northern R. Co.* 8 N. D. 23, 73 A. S. R. 727, 42 L.R.A. 664, 77 N. W. 97, holding that railroad company is liable for death of intoxicated passenger from exposure, where he was, after being carried beyond destination, ejected; *Evansville & I. R. Co. v. Gilmore*, 1 Ind. App. 468, 27 N. E. 992; *Lake Erie & W. R. Co. v. Mays*, 4 Ind. App. 413, 30 N. E. 1106; *Sage v. Evansville & T. H. R. Co.* 134 Ind. 100, 33 N. E. 771,—holding that passenger may be removed for failure to pay excess fare in accordance with rule, requiring same on failure to purchase ticket; *Pickens v. Richmond & D. R. Co.* 104 N. C. 312, 10 S. E. 556, holding that officers of railroad company have right to expel passenger who refuses to pay fare, using only necessary force.

Cited in reference note in 35 A. R. 280, on duty of railroad conductor to accept passenger's fare after stopping train to eject him.

Cited in notes in 41 A. D. 477, on ejection of passengers for not showing or surrendering ticket or paying fare; 24 A. S. R. 249; 5 L.R.A. 820; 60 A. S. R. 719,—on expulsion of passenger for nonpayment of fare; 33 L. ed. U. S. 294, on conductor's right to expel passenger from train.

Distinguished in *Chamberlain v. Lake Shore & M. S. R. Co.* 110 Mich. 614, 68 N. W. 423, holding that passenger who is ejected for refusal to pay customary but excessive fare may recover actual damages sustained.

— Place of.

Cited in *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 23 A. S. R. 506, 5 L.R.A. 733, 5 So. 633, holding that passenger may be removed from train at any point for disorderly conduct; *Fagg v. Louisville & N. R. Co.* 111 Ky. 30, 54 L.R.A. 919, 63 S. W. 580, holding that railroad company is liable for death of drunken trespasser ejected from train in deep cut, in night time where he was killed by train following; *Roseman v. Carolina C. R. Co.* 112 N. C. 709, 34 A. S. R. 524, 19 L.R.A. 327, 16 S. E. 766, holding that at common law passenger refusing to pay fare may be ejected at any safe place; *Choctaw, O. & G. R. Co. v. Hill*, 110 Tenn. 396, 75 S. W. 963, to point that passenger can be expelled from train only at regular station.

Cited in reference note in 2 A. S. R. 546, on right of railroad company to expel passenger except at regular station.

Cited in note in 26 L.R.A. 131, on ejection between stations of one refusing to pay fare.

Distinguished in *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 45 A. R. 464, holding that passenger is entitled to damages where he purchased return ticket and conductor on return trip ejected him though he offered portion of return ticket that was handed him by officer on outward trip.

Disapproved in *St. Louis, I. M. & S. R. Co. v. Branch*, 45 Ark. 524; *Phettipiece v. Northern P. R. Co.* 84 Wis. 412, 20 L.R.A. 483, 54 N. W. 1092,—hold-

ing that under statute passenger cannot be expelled from train for refusal to pay fare except at stopping place or near dwelling.

Liability of carrier for erroneous directions given by agent.

Cited in *South & North Ala. R. Co. v. Huffman*, 76 Ala. 492, 52 A. R. 349, holding railroad company liable for erroneous advice and directions given by agents in charge.

Remanding of cause upon failure to comply with order for change of venue.

Cited in *Lake Erie & W. R. Co. v. Lowder*, 7 Ind. App. 537, 34 N. E. 447, holding that cause may be remanded where change of venue is granted but change not perfected within prescribed time.

34 AM. REP. 286, OREM v. WRIGHTSON, 51 MD. 34.

Right of subrogation.

Cited in *Hart v. Tiernan*, 59 Conn. 521, 21 Atl. 1007, holding that under statute where rate tax collector is charged with whole amount of tax levied, he is subrogated to right of community to recover for taxes in his own name, after he has paid over taxes in full; *American Nat. Bank v. Fidelity & D. Co.* 129 Ga. 126, 58 S. E. 867, 12 A. & E. Ann. Cas. 666, to point that doctrine of subrogation is not founded on contract but has its origin in sense of natural justice; *Commercial Bldg. & L. Asso. v. Robinson*, 90 Md. 615, 45 Atl. 449, holding that mortgagee of land subject to ground rent is entitled to be subrogated to rights of state and owner of ground rent for taxes paid; *Parsons v. Urie*, 104 Md. 238, 8 L.R.A.(N.S.) 559, 64 Atl. 927, 10 A. & E. Ann. Cas. 278, holding that one of several tenants in common who pays joint mortgage debt on their land is entitled to have debt kept alive so as to recover against co-tenants.

Cited in reference notes in 2 A. S. R. 250, on parties entitled to subrogation; 99 A. S. R. 497, on subrogation to rights of nation, state, and municipality in case of official bonds.

Cited in note in 99 A. S. R. 488, on priority of right to be subrogated over other claims.

— Of sureties.

Cited in *Jackson v. Davis*, 4 Mackey, 194, holding that one of two sureties on bond given to United States who pays debt of insolvent principal is entitled, in his claim for contribution, to be subrogated to priority of United States over other creditors of cosurety; *Yule v. Bishop*, 133 Cal. 574, 65 Pac. 1094, to point that debt paid by surety is kept alive and that court has power to compel assignment thereof to surety; *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653; *Whitbeck v. Estate of Ramsay*, 74 Ill. App. 524,—holding that equities of sureties extends to all rights of creditors respecting debt which sureties pay; *Thomas v. Stewart*, 117 Ind. 50, 1 L.R.A. 715, 78 N. E. 505, holding that surety who permits joint judgment against him cannot redeem as against purchaser at foreclosure sale under prior mortgage who has made valuable improvements, without notice of surety's rights except record notice; *American Bonding Co. v. National Mechanics Bank*, 97 Md. 598, 99 A. S. R. 466, 55 Atl. 395, holding that surety upon paying debt arising from breach of trust by principal is subrogated to remedies of cestui que trust against those who participated in breach; *McClure v. Johnson*, 10 Okla. 668, 65 Pac. 104, to the point that payment of debt by surety operates as assignment of debt; *Myers v. Miller*, 45 Am. Rep. Vol. XVII.—50.

W. Va. 595, 31 S. E. 976, holding that sureties on sheriff's official bond, upon making good default will be subrogated to position of state in respect to securities; *Pond v. Dougherty*, 6 Cal. App. 686, 92 Pac. 1035, holding that sureties on Federal collector's bond are entitled to be subrogated to rights of United States against distributees of estate of cosurety; *Wallace v. Jones*, 110 Md. 143, 72 Atl. 769, holding that indorser of note will be subrogated to rights of holder; *Stehle v. United Surety Co.* 107 Md. 470, 68 Atl. 600, holding that surety of contractor making default will be subrogated to his rights.

Cited in notes in 29 L.R.A. 248, on subrogation of surety paying debt to state, to its priority in payment from assets of debtor; 68 L.R.A. 524, on equitable doctrine of subrogation of sureties paying judgments against principals; 68 L.R.A. 529, 530, on subrogation of sureties paying judgments against principals to collateral securities; 68 L.R.A. 541, on subrogation of sureties paying judgments against principals to primary securities; 68 L.R.A. 558, on succession of surety paying judgment against principal to specialties, preferences, and priorities.

Priority of claim for taxes.

Cited in *Re Walley*, 142 Fed. 883, holding that county has no right of priority over other creditors in insolvency for money due county from delinquent tax collector; *State v. Jahraus*, 117 La. 286, 116 A. S. R. 208, 41 So. 575, to the point that state is entitled to preference in distribution of fund collected by defaulting tax officer as against parish or school board; *Re Lewis*, 9 Daly, 220, holding that state shares with private creditors under assignment for creditors, except as to priority of payment of taxes out of particular property on which tax is imposed; *United States Fidelity & G. Co. v. Rainey*, 120 Tenn. 357, 113 S. W. 397, holding that state is entitled to priority over creditors of defrauding officer in collection of delinquent revenue on official bond.

Cited in notes in 29 L.R.A. 243, on what priority of states in payment from assets of debtor is based; 29 L.R.A. 245, on nature and extent of priority of state in payment from assets of debtor; 1 L.R.A.(N.S.) 255, on preference of claims of state over other creditors.

34 AM. REP. 291, BALTIMORE & O. R. CO. v. STRICKER, 51 MD. 47.

Liability of master for injury to servant.

Cited in *Chicago City R. Co. v. Enroth*, 113 Ill. App. 285, to the point that if servant knew of danger but because of circumstances forgot at precise moment, question of contributory negligence would be for jury; *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627, holding that railroad company is liable for injury to brakeman caused by collision with overhead bridge of insufficient height, where brakeman was ignorant of danger; *Erslew v. New Orleans & N. E. R. Co.* 49 La. Ann. 86, 21 So. 153, holding that employee of railroad company can recover for injury caused by coming in contact with guy wire of electric road negligently permitted to be erected, when he had no reasonable means of knowing of danger; *Baker v. Maryland Coal Co.* 84 Md. 19, 35 Atl. 10, holding that coal mining company, operating tramway in mine is liable to brakeman for injury caused by negligence in constructing tracks too close to side of tunnel; *Pikesville, R. & E. G. R. Co. v. State*, 88 Md. 563, 42 Atl. 214, holding that street railway company is liable to conductor for injury caused by colliding with pole negligently placed too close

to track, where he had no knowledge of danger; *Baltimore Boot & Shoe Mfg. Co. v. Jamar*, 93 Md. 404, 26 A. S. R. 428, 49 Atl. 847, holding that contractor is liable to employee for injury caused by negligence in constructing elevator in such manner that it fell injuring servant; *Philadelphia, B. & W. R. Co. v. Devers*, 101 Md. 341, 61 Atl. 418, holding that railroad company is liable to watchman for injury caused by negligence in placing watchbox so near track that it was struck by train.

Cited in notes in 77 A. D. 219, on liability of master for injuries to servant from defective machinery or material; 53 A. R. 700; 7 A. S. R. 450; 36 A. R. 459,—on liability of railroad company to servant injured by low bridge.

Assumption of risk of employment by servant.

Cited in *State v. Malster*, 57 Md. 287; *Yates v. McCollough Iron Co.* 69 Md. 370, 16 Atl. 280,—holding that knowledge of servant as to defects in machinery necessarily carry with it knowledge of risk and continuance in employment is at his own risk; *Pennsylvania R. Co. v. Wachter*, 60 Md. 395; *Baltimore & P. R. Co. v. State*, 75 Md. 152, 32 A. S. R. 372, 23 Atl. 310; *Wood v. Heiges*, 83 Md. 257, 34 Atl. 872,—holding that person accepting employment with full knowledge of all risks incident to service must be considered as having assumed such risks; *Gans Salvage Co. v. Byrnes*, 102 Md. 230, 1 L.R.A.(N.S.) 272, 62 Atl. 155, holding that person employed to remove goods from cellar of building destroyed by fire assumes risk of injury from fall of walls; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 13 A.S.R. 84, 4 L.R.A. 710, 6 So. 277; *Carbine v. Bemington & R. R. Co.* 61 Vt. 348, 17 Atl. 491; *Clark v. Richmond & D. R. Co.* 78 Va. 709, 49 A. R. 394,—holding that risk of collision with overhead bridge, where danger is known to employee, must be considered as having been assumed by railroad brakeman; *State use of Eckhardt v. Lazaretto Guano Co.* 90 Md. 177, 44 Atl. 1017; *Hooper v. Columbia & G. R. Co.* 21 S. C. 541, 53 A. R. 691; *Williamson v. Newport News & M. Valley Co.* 34 W. Va. 657, 26 A. S. R. 927, 12 L.R.A. 297, 12 S. E. 824; *Woodell v. West Virginia Improv. Co.* 38 W. Va. 23, 17 S. E. 386,—holding that employee of railroad company who continues to work after knowledge of danger connected with employment waives claim for damages in case of injury; *Harris v. Consolidation Coal Co.* 111 Md. 209, 73 Atl. 805, holding that miner assumes risk of bursting of pipe; *Smith v. Philadelphia, B. & W. R. Co.* 111 Md. 274, 73 Atl. 818, holding that repairer under cars assumes risk of movement of cars by engine.

Cited in notes in 77 A. D. 222; 1 A. S. R. 631,—on assumption by servant of risk of defects in machinery or appliances.

Duty of master to provide safe place and machinery.

Cited in *Chicago, M. & St. P. R. Co. v. Carpenter*, 5 C. C. A. 551, 12 U. S. App. 392, 56 Fed. 451, holding that railroad company is bound to give warning of danger of collision with overhead bridges; *National Enameling & Stamping Co. v. Cornell*, 95 Md. 524, 52 Atl. 588, to point that employer is bound to exercise all reasonable care to provide safe, sound, and suitable machinery.

Right to dismiss case upon demurrer to evidence.

Cited in *Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 409, 32 L.R.A. 354, 34 S. W. 1029, holding that dismissing complaint on demurrer to evidence, in proper case, is not violation of constitutional guaranty of right to trial by jury.

34 AM. REP. 298, HOSHALL v. HOSHALL, 51 MD. 72.**"Cruel treatment" as ground for divorce.**

Cited in *Williams v. Williams*, 1 Colo. App. 281, 28 Pac. 726; *Goodhues v. Goodhues*, 90 Md. 292, 44 Atl. 990,—holding that single act of violence on part of husband is not such cruelty of treatment as constitutes cause for divorce; *Lemmert v. Lemmert*, 103 Md. 57, 63 Atl. 380, holding that it is not justification for abandonment of husband, that he spoke harshly and abusively to wife because she became adherent of new fangled religion.

Cited in reference note in 36 A. R. 848, as to whether single act of cruelty is ground for divorce.

Cited in notes in 51 A. R. 737, on accusations of adultery as ground for divorce; 29 A. D. 676; 40 A. R. 463; 32 A. S. R. 163; 65 A. S. R. 74; 6 L.R.A. 187,—on cruelty and inhuman treatment as ground for divorce; 6 L.R.A. 188, on extent of cruelty sufficient to authorize divorce.

34 AM. REP. 300, SECOND NAT. BANK v. WESTERN NAT. BANK, 51 MD. 128.**Right of bank to revoke certification of check.**

Cited in *Brinton v. Lewiston Nat. Bank*, 11 Idaho, 92, 81 Pac. 112, holding that bank has right to countermand notice of deposit with it in favor of third person before any rights or liabilities have been incurred in consequence of notice; *Dillaway v. Northwestern Nat. Bank*, 82 Ill. App. 71, holding that bank which certifies check by mistake may revoke certification any time rights of third parties have intervened; *Inter-state Nat. Bank v. Ringo*, 72 Kan. 116, 115 A. S. R. 176, 3 L.R.A.(N.S.) 1179, 83 Pac. 119, to point that bank is presumed to know state of depositor's account; *Rankin v. Colonial Bank*, 31 Misc. 227, 64 N. Y. Supp. 32, holding that if check certified by mistake is received for value by third person without notice bank is estopped from revoking certification.

Cited in notes in 89 A. D. 443; 128 Am. St. R. 702; 19 L. ed. U. S. 1009,—on right of bank to correct mistake as to certification of check.

Admissibility of evidence of custom.

Cited in *Baltimore Base Ball Club & E. Co. v. Pickett*, 78 Md. 375, 44 A. S. R. 304, 22 L.R.A. 690, 28 Atl. 279, holding that usage to affect contract must be proved to be known to parties or be so general and well established that knowledge of it may be presumed; *Fitzgerald v. Hanson*, 16 Mont. 474, 41 Pac. 230, holding that custom that physician engaged to assist another must look to patient for pay is inadmissible unless known to such assisting physician or proven to be generally established; *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239, 64 L.R.A. 443, 79 S. W. 124, holding that person who ships goods to his agent at place where there is established custom to suspend business on fourth of July is bound by such custom.

34 AM. REP. 304, THIRD NAT. BANK v. LANGE, 51 MD. 138.**Instrument describing holder as "trustee" as notice as to title.**

Cited in *Geyser-Marion Gold Min. Co. v. Stark*, 53 L.R.A. 684, 45 C. C. A. 467, 106 Fed. 558, holding that corporate record and certificate of ownership of stock by person as trustee is notice to corporation that he holds it without power of disposition; *Marbury v. Ehlen*, 72 Md. 206, 20 A. S. R. 467, 19 Atl.

648, holding that transfer of stock on books of corporation by executor to trustee under will is notice to corporation of will and trust thereunder; *McLeod v. Despain*, 49 Or. 536, 124 A. S. R. 1066, 19 L.R.A. (N.S.) 276, 90 Pac. 492, holding that purchaser of note payable to one as "trustee" will be presumed to know of such equities as might be discovered by investigation; *Ford v. Brown*, 114 Tenn. 467, 1 L.R.A. (N.S.) 188, 88 S. W. 1036, holding that purchaser of time certificates of deposit in name of one as trustee is put upon inquiry as to trustee's right to sell; *Hazeltine v. Keenan*, 54 W. Va. 600, 102 A. S. R. 953, 46 S. E. 603, holding that purchaser of note payable to person with word "attorney" affixed to name and endorsed in like manner is put upon inquiry as to right of payee to sell; *McLeod v. Despain*, 49 Or. 536, 124 A. S. R. 1066, 19 L.R.A. (N.S.) 276, 90 Pac. 492, holding that "trustee" added to payee's name is sufficient to put persons dealing with trustee upon inquiry; *Alexander v. Fidelity & D. Co.* 108 Md. 541, 70 Atl. 209, holding that execution of assignment of mortgage by executor as such is notice of fact that mortgage was held under will.

Cited in notes in 82 A. S. R. 514-516, on effect of note or check payable to "trustee;" 35 L.R.A. 678,—on negotiability of note payable to trustee; 1 L.R.A. (N.S.) 188, on use of word "trustee" as affecting negotiability or as notice of rights of beneficiaries of negotiable paper; 29 L.R.A. (N.S.) 365, on fact that note is payable to "trustee" as putting purchaser upon inquiry.

Distinguished in *Mason v. Bank of Commerce*, 16 Mo. App. 275, holding that purchaser of note in good faith from trustee takes good title thereto; *Tradesmen's Nat. Bank v. Looney*, 90 Tenn. 278, 63 A. S. R. 830, 38 L.R.A. 837, 42 S. W. 149, holding that note describing payee as "trustee" does not destroy its negotiability, and let in defenses against bona fide holder.

Right of one trustee to withdraw funds deposited in name of two.

Cited in *Williams v. Manufacturers' Nat. Bank*, 68 Md. 236, 11 Atl. 835, holding that trust funds deposited in name of two trustees cannot be withdrawn without order of both.

Liability of person who aids trustee in misappropriation of funds.

Cited in *Lang v. Metzger*, 86 Ill. App. 117; *Safe Deposit & T. Co. v. Cahn*, 102 Md. 530, 62 Atl. 819,—holding that persons who aid trustee in misappropriation of trust funds are liable therefor in equity; *Duckett v. National Mechanics' Bank*, 86 Md. 400, 63 A. S. R. 513, 39 L.R.A. 84, 38 Atl. 983, holding that bank may assume that trustee who deposits money in his name as such will upon withdrawal make proper appropriation of it.

34 AM. REP. 307, ROSE v. BALTIMORE, 51 MD. 256.

Right to market stalls as personal property.

Cited in *Border State Sav. Inst. v. Wilcox*, 63 Md. 525, to the point that market stall is not interest in land and is not freehold estate; *Green v. Western Nat. Bank*, 86 Md. 279, 38 Atl. 131, holding that execution issued on judgment becomes lien on interest of judgment debtor in market stalls; *Pfefferling v. Baltimore*, 88 Md. 475, 41 Atl. 778, holding that under charter where license is given for use of market stall for one year, passage of subsequent ordinance under which another becomes entitled to stall after year expires does not deprive first licensee of any property right; *Hutchins v. Durham*, 118 N. C. 457, 32 L.R.A. 706, 24 S. E. 723, holding that licensees of market stalls do not acquire rights of tenants from year to year by holding over.

Estoppel by acquiescence to attack ordinance collaterally.

Cited in *Chicago & N. W. R. Co. v. West Chicago Park*, 151 Ill. 204, 25 L.R.A. 300, 37 N. E. 1079, holding that after long acquiescence in exercise of jurisdiction by municipality, validity of proceedings by which jurisdiction was originally acquired cannot be attacked collaterally.

34 AM. REP. 311, CARTER v. HOWE MACH. CO. 51 MD. 290.**Liability of principal for tort of agent involving malicious intent.**

Cited in *Laird v. Farwell*, 60 Kan. 513, 57 Pac. 98, holding mortgagee of chattels not liable for false arrest caused by agent employed to sell property; *Carter v. Worcester County*, 94 Md. 621, 51 Atl. 830, holding that county commissioners are not liable for false arrest caused by road supervisor without special authorization; *Bernheimer Bros. v. Becker*, 102 Md. 250, 111 A. S. R. 356, 3 L.R.A.(N.S.) 221, 62 Atl. 526, holding partner not jointly liable in tort where copartner unlawfully caused person to be arrested, unless he previously authorized or subsequently ratified act.

Cited in notes in 54 A. S. R. 87, on master's liability for servant's wilful, malicious, or criminal acts, torts, or frauds; 88 A. S. R. 789, on nonliability of principal for acts of agent outside of scope of employment; 88 A. S. R. 793, on liability of principal in tort for malicious prosecution, etc., by agent; 14 L.R.A. 795, on master's liability for false arrest or imprisonment or malicious prosecution by servant employed for police duty.

— Of corporation generally.

Cited in *Baltimore Mut. L. Ins. Co. v. McSherry*, 68 Md. 41, 11 Atl. 577, holding that in order to make corporation liable for torts of agent it must be shown by competent evidence that agent was acting within scope of authority; *Grand Fountain U. O. T. R. v. Murray*, 88 Md. 422, 41 Atl. 896, holding corporation not liable for torts of agents not done within limits of authority unless subsequently ratified; *Gambrill v. Schooley*, 93 Md. 48, 86 A. S. R. 414, 52 L.R.A. 87, 48 Atl. 730, to the point that corporation may be held liable for libel published by agent; *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426, 21 L.R.A. 278, 56 N. W. 9, holding that corporation may be liable in tort even though malicious intent is necessary to be proven; *Philadelphia, B. & W. R. Co. v. Green*, 110 Md. 32, 71 Atl. 986, holding that officer must be acting within scope of employment to render railroad liable for assault and arrest.

Cited in notes in 12 L.R.A. 113, on liability of railroad company for torts; 17 E. R. C. 280, on liability of carrier for servant's tort.

— Of corporation for malicious prosecution.

Cited in *Little Rock Traction & Electric Co. v. Walker*, 65 Ark. 144, 40 L.R.A. 473, 45 S. W. 57, holding that street car company is not liable for acts of conductor in maliciously prosecuting passenger for violating city ordinance in riding without paying fare; *Jordan v. Alabama G. S. R. Co.* 74 Ala. 85, 49 A. R. 800; *Farmers' Mut. F. Ins. Asso. v. Stewart*, 167 Ind. 544, 79 N. E. 490,—holding that corporation is liable for malicious prosecution instituted by agent where such acts are within scope of authority; *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 A. R. 468, holding that action for malicious prosecution will lie against savings bank; *Cameron v. Pacific Exp. Co.* 48 Mo. App. 99, holding that where express agent charged with protecting property and collecting charges thereon, mistakenly institutes criminal prosecution without probable cause, principal is liable; *Boogher v. Life Asso. of America*, 75 Mo. 319, 42 A. R. 413; *Willard*

v. Holmes, B. & Haydens, 2 Misc. 303, 21 N. Y. Supp. 998,—holding that corporation may be liable in damages for malicious prosecution; *Tolchester Beach Improv. Co. v. Steinmeier*, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188; *Markley v. Snow*, 207 Pa. 447, 64 L.R.A. 685, 56 Atl. 999; *Canon v. Sharon & W. Street R. Co.* 216 Pa. 408, 65 Atl. 795,—holding that corporation cannot be held liable in action for malicious prosecution, because of prosecution instituted by superintendent, unless latter was expressly authorized or such act ratified; *Johnston v. Chicago, St. P. M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424, to point that railroad company is liable for acts of agent committed while in performance of duty in “protecting and looking after” company’s property.

Cited in notes in 26 A. S. R. 131, on liability of corporations for malicious prosecutions; 34 A. R. 496, on liability of corporation for malicious act; 16 E. R. C. 756, on right to maintain action for malicious prosecution against corporation.

— Of corporation for false imprisonment.

Cited in *Pressley v. Mobile & G. R. Co.* 4 Woods, 569, 15 Fed. 199, holding that corporation is not liable for false arrest of person for larceny caused by agent employed to control and supervise its lands; *Wells v. Washington Market Co.* 8 Mackey, 385, holding that market company is not liable for false arrest made by person employed to collect rents and keep order in market house, but without authority from company to make arrests; *Pennsylvania Co. v. Weddle*, 100 Ind. 138, holding that corporation is liable for false arrest made by agent employed to detect and arrest offenders against its property, where act was within scope of authority; *Schmidt v. New Orleans R. Co.* 116 La. 311, 7 L.R.A. (N.S.) 162, 40 So. 714, holding that street railroad company is liable for false arrest of passenger on charge of being pickpocket, preferred by conductor; *National Bank v. Baker*, 77 Md. 462, 26 Atl. 867; *Beiswanger v. American Bonding & T. Co.* 98 Md. 287, 57 Atl. 202,—holding that corporation is not liable for unauthorized act of agent procuring arrest; *Central R. Co. v. Brewer*, 78 Md. 394, 27 L.R.A. 63, 28 Atl. 615, holding that street railway company is not liable for false arrest caused by agent of person accused of placing counterfeit money in cash box; *Barabasz v. Kabat*, 86 Md. 23, 37 Atl. 720, holding that principal is not liable for false arrest made by doorkeeper of person who entered church without ticket; *Baltimore & Y. Turnp. Road v. Green*, 86 Md. 161, 37 Atl. 642, holding that turnpike company is not liable for unlawful arrest of person caused by gate-keeper, for nonpayment of tolls; *Daniel v. Atlantic Coast Line R. Co.* 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 A. & E. Ann. Cas. 718, holding that railroad company is not liable for arrest of person suspected of stealing by cashier in local office, unless on proof of authority or ratification; *Baltimore, C. & A. R. Co. v. Ennalls*, 108 Md. 75, 16 L.R.A. (N.S.) 1100, 69 Atl. 638, holding that railroad is liable for unauthorized arrest made by employee commissioned as special policeman.

34 AM. REP. 316, BALTIMORE & O. R. CO. v. POTOMAC COAL CO. 51 MD. 327.

Necessity of mutuality in contracts.

Cited in *Benjamin v. Bruce*, 87 Md. 240, 39 Atl. 810, holding that contract

by which person agrees to sell at lowest price all goods made by him to another, and which does not bind latter to order any goods is void; *Automatic Bending Co. v. Heins*, 39 Misc. 788, 81 N. Y. Supp. 301, holding that instrument without mutuality is not enforceable as contract.

When supreme court can render judgment on case stated.

Cited in *Jackson v. Salisbury*, 66 Md. 459, 7 Atl. 563, to the point that supreme court has no power to render judgment on case stated unless it is so expressly agreed.

34 AM. REP. 323, ROKES v. AMAZON INS. CO. 51 MD. 512.

Waiver of conditions in policy.

Cited in *Tillis v. Liverpool & L. & G. Ins. Co.* 46 Fla. 268, 110 A. S. R. 89, 35 So. 171, holding that condition in insurance policy as to "iron safe clause" is waived by adjustment of loss and promise to pay with notice of breach; *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 606, holding that waiver of condition in insurance may be inferred from acts of insurer inconsistent with intention to insist upon strict performance of condition; *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 1 A. S. R. 398, 10 Atl. 139, holding that if refusal to recognize obligation to pay, be placed upon other grounds than alleged defects in proofs of loss, company will be regarded as having waived objections to such defects; *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 A. S. R. 499, 38 Atl. 29, holding that if after loss, insurer recognizes its liability and promises to pay, waiver of proof of loss may be inferred therefrom; *Farmers' F. Ins. Co. v. Baker*, 94 Md. 545, 51 Atl. 184; *New Orleans Ins. Asso. v. Matthews*, 65 Miss. 301, 4 So. 62; *Loeb v. American Cent. Ins. Co.* 99 Mo. 50, 12 S. W. 374; *Okey v. State Ins. Co.* 29 Mo. App. 105,—holding that usual provision in insurance policy as to waiver of conditions in policy does not apply to acts to be performed after loss occurs; *Norris v. Farmers' Mut. F. Ins. Co.* 65 Mo. App. 632; *Henry v. Aetna Indemnity Co.* 36 Wash. 553, 79 Pac. 42,—holding that waiver of condition in contract as to notice may be inferred from acts and conduct of party inconsistent with intention to insist upon strict performance of condition.

Cited in reference note in 39 A. R. 584, on effect of parol waiver of conditions by insurance agent.

Cited in note in 107 A. S. R. 117, as to what conditions in policy restrictions on right of agents to waive forfeitures are applicable.

— As to proofs of loss.

Cited in *Indian River State Bank v. Hartford F. Ins. Co.* 46 Fla. 283, 35 So. 228; *Citizens' Ins. Co. v. Stoddard*, 99 Ill. App. 469; *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.* 110 Iowa, 423, 80 A. S. R. 311, 81 N. W. 707; *Titworth v. American Cent. Ins. Co.* 62 Mo. App. 310,—holding that stipulation as to proofs of loss may be waived by agent of company; *Aetna Ins. Co. v. Shryer*, 85 Ind. 362; *Ruthven Bros. v. American F. Ins. Co.* 102 Iowa, 550, 71 N. W. 574,—holding that adjuster with power to settle loss had power to waive conditions of policy in respect to proof of loss; *Atlantic Ins. Co. v. Carlin*, 58 Md. 336, on power of agent of insurance company to waive condition of policy requiring proofs of loss; *Bakhaus v. Caledonian Ins. Co.* 112 Md. 676, 77 Atl. 310, holding that examination by insurance agent of burned building and statement to insured that he would hear from adjuster waives proof of loss; *United States Health & Acci. Ins. Co. v. Clark*, 41 Ind. App. 345,

83 N. E. 760, holding that denial of liability within time for filing proofs of death constitutes waiver thereof.

Cited in reference notes in 1 A. S. R. 405, on waiver of objections to proof of loss by refusing to pay on some other ground; 2 A. S. R. 566, on waiver by insurance company of compliance with conditions as to proof of loss.

Construction of word "immediate" in policy.

Cited in *Williams v. Preferred Mut. Acci. Asso.* 91 Ga. 698, 17 S. E. 982, to the point that word "immediately" when referring to something to be done, voluntarily by human agency, may mean "as soon as practicable;" *Martin v. Pifer*, 96 Ind. 245, to point that word "immediately" means such convenient time as is reasonably requisite for performing act; *Pacific Mut. L. Ins. Co. v. Branham*, 34 Ind. App. 243, 70 N. E. 174, holding that under policy of accident insurance which provided that "immediate" notice of loss must be given, notice given twenty-two days after injury was in time; *Schaeffer v. Farmers' Mut. F. Ins. Co.* 80 Md. 563, 45 A. S. R. 361, 31 Atl. 317, holding that whether reasonable notice was given to examine as to increase of risk before loss occurred, under condition in policy, was question of fact; *Hartford Steam Boiler Inspection & Ins. Co. v. Sonneborn*, 96 Md. 616, 54 Atl. 610, holding that explosion of boiler was "immediate" cause of loss under policy insuring against "immediate loss or damage" by explosion though damage was in part caused by water from a sprinkler system; *Merrill v. Travelers' Ins. Co.* 91 Wis. 329, 64 N. W. 1039, to point that "immediate" notice of loss under insurance means notice within reasonable time.

34 AM. REP. 325, HARDY v. CHESAPEAKE BANK, 51 MD. 562.

Liability of bank for deposits paid on forged checks.

Cited in *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, holding that depositor is bound to examine returned checks and report to bank without unreasonable delay any errors discovered; *Janin v. London & S. F. Bank*, 92 Cal. 14, 27 A. S. R. 82, 14 L.R.A. 320, 27 Pac. 1100, holding that bank is liable for payment of depositor's money on forged checks unless depositor by his negligence induced such payment or by subsequent conduct is estopped to deny correctness of payments; *Merchants' Nat. Bank v. Nichols & S. Co.* 123 Ill. App. 430, holding that unless depositor has been so negligent as to create estoppel against him because of failure to examine returned checks he is not liable for unauthorized overdraft made by agent on his account; *Merchants' Nat. Bank v. Baltimore, C. & R. S. B. Co.* 102 Md. 573, 63 Atl. 108, holding that assignee of commercial paper altered by third person acquires no rights thereunder; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 A. S. R. 595, 77 N. E. 693, holding that if bank pays depositor's check upon forged indorsement of payee, it is liable to him where his negligence did not mislead bank; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72, holding that depositor may recover from bank money paid upon forged check although he failed to discover forgery after checks were returned, unless bank has suffered disadvantage because of such failure; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125, 70 S. W. 173, to point that knowledge of agent of bank who did forging cannot be imputed to principal; *Kenneth Invest. Co. v. National Bank*, 103 Mo. App. 613, 77 S. W. 1002, holding that if bank pays money of depositor on forged check, it must stand loss, if depositor has done nothing to mislead bank; *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 A. S. R. 884, 6 L.R.A.

724, 12 S. W. 716, holding that bank which has negligently cashed forged check purporting to be drawn on another bank, and has upon indorsement thereof received money from drawee bank is liable to latter for amount received; *Janin v. London & S. F. Bank*, 92 Cal. 14, 27 A. S. R. 82, 14 L.R.A. 320, 27 Pac. 1100 (dissenting opinion), on liability of bank for deposits paid on forged checks; *Jordan-Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 22 L.R.A. (N.S.) 250, 87 N. E. 740, holding it duty of bank in paying check of depositor to see that signature of payee is genuine; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 22 L.R.A. (N.S.) 250, 87 N. E. 740, to point that it is duty of banker to see that signature of payee is genuine.

Cited in reference note in 38 A. R. 501, on right to recover from bank amount of checks forged by confidential clerk who prevented discovery of fraud when check was returned.

Cited in notes in 11 A. S. R. 616; 36 L.R.A. 539, 39 A. D. 519, 520, 525,—on liability of bank for deposits paid on forged checks; 17 A. S. R. 890, on drawee's right to recover back money paid on check or draft to which drawer's signature is forged; 2 L.R.A. 96, on duty and liability of banks as to forged paper; 27 L.R.A. 426, on duty of depositor as to forged checks charged to him by bank; 36 L.R.A. 539, on liability on forged checks; 7 L.R.A. (N.S.) 750, on depositor's right to recover amount of forged or raised checks paid by bank as affected by his having intrusted examination of vouchers to employee guilty of original fraud; 20 L.R.A. (N.S.) 80, on loss or prejudice from negligent failure to give prompt notice of forgery of check as condition of bank's exoneration from liability.

Relation of bank and depositor as that of debtor and creditor.

Cited in *Colton v. Drovers' Perpetual Bldg. & L. Asso.* 90 Md. 85, 78 A. S. R. 431, 46 L.R.A. 388, 45 Atl. 23, holding that depositor indebted to insolvent bank in amount greater than deposit is only required to pay to receiver of bank difference between indebtedness and amount of deposit; *T. S. Reed Grocery Co. v. Canton Nat. Bank*, 100 Md. 299, 70 L.R.A. 959, 59 Atl. 716, holding that when seller of goods deposits draft received therefor in bank, buyer has no claim against bank on account of fraud of seller; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281; *Nodine v. First Nat. Bank*, 41 Or. 386, 68 Pac. 1109,—holding that relation between bank and its depositors is that of debtor and creditor and retention of statement of account for reasonable time constitutes account stated.

Doctrine of estoppel in pais.

Cited in *Andrews v. Clark*, 72 Md. 396, 20 Atl. 429; *National Union Bank v. National Mechanics' Bank*, 80 Md. 371, 45 A. S. R. 350, 27 Atl. 476, 30 Atl. 913; *Turnbull v. Home F. Ins. Co.* 83 Md. 312, 34 Atl. 875,—to point that only party who has been misled to his injury can claim benefit of equitable doctrine of estoppel in pais; *Carroll Springs Distilling Co. v. Schnepfe*, 111 Md. 420, 74 Atl. 828, holding that silence as to distillery does not estop plaintiff from maintaining action for damages for nuisance.

Cited in reference note in 35 A. S. R. 642, on necessity of knowledge in estoppel by acquiescence.

Cited in notes in 134 Am. St. R. 1024, on estoppel by acquiescence in balances struck in pass books; 27 L.R.A. 430, on effect of depositor intrusting examination of returned checks to agent who happens to have forged them; 11 E. R. C. 103, on estoppel in pais by conduct deceiving another to his injury.

Admissibility of evidence of statements of surviving defendants.

Cited in *Simmons v. Haas*, 56 Md. 153, holding that evidence of statements of surviving defendant made to person in employ of plaintiff as to proposed contract which statements were acted upon by plaintiff is admissible.

Retention of statement of bank account as account stated.

Cited in note in 29 L.R.A. (N.S.) 339, 349, on effect of retaining statement of account to render it an account stated.

34 AM. REP. 335, DUBOIS v. MASON, 127 MASS. 37.**Liability of person writing name on back of note.**

Cited in *Stevens v. Parsons*, 80 Me. 351, 14 Atl. 741, holding that person who indorses note before delivery which is payable to order of maker and indorsed by maker to order of plaintiff is liable as original promisor; *Wescott v. Stevens*, 85 Me. 325, 27 Atl. 146, holding that person who indorses note for accommodation of maker and signs as second indorser although payee appears as first indorser, is liable to payee for money advanced; *Baldwin v. Dow*, 130 Mass. 416, holding that liability of party whose name appears on back of note as guarantor is to be determined by relation which is thereby assumed towards payee at time note first took effect; *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592, to point that person who before statute, signed note in blank on back, before delivery to payee was entitled to notice as indorser; *Haddock, B. & Co. v. Haddock*, 118 App. Div. 412, 103 N. Y. Supp. 584 (dissenting opinion), on admissibility of parol evidence to show liability of party to promissory note; *People's Bank v. Rockwood*, 59 Minn. 420, 61 N. W. 457; *Sawyer v. Brownell*, 13 R. I. 141, 43 A. R. 19,—holding that "C" is liable as indorser on note payable to order of "B" and indorsed by him and also by "C" for accommodation of maker; *Harnett v. Holdredge*, 5 Neb. (Unof.) 114, 97 N. W. 443; *Harnett v. Holdredge*, 73 Neb. 570, 119 A. S. R. 905, 103 N. W. 277,—holding that persons who write names on back of note payable to order of maker become liable as indorsers thereon and not as joint makers; *Ewan v. Brooks-Waterfield Co.* 55 Ohio St. 596, 60 A. S. R. 719, 35 L.R.A. 786, 45 N. E. 1094, to point that nature of liability of parties whose names appear on back of note is conclusively determined by position of signatures with reference to those of other parties when note takes effect; *Mercantile Bank v. Busby*, 120 Tenn. 652, 113 S. W. 390, holding that stockholders indorsing note to raise money for corporation are liable as joint makers.

Cited in notes in 39 A. R. 557, on liability of indorser before utterance; 72 A. S. R. 684, on liability of indorser before delivery of notes payable to maker; 4 E. R. C. 551, on order of liability of parties to bill or note.

When note payable to order of maker has inception.

Cited in *Pickering v. Cording*, 92 Ind. 306, 47 A. R. 148, holding that note payable to order of maker is nullity until indorsed by him; *Lowrie v. Zunkel*, 49 Mo. App. 153, holding that under statute note payable to order of maker becomes payable to bearer by delivery for value without indorsement; *Pettyjohn v. National Exch. Bank*, 101 Va. 111, 43 S. E. 203, holding that note made by firm payable to member of partnership or order is not valid until indorsed by such partner; *Union Nat. Bank v. Chapman*, 52 App. Div. 57, 64 N. Y. Supp. 1053, to point that note payable to order of one maker and delivered for purpose of raising money, has no inception until indorsed by payee and delivered to third person.

Presumption as to law in another state.

Cited in *Schofield v. Palmer*, 134 Fed. 753, holding that if no rate of interest is specified in instrument it will be presumed that rate where it is to be performed is same as in state where judgment is recovered, in absence of proof.

Cited in notes in 21 L.R.A. 468, on presumption as to statutes of other states; 67 L.R.A. 48, on conflict between presumption in favor of common law and presumption that law of other jurisdiction is the same as that of forum where proper common law is not proved.

34 AM. REP. 337, WOODWARD v. TOWNE, 127 MASS. 41.

Fiduciary character of debt as affecting its release by discharge in bankruptcy.

Cited in *Boyd v. Agricultural Ins. Co.* 20 Colo. App. 28, 76 Pac 986, holding that judgment on bond of insurance agent for default in remitting to company money collected as premiums is released by discharge in bankruptcy; *Svanoe v Jurgens*, 144 Ill. 507, 33 N. E. 955; *Reeves v. McCracken*, 69 N. J. Eq. 203, 60 Atl. 332,—to point that words “fiduciary character” in bankruptcy act of 1867, referred to technical trusts only and not to agency or bailment; *Du Pont v. Beck*, 81 Ind. 271, holding that obligation of factor to principal for proceeds of goods sold is, under bankruptcy act of 1867, discharged in bankruptcy; *Herman v. Lynch*, 26 Kan. 435, 40 A. R. 320, holding that obligation of person who received money to be paid to third person is not released by discharge in bankruptcy; *Hayes v. Nash*, 129 Mass. 62, holding that action against officer for conversion of property by attaching it upon writ against third person is barred by discharge in bankruptcy; *Stapleton v. Dee*, 132 Mass. 279, to point that debt created by embezzlement of bankrupt while acting as administrator is not released by discharged in bankruptcy; *Raphael v. Mullen*, 171 Mass. 111, 50 N. E. 515, holding that obligation of trustee of debtor’s property to pay debts and return balance of property to debtor, is not released by discharge in bankruptcy; *Gibson v. Gorman*, 44 N. J. L. 325, holding that money received as deposit from purchaser on sale by auctioneer where sale fell through because of defect in title was not received in fiduciary capacity; *Furber v. Dane*, 204 Mass. 412, 27 L.R.A.(N.S.) 808, 90 N. E. 859, holding that relation between stockholder and customer is not fiduciary.

Cited in reference notes in 77 A. D. 386, as to what are fiduciary debts within meaning of bankrupt and insolvency laws; 34 A. R. 483, on attorney as one acting on “fiduciary character” within bankrupt act.

Cited in 39 A. R. 725, on “fiduciary character” of relation of factor to principal within bankruptcy act.

34 AM. REP. 338, CONNECTICUT RIVER R. CO. v. FRANKLIN COUNTY, 127 MASS. 50.

Necessity and sufficiency of provision for compensation in eminent domain statute.

Cited in *Brickett v. Haverhill Aqueduct Co.* 142 Mass. 394, 8 N. E. 119, holding that provision in statute providing for taking of property for aqueduct, that damages shall be ascertained in same manner as in taking of land for highway is sufficient; *Woodbury v. Marblehead Water Co.* 145 Mass. 509, 15 N. E. 282, holding that provision in statute permitting water company to take land upon giving satisfactory security makes adequate provisions for compensation; Atty.

Gen. v. Old Colony R. Co. 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252, holding that provision in statute for compensation for property taken for public use, ought to be more than mere right of action against corporation; Rockport Water Co. v. Rockport, 161 Mass. 279, 37 N. E. 168, on sufficiency of security for payment of value of water plant to be taken over by town from water company; Bent v. Emery, 173 Mass. 495, 53 N. E. 910, holding that statute providing for taxing of private land for public use is invalid if it leaves uncertain source of compensation; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43, holding statute authorizing taking of private property for public use without providing for payment of compensation unconstitutional; Drury v. Midland R. Co. 127 Mass. 571; Neponset Meadow Co. v. Tileston, 133 Mass. 189,—to point that statute providing for taking of land for public purpose without providing for compensation is invalid; dissenting opinions in Pierce v. Drew, 136 Mass. 875, 49 A. R. 7; Jones v. Franklin County, 130 N. C. 451, 42 S. E. 144,—on constitutionality of statute which undertakes to appropriate private property for public use, without adequate provision for payment of compensation; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 446, 29 Sup. Ct. Rep. 246, holding that constitutional provision that carrier must deliver cars to connecting carrier without providing adequate protection for their return or compensation for their use is taking of property without due process of law.

Cited in reference note in 65 A. S. R. 807, on necessity of provision for compensation on acquiring by eminent domain of property already devoted to public use.

Cited in note in 42 L. ed. U. S. 273, on necessity of provision for compensation for laying out highway.

Exclusiveness of statutory remedy for property taken by eminent domain.

Cited in Bigelow v. Union Freight R. Co. 137 Mass. 478, to point that where statute adequately provides for compensation for damages upon taking property for public use all other remedies are excluded.

When writ of prohibition lies.

Cited in Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 520, holding that writ of prohibition does not lie to court martial to correct mistakes in decision of question within its jurisdiction; Henshaw v. Cotton, 127 Mass. 60, holding that magistrate may be restrained by writ of prohibition from entertaining second application of debtor to take oath that he does not intend to leave state; Chandler v. Railroad Comrs. 141 Mass. 208, 3 N. E. 509, holding that railroad commissioners may be restrained by prohibition from hearing appeal from county commissioners made by party "not aggrieved;" Hyde Park v. Wiggin, 157 Mass. 94, 31 N. E. 693, holding that prohibition will not be issued to court having jurisdiction merely because proceedings are irregular; Jaquith v. Fuller, 167 Mass. 123, 45 N. E. 54, holding that prohibition will not lie to judge of insolvency and assignee appointed by him when proceeding in question may be revised by petition in equity under statute; Lodge v. Fletcher, 184 Mass. 238, 68 N. E. 204, holding that investigation by board of aldermen, of granting of licenses by licensing board cannot be restrained by writ of prohibition; Tehan v. Municipal Ct. Justices, 191 Mass. 92, 77 N. E. 313, holding that writ of prohibition is used to prevent court from exercising jurisdiction which it does not possess; State ex rel. Vogel v. Bersch, 84 Mo. App. 657, holding that action of board of arbitration in determining formation of new school district is judicial and may be restrained by prohibition; State ex rel. Morley v. Godfrey, 54 W. Va. 54, 46 S. E. 185,

to point that landowner may obtain writ of prohibition to prevent assessment of damages for land taken for railroad under statute which does not make adequate provision for payment of compensation; *Anderdon Twp. v. Colchester North Twp.* 21 Ont. Rep. 476, granting prohibition forbidding arbitrators from further proceeding on appeal by township from report as to drain; *Judy v. Lashley*, 50 W. Va. 628, 57 L.R.A. 413, 41 S. E. 197, holding that prohibition lies to restrain mayor from imposing fine under void ordinance against carrying deadly weapons; *Bell v. First Judicial Dist. Ct.* 28 Nev. 280, 113 A. S. R. 854, 1 L.R.A. (N.S.) 843, 81 Pac. 875, 6 A. & E. Ann. Cas. 982, holding that constitutionality of statute may be considered on writ of prohibition.

Cited in notes in 111 A. S. R. 941, on writ of prohibition to boards usually exercising functions of a ministerial or legislative character; 111 A. S. R. 970, on who may apply for writ of prohibition.

Judge as proper party in writ of prohibition.

Cited in *Winchester v. Thayer*, 129 Mass. 129, to point that in proceedings for writ of prohibition to restrain court of insolvency, judge of court was properly made party.

Effect of proceedings under unconstitutional statute.

Cited in *Dexter v. Boston*, 176 Mass. 247, 79 A. S. R. 306, 57 N. E. 379, holding that action under unconstitutional statute is as if there were no statute; *White v. Gove*, 183 Mass. 333, 67 N. E. 359, to point that deed obtained on sale of land for taxes levied under invalid statute passes no title.

Statutory provisions as to state writs as confirmatory of common law.

Cited in *Boody v. Watson*, 64 N. H. 162, 9 Atl. 704, holding that statutory authorization of writs of mandamus is confirmation of common-law power of issuing process that is necessary for furtherance of justice; *Brazie v. Fayette County*, 25 W. Va. 213, holding that statute authorizing judge of circuit court to issue writ of prohibition, in vacation, is constitutional.

Right to sue state.

Cited in *Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 306, to point that state cannot be sued unless it permits action to be maintained against it.

Superintending control of superior over inferior tribunal.

Cited in notes in 51 L.R.A. 34, on superintending control and supervisory jurisdiction of superior over an inferior or subordinate tribunal; 51 L.R.A. 36, on existence of inherent power of supervisory or superintending control of highest law court of original jurisdiction; 51 L.R.A. 53, on constitutional and statutory grants of superintending control, general supervision, etc., over inferior tribunal; 20 L.R.A. (N.S.) 414, on superintending control of civil courts over courts-martial.

34 AM. REP. 345, FREEMAN'S NAT. BANK v. SAVERY, 127 MASS. 75.

What constitutes notice to purchaser of infirmities of title to commercial paper.

Cited in *Redlon v. Churchill*, 73 Me. 146, 40 A. R. 345; *Daniels v. Hammond*, 154 Mass. 165, 28 N. E. 12,—holding that notice of fraud upon firm is not shown because partner gave his own note indorsed with firm name for money received; *National Secur. Bank v. McDonald*, 127 Mass. 82; *Coolidge v. Smith*, 129 Mass. 554,—holding that party must be presumed to know contents and

meaning of instrument he takes as evidence of title; *Stimson v. Whitney*, 130 Mass. 591, holding that form of note was not notice to purchaser where member of one firm made note of that firm payable to order of another firm of which he was also member and indorsed latter firm's name in fraud of latter firm; *Central Nat. Bank v. Frye*, 148 Mass. 498, 20 N. E. 325, holding that bank which discounts note signed with firm name payable to partner who has it credited to his personal account with bank has notice that partner was exceeding his authority; *Bill v. Stewart*, 156 Mass. 508, 31 N. E. 386, holding that holder of check in good faith without notice of infirmity of title may recover against maker, though check is post dated; *International Trust Co. v. Wilson*, 161 Mass. 80, 36 N. E. 589, holding that form of note may be evidence of notice of limitation on partner's authority to borrow money; *Murphy v. Barnard*, 162 Mass. 72, 44 A. S. R. 340, 38 N. E. 29, to point that title of person who buys commercial paper in good faith is not vitiated because there were suspicious circumstances which might have put him on inquiry; *Merchants' Nat. Bank v. McNeir*, 51 Minn. 123, 53 N. W. 178, holding that fact that cashier of bank appeared to be payee of note and first indorser and his bank second indorser is not conclusive evidence that indorsement of his bank was unauthorized.

Cited in notes in 3 E. R. C. 678, as to what will import notice of prior equities on transfer of negotiable paper; 4 E. R. C. 434, on constructive notice of fraud in inception of negotiable paper.

Distinguished in *Reed v. Bacon*, 175 Mass. 407, 56 N. E. 716, holding that action may be maintained against firm on note signed by one member and indorsed by him in firm name in carrying out agreement of firm though such partner misappropriated money received.

Right to recover on note taken for greater amount than debt.

Cited in *Proctor v. Whitcomb*, 137 Mass. 303, holding that person who takes note as security for debt less in amount than face of note with intent to sell note for face value, is not precluded from recovering amount of debt.

Extent of bank's right to discount notes.

Cited in *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909, to point that bank cannot discount notes except in return for loan of money made on strength of promises contained in them; *National Revere Bank v. Morse*, 163 Mass. 383, 40 N. E. 180, to point that by note is meant negotiable promissory note.

Enforcement of ultra vires contract.

Cited in *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 39 A. S. R. 467, 22 L.R.A. 364, 35 N. E. 776, on enforcement of ultra vires contract of corporation on equitable grounds.

Effect of negligence as to title on rights of endorser.

Cited in *Lee v. Whitney*, 149 Mass. 447, 21 N. E. 948; *Dary v. Grau*, 190 Mass. 482, 77 N. E. 507; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 53 A. R. 5, 21 N. W. 849,—holding that negligence of indorser of note respecting title to it, will not affect his rights, unless he is chargeable with bad faith.

Liability of firm on note issued by partner.

Cited in *Stevens v. McLachlan*, 120 Mich. 285, 79 N. W. 627, holding that it is no defense to firm's note taken in good faith, that partner who issued it applied money received to his own use.

When liability on indemnity bond commences.

Cited in *Thomas v. Bleakie*, 136 Mass. 568, holding that liability of surety on bond for faithful performance of duty of officer does not commence until transfer of it to obligee.

34 AM. REP. 349, MULLEN v. OLD COLONY R. CO. 127 MASS. 86.**Effect of release obtained by fraud on right of action—Necessity of returning consideration.**

Cited in *Johnson v. Merry Mount Granite Co.* 53 Fed. 569; *Lyons v. Allen*, 11 App. D. C. 543; *Citizens Street R. Co. v. Horton*, 18 Ind. App. 335, 48 N. E. 22; *Louisville & N. R. Co. v. McElroy*, 100 Ky. 153, 37 S. W. 844,—holding that before person can recover for personal injury, which has been settled, on ground that settlement was procured by fraud, he must return money received in settlement; *Lumley v. Wabash R. Co.* 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 66, holding that person seeking to recover part of damages resulting from accident need not return money received by him on account of release given of other part of damages; *Georgia Home Ins. Co. v. Rosenfield*, 37 C. C. A. 96, 95 Fed. 358, to point that it is not necessary to return consideration received upon giving release procured by fraud before commencing action on original obligation; *Heck v. Missouri P. R. Co.* 147 Fed. 775, holding that in order to avoid release pleaded as defense, plaintiff must return or offer to return consideration received; *Harkey v. Mechanics' & T. Ins. Co.* 62 Ark. 274, 54 A. S. R. 295, 35 S. W. 230, holding that where assured accepts sum of money in full settlement of disputed loss, he cannot rescind on ground of fraud without return of money received; *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042; *Carroll v. People*, 13 Ill. App. 206,—holding that consideration need not be returned before action on original liability where party holds out that he gives consideration for one thing and by fraud obtains agreement for another; *Stapleton v. Haight*, 135 Iowa, 564, 113 N. W. 351, holding that deed will not be canceled for fraud unless consideration is returned; *Bliss v. New York C. & H. R. Co.* 160 Mass. 447, 39 A. S. R. 504, 36 N. E. 66, holding that person who gives release for personal injury and injury to clothing may sue for injury without returning money received, where he understood that such money was only for injury to clothing; *Drohan v. Lake Shore & M. S. R. Co.* 162 Mass. 435, 38 N. E. 1116, holding that money received upon giving release procured by fraud must be tendered back, before action, unless party shows that he was fraudulently induced to believe that release was only for part of damages; *Jones v. Alabama & V. R. Co.* 72 Miss. 22, 16 So. 379, holding that no tender of sum paid for fraudulent release of damages for personal injuries is necessary before action; *Girard v. St. Louis Car Wheel Co.* 123 Mo. 358, 45 A. S. R. 556, 25 L.R.A. 514, 27 S. W. 648 (dissenting opinion), on necessity of returning consideration received for release of cause of action procured by fraud before bringing action; *Ellison v. Beannabia*, 4 Okla. 347, 46 Pac. 477, holding that restitution of consideration received need not be returned before suit for cancellation of conveyance of land procured by fraud where because of fraud party did not get what he bargained for; *McCarty v. Houston & T. C. R. Co.* 21 Tex. Civ. App. 568, 54 S. W. 421, to point that if nature of instrument signed is by fraud concealed from person signing, he may sue without returning consideration received; *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758, holding that where party has received anything in settlement of cause of action he must before maintaining action return it though such settlement was obtained by fraud.

Cited in reference notes in 39 A. S. R. 509, on return of consideration as prerequisite to action against one fraudulently procuring signature to discharge of cause of action; 44 A. S. R. 596, on restoration of benefits received as prerequisite to rescission.

— **Right to set up fraud in reply to answer alleging release.**

Cited in *Wagner v. National L. Ins. Co.* 33 C. C. A. 121, 61 U. S. App. 691, 90 Fed. 395; *Girard v. St. Louis Car Wheel Co.* 123 Mo. 358, 45 A. S. R. 556, 25 L.R.A. 514, 27 S. W. 648; *Koffman v. Southwest Missouri Electric R. Co.* 95 Mo. App. 459, 69 S. W. 212; *Perry v. M. O'Neil & Co.* 78 Ohio St. 200, 85 N. E. 41,—holding that release of cause of action that is void, is not bar to action but plaintiff may by reply aver facts that make it void; *Chesapeake & O. R. Co. v. Howard*, 14 App. D. C. 262, holding that tender of money on trial is sufficient compliance with rule that party seeking to avoid release on ground of fraud must return consideration; *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120; *Chicago, R. I. & P. R. Co. v. Lewis*, 13 Ill. App. 166; *Indiana, D. & W. R. Co. v. Fowler*, 103 Ill. App. 565; *O'Brien v. Chicago, M. & St. P. R. Co.* 89 Iowa, 644, 57 N. W. 425,—holding that party need not return amount received upon settlement procured by fraud before suing on original liability; *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747, to point that where release is procured by fraud proper mode of pleading facts was non est factum; *Weiser v. Welch*, 112 Mich. 134, 70 N. W. 438, holding that delay of three months in tendering back money received on giving release procured by fraud does not bar action.

— **When question of fraud is for jury.**

Cited in *Union P. R. Co. v. Harris*, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843, holding that question whether or not release from damages for personal injury was procured by fraud was one for jury; *Schus v. Powers-Simpson Co.* 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68, on question whether release in full for damages for personal injury was procured by fraud as question for jury.

Validity of release obtained by fraud.

Cited in *St. Louis, I. M. & S. R. Co. v. Smith*, 82 Ark. 105, 100 S. W. 884, holding that person who is induced by fraud of another's agent to sign release, without reading it is not bound thereby; *Och v. Missouri, K. & T. R. Co.* 130 Mo. 27, 36 L.R.A. 442, 31 S. W. 962, holding that release of all damages for personal injury is bar to action for such damages until set aside in equitable action for fraud; *Kelly v. Chicago, R. I. & P. R. Co.* 138 Iowa, 273, 128 A. S. R. 195, 114 N. W. 536, holding that release from liability for personal injury obtained by fraud or undue influence is void.

34 AM. REP. 351, BRADLEE v. WARREN FIVE CENTS SAV. BANK, 127 MASS. 107.

Implied powers of corporate officers.

Cited in *Merchants' Nat. Bank v. Citizens' Gaslight Co.* 159 Mass. 505, 38 A. S. R. 451, 34 N. E. 1069, holding that treasurer of gas light company has by virtue of his office, authority to sign note which shall bind company; *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838, holding that director of corporation has no power, unless specially authorized, to bind corporation by express promise; *Consolidated Water-Power Co. v. Nash*, 109 Wis. 490, 85 N. W. 485, holding that president and secretary of going corporation

Am. Rep. Vol. XVII.—51.

have no power to contract for sale of entire operating plant without sanction of stockholders.

— Of savings bank.

Cited in *Com. v. Reading Sav. Bank*, 137 Mass. 431, holding that treasurer of savings bank cannot bind bank by representation that second mortgage which he assigned was first mortgage; *Com. v. Reading Sav. Bank*, 133 Mass. 16, 43 A. R. 495; *Jewett v. West Somerville Co-op. Bank*, 173 Mass. 54, 73 A. S. R. 259, 52 N. E. 1085,—to the point that treasurer of savings bank cannot bind corporation by indorsement of commercial paper; *Slattery v. North End Sav. Bank*, 175 Mass. 380, 56 N. E. 606, holding that president and treasurer of savings bank have no authority to contract in name of bank for material for building on land subject to building-loan mortgage; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 7 Atl. 318, holding that treasurer of savings bank is not by virtue of office, invested with power of borrowing money for institution and pledging its securities as collateral.

Cited in reference note in 73 A. S. R. 261, on authority of treasurer of savings bank.

Cited in note in 27 L.R.A. 407, on power of bank officers and agents to indorse negotiable paper.

Recovery on corporate note.

Distinguished in *Whiddon v. Sprague*, 203 Mass. 526, 89 N. E. 917, on recovery on corporate note indorsed in blank by general manager.

34 AM. REP. 353, TOWNE v. FISKE, 127 MASS. 125.

What are fixtures.

Cited in *Fratt v. Whittier*, 58 Cal. 126, 41 A. R. 251, holding that gas fixtures pass with deed of hotel made in pursuance of contract which included improvements belonging to hotel; *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 16 A. S. R. 471, 4 L.R.A. 284, 21 Pac. 809, holding that nature and character of act by which thing is put in its place and purpose for which it is intended determines whether or not it is fixture; *Hayford v. Wentworth*, 97 Me. 347, 54 Atl. 940, holding that water closet placed in office building by tenant at will, removable without material injury to building does not become part of realty; *Kimball v. Grand Lodge of Masons*, 131 Mass. 59, holding that cases having shelves and drawers placed in building used as shop are not part of realty as between lessor and lessee; *Jennings v. Vahey*, 183 Mass. 47, 97 A. S. R. 409, 66 N. E. 598, holding that ordinary kitchen range with hot water front, placed in building by owner of apartment house is not part of realty; *Frank Adam Electric Co. v. Gottlieb*, 112 Mo. App. 226, 86 S. W. 901, holding that gas fixtures are not part of realty so as to be covered by mechanic's lien; *National Bank v. North*, 160 Pa. 303, 28 Atl. 694, on gas fixtures as part of real property; *Argles v. McMath*, 26 Ont. Rep. 224, holding that gas fixtures are chattels as between landlord and tenant.

Cited in reference notes in 29 A. R. 403, on heating and lighting fixtures as part of realty; 97 A. S. R. 412; 109 A. S. R. 857,—on steam radiators or hot-air furnaces as fixtures.

Cited in notes in 37 A. R. 475, on show cases as fixtures; 42 A. R. 449; 52 A. S. R. 585,—on what are fixtures.

— As between mortgagor and mortgagee.

Cited in *L'Hote v. Fulham*, 51 La. Ann. 780, 25 So. 655, holding that chande-

liers and brackets placed in dwelling do not pass under foreclosure sale of realty; *Allen v. Mooney*, 130 Mass. 155, holding that whether or not portable furnace set upon brick foundation and with usual connections is part of realty is mixed question of law and fact; *Capehart v. Foster*, 61 Minn. 132, 52 A. S. R. 582, 63 N. W. 257, holding that gas fixtures are not part of realty as between mortgagor and mortgagee of realty; *Cosgrove v. Troescher*, 62 App. Div. 123, 70 N. Y. Supp. 764, holding that gas range connected in usual manner is personalty as between mortgagor and mortgagee; *Canning v. Owen*, 22 R. I. 624, 84 A. S. R. 858, 48 Atl. 1033, holding that electric-light fixtures attached to property by mortgagor pass to purchaser upon sale under mortgage; *Hook v. Bolton*, 199 Mass. 244, 127 A. S. R. 487, 17 L.R.A.(N.S.) 699, 85 N. E. 175, holding that gas fixtures may or may not be personalty according to circumstances.

Cited in note in 1 L.R.A. 350, on fixtures as between mortgagor and mortgagee.

34 AM. REP. 355, CHURCHILL v. HOLT, 127 MASS. 165, Later appeal in 131 Mass. 67.

Right of contribution between joint tortfeasors.

Cited in *Churchill v. Holt*, 131 Mass. 67, 41 A. R. 191, holding that if occupant leaves hatchway in front of premises in dangerous condition and third person makes it more dangerous former cannot recover from latter damages he is obliged to pay to traveler who is injured by reason of dangerous condition; *Simpson v. Mercer*, 144 Mass. 413, 11 N. E. 720, to point that where parties are not equally in fault one who is not actively so, may recover over against other party amount former is obliged to pay; *Old Colony R. Co. v. Slavens*, 148 Mass. 363, 12 A. S. R. 558, 19 N. E. 372, holding that railroad company compelled to pay for personal injury to passenger caused by negligence of mail transfer contractor in obstructing sidewalk can recover over against later; *Lowell v. Glidden*, 159 Mass. 317, 34 N. E. 459, holding that city which is obliged to pay damages resulting from injury on defective street may recover over against person causing defect; *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 86 A. S. R. 478, 51 L.R.A. 781, 59 N. E. 657, on right of person who has been obliged to pay damages on account of another's negligence to recover indemnity from latter; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N. W. 698, holding that owner of premises who has been obliged to pay damages because of injury resulting from their defective condition may recover against person who caused condition; *Westfield Gas & Mill. Co. v. Noblesville & E. Gravel Road Co.* 13 Ind. App. 481, 55 A. S. R. 244, 41 N. E. 955; *Mayberry v. Northern P. R. Co.* 100 Minn. 29, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 A. & E. Ann. Cas. 754,—holding that rule that right of contribution does not exist as between joint tortfeasors has no application to torts which are result of mere negligence; *Eaton & P. Co. v. Mississippi Valley Trust Co.* 123 Mo. App. 117, 100 S. W. 551, to point that owner of building who has to pay damages to party injured by defective premises may recover indemnity from third person who negligently caused them to be so; *Nashua Iron & Steel Co. v. Worcester & N. R. Co.* 62 N. H. 159, holding that person who has been compelled to pay damages may recover indemnity although but for his negligence injury would not have happened, if at time it occurred he could not and third person could have prevented it, by use of ordinary care; *Gregg v. Page Belting Co.* 69 N. H. 247, 46 Atl. 26, holding that judgment debtor in action for personal injury necessarily involving actual negligence on his part cannot recover against third party bound by judgment whose negligence co-

operated to cause injury; *Boston & M. R. Co. v. Brackett*, 71 N. H. 494, 53 Atl. 304, to point that it is only when party who is in fault as to person injured is without fault as to party whose actual negligence is cause of injury, that recovery over can be had; *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 A. S. R. 685, 31 N. E. 987, 29 Abb. N. C. 238, holding that one who without fault has been held legally liable for negligence of another is entitled to indemnity from latter; *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 203 Mass. 159, — L.R.A. (N.S.) —, 89 N. E. 193, holding that there is no right of contribution between joint wrongdoers in *pari delicto*.

Liability for negligent injury.

Cited in *State v. Bradley*, 48 Conn. 533, to point that person negligently leaving unguarded excavation in street was liable to person injured thereby at common law.

— Of owner for injury from defective premises.

Cited in *Dow v. Winnepesaukee Gas & Electric Co.* 69 N. H. 312, 76 A. S. R. 173, 42 L.R.A. 569, 41 Atl. 288, holding that in no defense to action for injuries caused by escape of gas from defective pipe, that owners were not notified of its condition.

— Liability of joint tort-feasors.

Cited in *Bryant v. Bigelow Carpet Co.* 131 Mass. 491, holding that if injury is caused by combined acts of negligence of two corporations joint action may be maintained against them; *Clement v. Crosby & Co.* 148 Mich. 293, 10 L.R.A. (N.S.) 588, 111 N. W. 745, 12 A. & E. Ann. Cas. 265, holding that manufacturer and retail dealer who sold dangerous article are liable for injury caused purchaser resulting from their negligence in failing to give warning of character of article.

Cited in note in 16 A. S. R. 255, on negligence of two or more persons resulting in injury to a third.

Right to indemnity.

Cited in *Chicago v. Pittsburg, C. C. & St. L. R. Co.* 146 Ill. App. 403, holding that city can recover amount expended for repairs to approaches to railroad viaduct from railroad under obligation to repair same.

34 AM. REP. 358, DONLAN v. PROVIDENT INST. FOR SAV. 127 MASS. 183.

Liability of savings bank to depositor.

Cited in *Chase v. Waterbury Sav. Bank*, 77 Conn. 295, 69 L.R.A. 329, 59 Atl. 37, 1 A. & E. Ann. Cas. 96, holding that by accepting and using deposit book containing by-laws of savings bank depositor assents to them as part of contract of deposit; *Langdale v. Citizens' Bank*, 121 Ga. 105, 104 A. S. R. 947, 69 L.R.A. 341, 48 S. E. 708, 2 A. & E. Ann. Cas. 157, holding that if savings bank pays deposit to person who presents book no circumstance being present to excite suspicion, payment is good; *Kimmins v. Boston Five Cents Sav. Bank*, 141 Mass. 33, 55 A. R. 441, 6 N. E. 242; *McCarthy v. Provident Inst. for Sav.* 159 Mass. 527, 34 N. E. 1073,—to the point that savings bank may pay deposit to person who presents pass book and order of depositor; *Kimball v. Norton*, 59 N. H. 1. 47 A. R. 171, holding that agreement between savings bank and depositor, that deposit may be paid to person presenting passbook, does not relieve bank from duty of exercising reasonable care.

Cited in note in 69 L.R.A. 339, on liability of savings bank for payment after death of depositor.

By-laws of savings bank as contract.

Cited in reference notes in 25 A. S. R. 748, on effect of by-laws of savings banks on contracts with depositors; 94 A. S. R. 652, on by-laws of bank.

Cited in notes in 97 A. D. 121, on receipt of bill of lading without objection as contract limiting carrier's liability to its terms; 105 A. S. R. 733, on by-laws, rules, or regulations of savings banks as part of contract of deposit; 69 L.R.A. 325, on assent by savings-bank depositor to by-laws of bank.

34 AM. REP. 361, *BLAGGE v. ILSLEY*, 127 MASS. 191.

Right of action for seduction.

Cited in *Mohelsky v. Hartmeister*, 68 Mo. App. 318, holding that where debauchment results in loss of services of servant master is entitled to recover.

Cited in reference note in 36 A. R. 767, as to proof which will sustain action of seduction.

Cited in notes in 44 A. D. 169, 170, as to whether pregnancy, venereal disease, or other illness must ensue to give right of action for seduction; 88 A. D. 287, as to whether parent's right to sue for seduction of daughter is based upon relation of master and servant; 14 L.R.A. 700, on loss of service as element in action by father for seduction of child; 14 L.R.A. 706, on what impairment of daughter's serving powers must be shown to support parent's action for seduction.

Admissibility of evidence of defendant's pecuniary condition.

Cited in *Lavery v. Crooke*, 52 Wis. 612, 38 A. R. 768, 9 N. W. 599, holding that in action for loss of services caused by debauching of infant child, evidence to show defendant's pecuniary condition is admissible.

34 AM. REP. 367, *COSTELLO v. CROWELL*, 127 MASS. 293.

What constitutes negotiable instrument.

Cited in *Lincoln Nat. Bank v. Perry*, 14 C. C. A. 273, 32 U. S. App. 15, 66 Fed. 887, holding not negotiable, note containing agreement to give additional security if collateral security depreciates in value before maturity; *Moore v. Edwards*, 167 Mass. 74, 44 N. E. 1070, holding not negotiable, note containing condition allowing offset of claims maker may have against payee at maturity; *White v. Cushing*, 88 Me. 343, 51 A. S. R. 402, 32 L.R.A. 590, 34 Atl. 164; *Iron City Nat. Bank v. McCord*, 139 Pa. 52, 23 A. S. R. 166, 11 L.R.A. 559, 21 Atl. 143, 27 W. N. C. 151, 21 Pittsb. L. J. N. S. 335, 48 Phila. Leg. Int. 362,—holding not negotiable order drawn on blank form of savings bank, containing in margin words requiring presentation of deposit book; *Gazlay v. Riegel*, 16 Pa. Super. Ct. 501, holding not negotiable, note containing statement that title to property for which note was given, remained in payee till note paid; *Berenson v. London & L. F. Ins. Co.* 201 Mass. 172, 87 N. E. 687, holding that draft to be paid upon acceptance by insurance company is not, negotiable instrument until acceptance.

Cited in reference note in 71 A. D. 700, on negotiability of note containing provisions for set-off.

Cited in notes in 30 L.R.A.(N.S.) 43, on reference to extrinsic agreement as affecting negotiability; 4 E. R. C. 192, 194, on negotiability of bill of exchange or promissory note.

— **Instrument referring to collateral contract.**

Cited in *Costello v. Crowell*, 134 Mass. 280, denying action on note containing statement that it is collateral to contract, unless action at law maintainable on contract; *American Nat. Bank v. Sprague*, 14 R. I. 410, holding not negotiable, note showing on its face that it is collateral to maker's accepted draft.

— **Certainty as to time of payment.**

Cited in *Glidden v. Henry*, 104 Ind. 278, 54 A. R. 316, 1 N. E. 369, holding not negotiable, note containing provision allowing payee or assignee to extend time of payment indefinitely; *American Nat. Bank v. American Wood Paper Co.* 19 R. I. 149, 61 A. S. R. 746, 29 L.R.A. 103, 32 Atl. 305, holding negotiable, corporate bonds secured by mortgage, making whole balance due on default of any instalment.

— **Provision as to rate of interest after maturity.**

Distinguished in *Cherry v. Sprague*, 187 Mass. 113, 105 A. S. R. 381, 67 L.R.A. 33, 72 N. E. 456, holding that unconditional promise to pay definite sum of money in promissory note though it also contains provision that unpaid interest shall bear increased rate of interest.

Instruments constituting part of contract.

Cited in *Haddaway v. Post*, 35 Mo. App. 278, holding properly admissible, conditions to contract on back thereof to which reference is made on its face, on face being admitted in evidence; *Hopkins v. Van Zandt*, 40 Ill. App. 635, construing as part of note memorandum referred to therein concerning securities to be surrendered on payment thereof.

Cited in reference note in 38 A. D. 368, on memorandum annexed to a note as part of the note.

Cited in note in 127 Am. St. R. 433, 435, on effect of indorsements of memoranda on negotiable instruments at time of execution.

Distinguished in *American Gas & Ventilation Mach. Co. v. Wood*, 90 Me. 516, 43 L.R.A. 449, 38 Atl. 548, holding that writing contemporaneous with note and between same parties on same subject, should be construed with note.

34 AM. REP. 368, NATIONAL MAHAWE BANK v. PECK, 127 MASS. 298.

Time of making of deposit.

Cited in *Wasson v. Lamb*, 120 Ind. 517, 16 A. S. R. 342, 6 L.R.A. 191, 22 N. E. 729, holding time of deposit, date when delivered and credited in pass-book.

Bank's right to and control of deposits—Bank's ownership of.

Cited in *Camp v. First Nat. Bank*, 44 Fla. 497, 103 A. S. R. 173, 33 So. 241, holding that bank becomes absolute owner of money deposited to general credit of depositor, and bank becomes debtor of depositor; *Davenport v. State Bkg. Co.* 126 Ga. 136, 115 A. S. R. 68, note, 8 L.R.A.(N.S.) 944, 54 S. E. 977, 7 A. & E. Ann. Cas. 1000, to point that money deposited in bank becomes absolute property of bank; *Metropolitan Nat. Bank v. Loyd*, 25 Hun, 101, holding that bank becomes owner of checks by receiving them as cash and so crediting them to depositor.

— **Bank's liability for refusal to honor check.**

Cited in *Birchall v. Third Nat. Bank*, 17 Phila. 139, 41 Phila. Leg. Int. 478; *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. 655,—sustaining de-

positor's right of recovery for refusal to honor check when deposit sufficient to meet it.

Cited in note in 41 L. ed. U. S. 859, on liability for wrongful dishonor of check.

— **Right to apply deposits on indebtedness to bank.**

Cited in *Lamb v. Morris* (*Harrison v. Harrison*), 118 Ind. 179, 4 L.R.A. 111, 20 N. E. 746, holding bank unauthorized to apply deposit to payment of note upon which depositor liable as surety; *O'Grady v. Stotts City Bank*, 106 Mo. App. 366, 80 S. W. 696, holding that in absence of agreement, bank could not apply deposit to payment of third person's check of which depositor was guarantor; *Furber v. Dane*, 203 Mass. 108, 89 N. E. 227, holding that bank cannot apply deposit of its debtor to matured debt fully protected by collateral.

Cited in note in 96 A. S. R. 65, on right to apply deposits on indebtedness to bank.

Right of creditor generally to make application of payment on account.

Cited in *Cushman v. Snow*, 186 Mass. 169, 71 N. E. 529, to point that if no direction is given by debtor creditor may apply payment as he chooses.

Release of surety.

Cited in *McShane v. Howard Bank*, 73 Md. 135, 10 L.R.A. 552, 20 Atl. 776, holding sureties on bank cashier's bond not released by failure to set off salary against his indebtedness.

— **By bank's failure to apply principal's deposit on debt.**

Cited in *Citizens' Bank v. Booze*, 75 Mo. App. 189, holding surety not released by payee bank's failure to apply principal's deposit to payment of note at maturity; *Citizens' Bank v. Elliott*, 9 Kan. App. 797, 59 Pac. 1102, sustaining bank's right of recovery against sureties though failing to apply to note maker's deposit subsequent to maturity; *Kirkland Land & Improv. Co. v. Jones*, 18 Wash. 407, 51 Pac. 1043, holding surety not discharged by payee's failure to apply to part payment of note maker's deposit subsequent to maturity; *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 A. S. R. 64, 58 Pac. 164, holding guarantor's liability unaffected by permission to maker of note to check against general deposits subsequently made; *Commercial Nat. Bank v. Henniger*, 105 Pa. 496, 15 W. N. C. 33, 41 Phila. Leg. Int. 357, denying bank's right of recovery against indorser on note protested when maker's deposit was sufficient to meet it.

Cited in reference note in 53 A. S. R. 414, on release of surety by bank allowing principal to withdraw deposit.

Cited in notes in 115 A. S. R. 99, on duty of creditor to surety where he has property or funds of principal in his possession; 8 L.R.A.(N.S.) 946, 949, 952, on effect upon surety or indorser, of bank's failure to apply principal's deposit account upon note.

Distinguished in *Pursifull v. Pineville Bkg. Co.* 97 Ky. 154, 53 A. S. R. 409, 30 S. W. 203, holding surety released when bank at which note was payable instead of applying principal's deposit thereto permitted its withdrawal.

Striking balance of bank accounts.

Cited in note in 134 Am. St. Rep. 1023, on effect of balances struck in pass books.

34 AM. REP. 373, HUCK v. GLOBE INS. CO. 127 MASS. 306.

What constitutes total loss of insured property.

Cited in *Palatine Ins. Co. v. Weiss*, 109 Ky. 464, 59 S. W. 509; *Monteleone v.*

Royal Ins. Co. 47 La. Ann. 1563, 56 L.R.A. 784, 18 So. 472,—holding that when building insured is so injured as to be insecure and is condemned by proper authorities, insured may claim total loss; Northwestern Mut. L. Ins. Co. v. Rochester-German Ins. Co. 85 Minn. 48, 56 L.R.A. 108, 88 N. W. 265, holding that loss cannot be called total so long as remnant of structure left standing above foundation is reasonably safe for use as basis upon which to restore building; O'Keefe v. Liverpool, L. & G. Ins. Co. 140 Mo. 558, 39 L.R.A. 819, 41 S. W. 922, holding that total loss occurred where testimony showed that it would cost as much to rebuild old building as to construct building anew; Royal Ins. Co. v. McIntyre, 90 Tex. 170, 59 A. S. R. 797, 35 L.R.A. 672, 37 S. W. 1068, on what constitutes total loss under policy of fire insurance; Hamburg-Bremen F. Ins. Co. v. Garlington, 66 Tex. 103, 59 A. R. 613, 18 S. W. 337, holding that total loss under policy of fire insurance does not necessarily mean absolute extinction; Corbett v. Spring Garden Ins. Co. 85 Hun, 250, 32 N. Y. Supp. 1059; Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93,—holding that loss is to be regarded as total where building is almost completely destroyed by fire and so injured as to lose its identity.

Cited in note in 23 A. S. R. 916, on what included within loss by fire.

Validity of provision against liability for fall of insured building.

Cited in Teutonia Ins. Co. v. Beard, 74 Ill. App. 496, to the point that provision in fire insurance policy that no liability attaches where building falls before fire occurs, is valid; John Davis & Co. v. Insurance Co. of N. A. 115 Mich. 382, 73 N. W. 393; Nelson v. Traders' Ins. Co. 86 App. Div. 66, 83 N. Y. Supp. 220,—holding that policy of fire insurance ceases upon fall of walls of building causing fire where policy provides against loss by falling of building except as result of fire.

Cited in reference notes in 42 A. S. R. 465, on condition against "fallen building" in insurance policy; 34 A. R. 387, on effect of fall of building on insurance.

Cited in note in 36 A. S. R. 858, on falling of insured building as proximate cause of loss.

34 AM. REP. 376, BLUMANTLE v. FITCHBURG R. CO. 127 MASS. 322.

Liability of carrier for loss of merchandise shipped as baggage.

Cited in Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; Toledo & O. C. R. Co. v. Bowler & B. Co. 63 Ohio St. 274, 58 N. E. 813,—holding that carrier of passenger's is not liable for loss of package containing merchandise shipped under guise of baggage where loss occurred without gross neglect of duty; St. Louis S. W. R. Co. v. Berry, 60 Ark. 433, 46 A. S. R. 212, 28 L.R.A. 501, 30 S. W. 764, holding that carrier's common law liability attaches in case of loss where baggage agent receives more money for shipment than company is obliged to carry, if passenger is unaware of his lack of authority; Weber Co. v. Chicago, St. P. M. & O. R. Co. 113 Iowa, 188, 84 N. W. 1042, holding that railroad company is not bound by act of baggage agent in receiving merchandise as baggage where passenger had knowledge of lack of agent's authority; Nealand v. Boston & M. R. Co. 161 Mass. 67, 36 N. E. 592, to point that railroad company is only liable in case of gross negligence for loss of merchandise shipped as baggage without disclosing contents; dissenting opinions in Talcott v. Wabash R. Co. 159 N. Y. 461, 54 N. E. 1; Trimble v. New York, C. & H. R. R. Co. 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532 (affirming 39 App.

Div. 403; 57 N. Y. Supp. 437),—on liability of railroad company for loss of merchandise shipped as baggage where contents of package was not disclosed.

Cited in reference notes in 43 A. R. 199, on carrier's responsibility as to baggage; 63 A. S. R. 705, on liability of carrier for articles received as baggage.

Cited in notes in 99 A. S. R. 357, on effect of carrier's knowledge of character of property on its liability for merchandise as baggage; 11 L.R.A. 761, on liability of carrier for loss of merchandise carried as baggage; 14 L.R.A. 517, on liability of carrier in transporting merchandise intrusted to it by passenger; 10 L.R.A.(N.S.) 1121, on how far carrier is bound by act of baggageman in receiving articles as baggage; 5 E. R. C. 500, on liability of carrier for loss of luggage in personal charge of passenger.

Disapproved in *Bergstrom v. Chicago*, R. I. & P. R. Co. 134 Iowa, 223, 10 L.R.A.(N.S.) 1119, 111 N. W. 818, 13 A. & E. Ann. Cas. 239, holding that baggage agent has implied authority to receive merchandise as baggage, and by so doing bind carrier unless passenger is advised that agent exceeded his authority; *Charlotte Trouser Co. v. Seaboard Air Line R. Co.* 139 N. C. 382, 51 S. E. 973, holding that if carrier receives merchandise as baggage it is liable as insurer for loss not resulting from act of God.

What constitutes baggage.

Cited in reference note in 93 A. D. 141, on what is baggage to which passenger is entitled.

Cited in notes in 71 A. D. 161; 53 A. R. 271,—on merchandise as baggage; 99 A. S. R. 349, on money as baggage; 99 A. S. R. 354, on merchandise not included in baggage; 20 L. ed. U. S. 423, on what is included in "baggage" for which carrier is responsible.

34 AM. REP. 381, CROMARTY v. BOSTON, 127 MASS. 329.

Liability of city for injury resulting from defective streets.

Cited in *Scott v. District of Columbia*, 27 App. D. C. 413, holding that in order to recover for injury occurring on street he must show it was result of defective condition and that such condition was caused by city's negligence; *Ziegler v. Philadelphia*, 19 Phila. 400, 46 Phila. Leg. Int. 78, holding that city must keep streets in safe condition by night as well as by day.

Cited in note in 30 A. S. R. 384, on duty of municipal officers and agents as to public streets as public and not municipal.

—Slippery condition of sidewalk.

Cited in *Cloughessey v. Waterbury*, 51 Conn. 405, 50 A. R. 38, on liability of city for injury to person resulting from fall on sidewalk caused by accumulation of ice; *Magaha v. Hagerstown*, 95 Md. 62, 93 A. S. R. 317, 51 Atl. 832, holding city not liable for injury caused to person who slips and falls upon ice on sidewalk, unless it is shown that city was negligent in not keeping streets in reasonably safe condition; *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128, holding city liable for injury caused by slipping on oval-shaped iron gutter crossing, negligently permitted to remain after it had become slippery by long use; *Moynihhan v. Holyoke*, 193 Mass. 26, 78 N. E. 742, holding that in action for injury resulting from defective sidewalk question of city's negligence is for jury where walk at place of injury was made partly of glass and was smooth and slippery and sloped 2½ inches in ten feet; *Leonard v. Butte*, 25 Mont. 410, 65 Pac. 425, holding that question of whether or not sidewalk was defective is question for jury where 100 persons slipped and fell on four cement

blocks therein within one year, and 25 fell within two months; *Muller v. Newburgh*, 32 Hun, 24 (dissenting opinion), on liability of city for injury caused by slippery condition of street; *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674, holding that in action for injury caused by defective street evidence that trap door projected above level of sidewalk and was smooth and slippery raises question for jury as to city's negligence; *Smith v. Tacoma*, 51 Wash. 101, 21 L.R.A. (N.S.) 1018, 98 Pac. 91, holding that liability of city for injury from fall upon slippery iron cover of coal hole is question for jury.

34 AM. REP. 384, DOWS v. FANEUIL HALL INS. CO. 127 MASS. 346.

Liability for loss by explosion.

Cited in *Leonard v. Orient Ins. Co.* 54 L.R.A. 706, 48 C. C. A. 369, 109 Fed. 286; *John Davis & Co. v. Insurance Co. of N. A.* 115 Mich. 382, 73 N. W. 393,—holding that under insurance policy upon stock of goods providing that company would not be liable for damages by explosion and that policy would cease upon fall of building except as result of fire insured may recover for loss by fire ensuing upon explosion which caused building to collapse; *Vorse v. Jersey Plate Glass Ins. Co.* 119 Iowa, 555, 97 A. S. R. 330, 60 L.R.A. 838, 93 N. W. 569, holding that under policy insuring plate glass and providing against liability for damage by fire, company is liable for loss caused by gas explosion resulting from lighting match in room.

Cited in reference notes in 42 A. S. R. 465, on condition against "fallen building" in insurance policy; 60 A. S. R. 716, on loss of insured property by lighting or explosion.

Cited in notes in 36 A. S. R. 858, on fire accompanied by explosion as proximate cause of loss of insured property; 19 L.R.A. 595, 597, on liability of insurer for loss caused by explosion.

34 AM. REP. 389, DEMPSEY v. GARDNER, 127 MASS. 381.

Sufficiency of delivery to complete sale of chattel.

Cited in *Davis v. Meyer*, 47 Ark. 210, 1 S. W. 95, holding that delivery of bill of parcels of articles sold is insufficient to complete sale as against subsequent purchaser; *Sherwin v. Mudge*, 127 Mass. 547, holding that by contract for sale of specific goods title passes as between parties without delivery; *Lufkins v. Collins*, 2 Idaho, 150, 7 Pac. 95; *Friberg v. Steenbock*, 54 Minn. 509, 56 N. W. 175, holding that notice of sale to person who has lien upon personal property is sufficient to constitute delivery as against attaching creditor; *Harlow v. Hall*, 132 Mass. 232, holding that delivery of bill of parcels of chattel to purchaser, who thereupon gives to seller lease of chattel, is not sufficient to pass title as against subsequent purchaser from original seller; *Thatcher v. Moors*, 134 Mass. 156; *Hallgarten v. Oldham*, 135 Mass. 1, 46 A. R. 433,—to point that as against attaching creditors delivery of article sold, either actual or symbolical, is necessary; *Clark v. Williams*, 190 Mass. 219, 76 N. E. 723, holding that delivery of bill of sale of machinery in possession of lessee without recording same or giving notice to lessee, passes no title as against attaching creditors of vendor; *Comaita v. Kyle*, 19 Nev. 38, 5 Pac. 666, holding that delivery of bill of sale of coal and wood located at certain place is not symbolical delivery of coal and wood.

34 AM. REP. 391, COM. v. HOLMES, 127 MASS. 424.**Corroboration of evidence of accomplice — Necessity of.**

Cited in *Stone v. State*, 118 Ga. 705, 98 A. S. R. 145, 45 S. E. 630; *Wilson v. State*, 71 Miss. 880, 16 So. 304; *State v. Green*, 48 S. C. 136, 26 S. E. 234,—holding that jury may convict on uncorroborated evidence of accomplice; *State v. Scott*, 28 Or. 331, 42 Pac. 1, to point that jury may convict upon uncorroborated testimony of accomplice.

Cited in reference notes in 35 A. R. 537; 38 A. R. 105; 5 A. S. R. 917,—on conviction on uncorroborated testimony of accomplice.

Cited in notes in 71 A. D. 673; 19 A. S. R. 318,—on corroboration of accomplice's testimony; 71 A. D. 674, on necessity of corroborating that part of accomplice's testimony which connected prisoner with crime; 71 A. D. 675, on sufficiency of corroboration of material part of accomplice's testimony; 98 A. S. R. 161, on necessity of corroborating testimony of accomplice; 98 A. S. R. 163, on advising and instructing jury as to necessity of corroborating testimony of accomplice; 75 A. S. R. 441; 98 A. S. R. 166,—on competency and sufficiency of corroborative evidence.

— What constitutes.

Cited in *United States v. Lancaster*, 10 L.R.A. 333, 44 Fed. 896; *State v. Calahan*, 47 La. Ann. 444, 17 So. 50; *Com. v. Hayes*, 140 Mass. 366, 5 N. E. 264; *McNeally v. State*, 5 Wyo. 59, 36 Pac. 824,—holding that if corroboration of accomplice is required, it must tend to confirm his testimony upon material point in sense that it must tend to convict prisoner with crime; *Malachi v. State*, 89 Ala. 134, 8 So. 104; *State v. Kent*, 4 N. D. 577, 27 L.R.A. 636, 62 N. W. 631; *State v. Hicks*, 6 S. D. 325, 60 N. W. 66,—holding that under statute providing that conviction cannot be had upon uncorroborated evidence of accomplice conviction may be had if there is some other evidence fairly tending to connect defendant with commission of crime; *Clapp v. State*, 94 Tenn. 186, 30 S. W. 214, holding that corroboration of accomplice is sufficient where it confirms accomplice's statement as to defendant's connection with crime; *State v. Dudoussat*, 47 La. Ann. 977, 17 So. 685; *Com. v. Chase*, 147 Mass. 597, 18 N. E. 565; *Com. v. Brennor*, 194 Mass. 17, 79 N. E. 799; *Gildersleeve v. Atkinson*, 6 N. M. 250, 27 Pac. 477; *Chase v. Rutland*, 77 Vt. 393,—to the point that to constitute evidence corroborative of accomplice, testimony must tend to confirm his testimony on material point in sense that it tends to prove guilt of prisoner.

— When corroborating evidence is subject to objection.

Cited in *Com. v. Wilson*, 152 Mass. 12, 25 N. E. 16, holding that if evidence is admitted for purpose of corroborating testimony of accomplice, which does not legally have that effect, it is subject to exception.

34 AM. REP. 411, COM. v. MUNSON, 127 MASS. 459.**Validity of marriage.**

Cited in *Robbins v. Robbins*, 140 Mass. 528, 54 A. R. 488, 5 N. E. 837, to point that marriage and divorce are regulated wholly by statute; *Norcross v. Norcross*, 155 Mass. 425, 29 N. E. 506; *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36,—holding that no marriage contracted in this state is valid if not solemnized according to statute, although parties cohabited; *Shelton v. Sears*, 187 Mass. 455, 73 N. E. 666, on validity of marriage, under statute where parties believe they have been lawfully married by person authorized to perform ceremony; *Smith v. Smith*, 52 N. J. L. 207, 19 Atl. 255, holding that marriage

celebrated according to laws of state where marriage takes place is valid here; *Re McLaughlin*, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651, holding that under statute agreement between parties to live together as husband and wife is ineffective to establish that relation.

Cited in note in 17 E. R. C. 169, 170, on validity of common-law marriage.

Effect of directory statute as to validity of common law marriage.

Cited in *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281, holding that common-law marriage is valid where statute regulating it is merely directory.

Cited in note in 2 L.R.A.(N.S.) 355, on effect of statute on validity of common-law marriage.

What constitutes lascivious association under statute.

Cited in *Pinson v. State*, 28 Fla. 755, 9 So. 706, holding that lewd and lascivious association and cohabitation under statute includes both lewd and lascivious intercourse and living together as if married.

Cited in reference note in 25 A. S. R. 22, on what constitutes lewd cohabitation.

Belief in death of former spouse as defense to charge of bigamy.

Cited in *Com. v. Hayden*, 163 Mass. 453, 47 A. S. R. 468, 28 L.R.A. 318, 40 N. E. 846, holding that honest belief in death of former husband or wife is not defense to prosecution for polygamy.

Cited in note in 8 E. R. C. 44, on belief in death of former spouse as defense to charge of bigamy.

Evidence of legislative intent.

Cited in *Brewer v. Hamor*, 83 Me. 251, 22 Atl. 161; *Opinion of Justices*, 66 N. H. 629, 33 Atl. 1076,—to point that time and circumstances in which statute was made and history of legislation on subject are competent evidence of legislative intent.

34 AM. REP. 423, HUNTER v. FARREN, 127 MASS. 481.

Liability for injury by blasting.

Cited in *Blackwell v. Lynchburg & D. R. Co.* 111 N. C. 151, 32 A. S. R. 786, 17 L.R.A. 729, 16 S. E. 12, holding that person is liable for death of person on adjoining premises caused by negligence in blasting; *Klepsch v. Donald*, 4 Wash. 436, 31 A. S. R. 936, holding that question of negligence is for jury where man 1200 feet distant from where blasting was lawfully done was killed by rock thrown by blast.

Cited in note in 17 L.R.A. 729, on duty of those engaged in blasting as to safety of others.

Measure of damages for malicious prosecution.

Cited in *Wheeler v. Hanson*, 161 Mass. 370, 42 A. S. R. 408, 37 N. E. 382, holding that in action for malicious prosecution evidence of what plaintiff had to pay sureties to go upon his bond and difficulty in obtaining employment is competent upon question of damages.

34 AM. REP. 425, SEARLE v. SAWYER, 127 MASS. 491.

Right of mortgagee to maintain action for injury to security.

Cited in *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. Rep. 334, holding that mortgagee of patent by assignment recorded, is partly entitled to maintain bill in equity against infringer; *McGahan v. National Bank*,

156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. Rep. 347, to point that mortgagee cannot recover for waste in cutting timber from mortgaged land by mortgagor unless severance be wrongful; *Arnold v. Broad*, 15 Colo. App. 389, 62 Pac. 577, holding that mortgagee may maintain action for damages for impairment of security by cutting timber from mortgaged premises; *Wilbur v. Moulton*, 127 Mass. 509, holding that mortgagee of land not in possession may maintain trover against person who unlawfully takes turf from mortgaged land; *Taylor v. Hines*, 31 Mo. App. 622, holding that person holding second mortgage on personal property may maintain action against attaching creditors for damages caused by diminished value of property wrongfully attached; *Heffner v. Miller*, 12 W. N. C. 219, holding that mortgagee may maintain trespass against mortgagor in possession and another who cut and removed shade trees from premises; *Stewart v. Finklestone*, 206 Mass. 28, 138 A. S. R. 370, 28 L.R.A.(N.S.) 634, 92 N. E. 37, holding that mortgagee may maintain suit to enjoin violation of building restriction upon neighboring property.

Cited in notes in 109 A. S. R. 432, on general nature of acts invading rights of mortgagees; 109 A. S. R. 447, on mortgagee's right to maintain action to recover timber.

Mortgagee of land as holder of legal title.

Cited in *Connecticut Trust & S. D. Co. v. Chase*, 75 Conn. 683, 55 Atl. 171, to point that mortgagee for purchase price of land has legal title.

Liability of mortgagee to purchaser from mortgagor.

Cited in *Porter v. Hubbard*, 134 Mass. 233, on right of mortgagee in possession to permit mortgagor to take crops as against purchaser of equity of redemption from mortgagor.

Cited in note in 43 A. S. R. 434, 435, on trespass by mortgagee for waste or removal of fixtures.

34 AM. REP. 428, POTETR v. STEVENS MACH. CO. 127 MASS. 592.

Right of stockholder as creditor to statutory remedies against other stockholders.

Cited in *Thacher v. King*, 156 Mass. 490, 31 N. E. 648; *Thompson v. Bemis Paper Co.* 127 Mass. 598,—to point that creditor who is stockholder of corporation and liable for its debts as such is not entitled to statutory remedies against stockholders.

Cited in note in 3 A. S. R. 870, 871, on actions by some stockholders against others involving statutory liability for corporate debts.

34 AM. REP. 432, HARDY v. PILCHER, 57 MISS. 18.

Parol evidence as to liability of parties to negotiable paper.

Cited in *Southern P. Co. v. Von Schmidt Dredge Co.* 118 Cal. 368, 50 Pac. 650, to point that where doubt as to party bound by instrument appears on its face parol evidence is admissible to show true intent; *Mathews v. Dubuque Mattress Co.* 87 Iowa, 246, 19 L.R.A. 676, 54 N. W. 225 (dissenting opinion), on admissibility of parol evidence to show liability of persons on negotiable instruments as between original parties; *Swarts v. Cohen*, 11 Ind. App. 20, 38 N. E. 536; *Martin v. Smith*, 65 Miss. 1, 3 So. 33,—holding that parol evidence is admissible to explain doubt arising on face of negotiable instrument as to party bound as between original parties; *Knippenberg v. Greenwood Min. &*

Mill. Co. 39 Mont. 11, 101 Pac. 159, holding parol evidence admissible to show liability as to note signed as trustee.

Liability on note signed by agent.

Cited in notes in 39 A. R. 300, on liability on negotiable instrument signed by agent; 4 E. R. C. 284, 285, on personal liability of one signing written instrument as agent.

34 AM. REP. 434, EPPERSON v. NUGENT, 57 MISS. 45.

Liability of infant for necessities.

Cited in *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761, holding that infant is liable in action for necessities furnished him; *Crafts v. Carr*, 24 R. I. 397, 96 A. S. R. 721, 60 L.R.A. 128, 53 Atl. 275, holding that infant is liable for counsel fees, where action is brought for his benefit; *Searcy v. Hunter*, 81 Tex. 644, 26 A. S. R. 837, 17 S. W. 372, holding that legal services, if beneficial, constitute valuable consideration for deed for reasonable share of land recovered.

Cited in reference notes in 34 A. R. 449, on liability of infant for counsel fees; 26 A. S. R. 841, on attorney's fees as necessities for infants.

Cited in notes in 18 A. S. R. 651, 652, on test of what are necessities for infants; 18 A. S. R. 655; 12 L.R.A. 860,—as to what are necessities for infant; 96 A. S. R. 731, 732, on infant's liability for attorney's fees as necessities; 96 A. S. R. 733, on infant's liability for attorney's fees in civil cases; 5 L.R.A. 176, on liability of infant for necessities supplied; 5 L.R.A. 177, on what are necessities as question of law.

Right of attorney for guardian ad litem to lien on ward's property.

Cited in *Owens v. Gunther*, 75 Ark. 37, 86 S. W. 851, 5 A. & E. Ann. Cas. 130, holding that attorney for guardian ad litem is entitled to reasonable attorney fee in litigation between them but is not entitled to lien on property itself.

Liability of guardian on contracts on behalf of ward.

Cited in *Lothrop v. Duffield*, 134 Mich. 485, 96 N. W. 577, to point that guardian of infant is liable for contracts made in ward's behalf.

34 AM. REP. 435, ANDING v. LEVY, 57 MISS. 51.

Effect of repeal of statute.

Cited in *Terry v. Dale*, 27 Tex. Civ. App. 1, 65 S. W. 396, holding that repeal of statute, except as to rights which have vested under it, completely expunges it from statute book; *Atty. Gen. v. Reynolds*, 27 N. S. 184, holding that repeal of statute giving extension of licenses takes away right to extension; *Bradstreet Co. v. Jackson*, 81 Miss. 235, 32 So. 999, holding that, aside from contractual obligations, every executory right depending on statute is abrogated by its repeal.

Cited in note in 41 L. ed. U. S. 1008, on repeal of statute as not validating contract.

— Upon which civil proceedings depended.

Cited in *White v. Post*, 91 Miss. 685, 45 So. 366; *Young v. State L. Ins. Co.* 91 Miss. 710, 45 So. 706; *Connecticut Mut. L. Ins. Co. v. Spratley*, 99 Tenn. 322, 44 L.R.A. 442, 42 S. W. 145,—holding that where civil proceedings depend upon statute they fall with repeal of statute.

— Upon validity of contract made without procuring license.

Cited in *Decell v. Lewenthal*, 57 Miss. 331, 34 A. R. 449, holding that contracts

of sale made by merchant in his business during time he is unlicensed, under privilege tax law, are void, and subsequent repeal of statute will not make them valid.

Cited in note in 16 L.R.A. 425, on repeal of statute as not validating contract made without procuring license.

Effect of re-enactment by repealing statute of clause of statute repealed.

Cited in *Great Northern R. Co. v. United States*, 84 C. C. A. 93, 155 Fed. 945; *Re Martin*, 153 Cal. 225, 94 Pac. 1053; *State v. Prouty*, 115 Iowa, 657, 84 N. W. 670; *State v. Gillis*, 75 Miss. 331, 24 So. 25,—to point that where repealing statute re-enacted clause of repealed statute such clause must be considered to be continuously in force; *Abbey v. Levee Comrs.* 83 Miss. 102, 35 So. 426, holding that act repealing statute, but substantially re-enacting portions of it does not terminate rights to penalty under re-enacted portions.

Retention of account rendered as creating account stated.

Cited in *Shade v. Sisson Mill & Lumber Co.* 115 Cal. 357, 47 Pac. 135 (dissenting opinion), on retention of statement of account rendered by party not in merchandise business as making account, account stated; *McCord v. Manson*, 17 Ill. App. 118, holding that retention by principal of statements of accounts rendered by agent, without objection is prima facie evidence of their correctness; *Biddle's Appeal*, 129 Pa. 26, 18 Atl. 474, on effect of retention of account rendered by trustee to cestui que trust; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692, holding that retention of account rendered to traveling salesman by employer, without objection binds former as account stated.

Cited in notes in 62 A. D. 85, on definition and elements of account stated; 62 A. D. 88, on accounts rendered becoming accounts stated by acquiescence; 136 Am. St. R. 40, on account stated; 27 L.R.A. 824, as to whom retention of account is applicable so as to constitute an account stated; 29 L.R.A.(N.S.) 336, 350, 351, on effect of retaining statement of account to render it an account stated; 19 L. ed. U. S. 885, on what constitutes an account stated; 1 E. R. C. 431, 432, as to recovery on account stated.

When services of guardian ad litem of infant are necessities.

Cited in *Englebert v. Trobell*, 40 Neb. 195, 42 A. S. R. 665, 26 L.R.A. 177, 58 N. W. 852, holding that services of guardian ad litem of infant in defending suit to foreclose mortgage were not necessities.

34 AM. REP. 440, BYRD v. STATE, 57 MISS. 243.

Husband and wife as witnesses.

Cited in *Anonymous*, 58 Miss. 15, holding that code of 1871 did not make wife competent witness against husband in suit by her for divorce; *Leach v. Shelby*, 58 Miss. 681, holding that where husband is made party defendant in suit, although unnecessary party, wife is not competent witness for complainant; *Safford v. Horne*, 72 Misc. 470, 18 So. 433, holding that under code husband and wife are competent witnesses for each other in all cases; *State v. McGrath*, 35 Or. 109, 57 Pac. 321, holding that under statute permitting husband or wife to testify against each other by consent of both active consent is necessary; *State v. Kenyon*, 18 R. I. 217, 26 Atl. 199, holding that under statute where husband or wife voluntarily appear as witness they must testify as if marital relation did not exist; *Ex parte Beville*, 58 Fla. 170, 27 L.R.A.(N.S.) 273, 50 So. 685, 19 A. & E. Ann. Cas. 48 (dissenting opinion), on competency of husband or wife as witness against other.

Cited in reference notes in 57 A. R. 622, on compelling wife to testify in her criminal complaint against husband; 43 A. S. R. 191, on husband or wife as witness.

Cited in notes in 70 A. S. R. 739; 106 A. S. R. 764,—on husband and wife as witnesses for or against each other in criminal prosecutions; 2 L.R.A. (N.S.) 864, on husband or wife as witness against the other in case of crime against third persons.

Construction of statute based upon misconception of law.

Cited in *State ex rel. Cutting v. La Grave*, 23 Nev. 120, 43 Pac. 470; *Rossmiller v. State*, 114 Wis. 169, 91 A. S. R. 910, 58 L.R.A. 93, 89 N. W. 839,—to point that statute based on evident misconception of what law is will not have effect per se of changing law so as to make it accord with misconception.

Effect of construction placed upon statute by provision therein.

Cited in *State v. Schlenker*, 112 Iowa, 643, 84 A. S. R. 360, 51 L.R.A. 347, 84 N. W. 698; *Russell v. Guptill*, 13 Wash. 360, 43 Pac. 340,—holding that where legislature puts construction on act, by provision therein such construction is binding upon courts.

34 AM. REP. 444, NELSON v. STATE, 57 MISS. 286.

Who are householders.

Cited in *Brown v. State*, 57 Miss. 424, holding that under code juror who rented store in which he slept was not householder; *Shively v. Lankford*, 174 Mo. 535, 74 S. W. 835, to point that person may be freeholder without being householder.

Cited in reference note in 42 A. S. R. 471, on meaning of "head of family."

34 AM. REP. 446, GRANGERS' L. INS. CO. v. BROWN, 57 MISS. 308.

Order for exhumation of body.

Cited in *Gray v. State*, 55 Tex. Crim. Rep. 90, 22 L.R.A.(N.S.) 513, 114 S. W. 635, holding that court has power to order disinterment of body, in trial for murder; *Wehle v. United States Mut. Acci. Asso.* 11 Misc. 36, 31 N. Y. Supp. 865, on right of, life insurance company to order for exhumation body of insured for purpose of examination.

Cited in notes in 14 E. R. C. 30; 49 A. R. 192,—on right of insurance company to have body disinterred.

Burden of proof in action on policy.

Cited in *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413, holding that burden of proof to establish materiality of misrepresentation is on insurance company in action on policy.

—As to truthfulness of declarations in application.

Cited in *O'Connor v. Grand Lodge*, A. O. U. W. 146 Cal. 484, 80 Pac. 688; *Britt v. Mutual Ben. L. Ins. Co.* 105 N. C. 175, 10 S. E. 896,—to point that declarations in application for insurance are presumed to be true and burden of showing contrary is on company; *Supreme Lodge, K. H. v. Wollschlager*, 22 Colo. 213, 44 Pac. 598, holding that declarations in application for insurance are presumed to be true and burden is on company to prove contrary.

—As to breach of warranty.

Cited in *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, 12 N. E. 372; *Liverpool & L. & G. Ins. Co. v. Farnsworth Lumber Co.* 72 Miss. 555, 17 So. 445,—holding that burden is upon insurer to establish breach of warranty in policy of insurance.

Cited in notes in 3 L.R.A. 443; 13 L.R.A. 263,—on burden of proving breach of condition in insurance policy.

—That death resulted from excepted cause.

Cited in *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 76, 50 A. S. R. 427, 31 S. W. 578; *Starr v. Aetna L. Ins. Co.* 41 Wash. 199, 4 L.R.A.(N.S.) 636, 83 Pac. 113,—holding that burden of proof is upon accident insurance company to show that death by violent means was caused by act made exception in order to avoid liability; *Hester v. Fidelity & C. Co.* 69 Mo. App. 186; *Railway Officials & E. Acci. Asso. v. Drummond*, 56 Neb. 235, 76 N. W. 562,—holding that burden is upon insurance company to show that death resulted from one of excepted causes on back of policy.

Admissibility of declarations of party as evidence.

Cited in *Field v. State*, 57 Miss. 474, 34 A. R. 476, holding that statements of person who was poisoned as to symptoms, existing at time he speaks, are admissible on trial of person accused of poisoning him.

Cited in note in 11 L.R.A.(N.S.) 93, on admissions or statements by assured outside of application as evidence against beneficiary.

Conflict of laws as to interest.

Cited in notes in 91 A. S. R. 738, on conflict of laws as to interest as damages; 62 L.R.A. 37, on conflict of laws as to interest as damages; 63 L.R.A. 868, on choice of laws as to damages and interest ex mora in case of insurance contracts.

34 AM. REP. 449, DECELL v. LOWENTHAL, 57 MISS. 331.

What are necessities for infant.

Cited in *House v. Alexander*, 105 Ind. 109, 55 A. R. 189, 4 N. E. 891, holding that horse purchased by infant to use in farming business is not necessary; *Brent v. Williams*, 79 Miss. 355, 30 So. 713, holding that person cannot recover from infant for merchandise sold without showing, that articles were necessities, and that defendant needed them; *Paul v. Smith*, 41 Mo. App. 275, holding that wagon purchased by infant to use in business is not necessary; *Englebert v. Troxall*, 40 Neb. 195, 42 A. S. R. 605, 26 L.R.A. 177, 58 N. W. 852, holding that services performed by guardian ad litem of infant in defending suit to foreclose mortgage were not necessities.

Cited in reference notes in 34 A. R. 434, on liability of infant for necessities for plantation; 18 A. S. R. 652, on question of infants' necessities as one of law or fact.

Cited in notes in 18 A. S. R. 606, on infants' lending and borrowing of money; 18 A. S. R. 647, on effect of infant's being already supplied with necessities upon contract for; 18 A. S. R. 654; 12 L.R.A. 860,—as to what are necessities for infant; 18 A. S. R. 652, on test of what are necessities for infants.

Admissibility of dying declarations.

Cited in *Lipscomb v. State*, 75 Miss. 559, 23 So. 210, holding that general Am. Rep. Vol. XVII.—52

objection to evidence of dying declaration should be overruled if any part of declaration is admissible.

Validity of contracts under privilege tax law.

Cited in *Young v. State L. Ins. Co.* 91 Miss. 710, 45 So. 706, holding that under privilege tax law contained in code of 1906 contracts made without obtaining license are not void; *White v. Post*, 91 Miss. 685, 45 So. 366, holding that premium note drawn by insured payable to himself and delivered to solicitor is void under laws of 1898, if solicitor had not paid privilege tax.

Cited in notes in 6 L.R.A. 218, on illegality of contracts in violation of law: 16 L.R.A. 426, on application and limitation of rule as to effect of failure to procure license for business; 41 L. ed. U. S. 1008, on contracts against public policy.

34 AM. REP. 451, MACON v. PATTY, 57 MISS. 378.

Special assessments for local improvements.

Cited in *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074, holding that special assessment for street improvements cannot be levied on railroad right of way abutting street; *Nugent v. Jackson*, 72 Miss. 1040, 18 So. 493, holding that right to impose special assessments for street improvements does not rest solely on idea of benefit to lot owners.

Cited in notes in 42 A. S. R. 660; 133 Am. St. Rep. 931, 932,—as to whether a personal liability may be created for an assessment; 8 L.R.A. 369, on constitutional restrictions of power, valuation, equality, and uniformity of taxation as to special assessments for local improvements; 8 L.R.A. 370, on assessment of taxes for costs of paving streets; 14 L.R.A. 759, on right to charge burden of street improvements on abutting lot directly; 20 L.R.A. 655, on delegation by city council of power to determine width, grade, and material for sidewalk improvements; 21 L.R.A. 566, on validity of assessment for sidewalks on abutting property made by charging on each piece the cost of improvement in front of it; 35 L.R.A. 40, on liability to local assessment for benefits, of property exempt from general taxation; 35 L.R.A. 64, on personal liability for local improvement assessments beyond value of property assessed.

— Validity of statute providing for.

Cited in *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760; *Speer v. Athens*, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802,—holding that statute providing for special assessment on abutting lots for improvements of sidewalks in city is valid; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, holding that assessment for local improvements which excludes any consideration of benefits is illegal; *Birmingham v. Klein*, 89 Ala. 461, 8 L.R.A. 369, 7 So. 386, holding that statute assessing expense of sidewalks on adjoining lot owners in proportion to benefit is valid; *Denver v. Knowles*, 17 Colo. 204, 17 L.R.A. 135, 30 Pac. 1041 (dissenting opinion), on constitutionality of statute providing for assessment by "front foot rule" for expense of street improvements; *Storrie v. Cortes*, 99 Tex. 283, 35 L.R.A. 666, 38 S. W. 164, on power of legislature to authorize city to assess upon owners of abutting property cost of improving streets; *Bloomington v. Latham*, 142 Ill. 462, 18 L.R.A. 487, 32 N. E. 506, holding that ordinance directing that cost of land taken for proposed street shall be assessed upon lands abutting upon proposed

street in proportion to frontage thereof is void; *Wilainaki v. Greenville*, 85 Miss. 393, 37 So. 807; *Edwards House Co. v. Jackson*, 91 Miss. 429, 45 So. 14,—holding that statute providing for "front foot" rule for apportionment of cost of street improvements is constitutional; dissenting opinions in *Louisville, N. A. & C. R. Co. v. State*, 8 Ind. App. 377, 35 N. E. 916; *Edward C. Jones Co. v. Perry*, 26 Ind. App. 554, 57 N. E. 583,—on validity of statute making lot owner personally liable for special assessment for street improvements; *Raleigh v. Peace*, 110 N. C. 32, 17 L.R.A. 330, 14 S. E. 521, holding that statute providing for special assessments for city improvements and authorizing personal judgment is invalid as to latter; *Lincoln v. Janesch*, 63 Neb. 707, 93 A. S. R. 478, 56 L.R.A. 762, 89 N. W. 280, holding that statute imposing upon lot owners in city duty of repairing sidewalk in adjacent street is valid exercise of police power; *Lentz v. Dallas*, 96 Tex. 258, 72 S. W. 59, holding that city may, under police power, require construction of sidewalks at expense of abutting owners; *Austin v. Nalle*, 102 Tex. 536, 120 S. W. 996, holding that statute authorizing collection of street improvement assessment before work is done is not constitutional.

— Validity of statute providing for improvement districts.

Cited in *Arnold v. Knoxville*, 115 Tenn. 195, 3 L.R.A.(N.S.) 837, 90 S. W. 469, 5 A. & E. Ann. Cas. 881, holding that statute providing for city improvement districts and special assessments for improvements therein is constitutional; *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955, holding that statute authorizing creation of improvement district embracing entire area of city is valid.

What are local improvements for which special tax may be levied.

Cited in *Ford v. Delta & P. Land Co.* 164 U. S. 642, 41 L. ed. 590, 17 Sup. Ct. Rep. 230, holding that repair of levees is local improvement for which property specially benefited may be assessed; *Crane v. West Chicago Park*, 153 Ill. 348, 26 L.R.A. 311, 38 N. E. 943, holding that maintenance of boulevard is not local improvement within meaning of Constitution.

Cited in notes in 42 A. S. R. 659; 101 A. S. R. 186; 35 L.R.A. 34, 35,—on distinction in meaning between the phrases "local assessment" and "taxation."

Police power of municipalities.

Cited in reference note in 30 A. S. R. 254, on police power of municipalities.

34 AM. REP. 476, *FIELD v. STATE*, 57 MISS. 474.

Admissibility of declarations of party.

Cited in *Coffin v. Bradbury*, 3 Idaho, 770, 95 A. S. R. 37, 35 Pac. 715; *State v. Harris*, 45 La. Ann. 842, 40 A. S. R. 259, 13 So. 199,—holding that declaration of party to be admissible must be contemporaneous with event except that where connecting circumstances exist declarations made some time afterwards are admissible; *Montgomery v. State*, 80 Ind. 338, 41 A. R. 815, holding that declarations of woman who died as result of abortion are not admissible to prove what occurred before or after act took place; *Johnson v. State*, 63 Miss. 313, holding that in prosecution for murder of child evidence as to what deceased said on day after whipping as to cause of pain in head is inadmissible; *Boyd v. State*, 84 Miss. 414, 36 So. 525, holding that in

prosecution for murder by poisoning evidence of narration by deceased of symptoms of past sufferings is inadmissible.

Cited in reference notes in 35 A. R. 745, on admissibility on murder trial of declarations of deceased; 37 A. S. R. 798, on declarations of prosecuting witness in rape as part of *res gestæ*; 37 A. S. R. 798, on admissibility of declarations in criminal cases as part of *res gestæ*; 44 A. S. R. 74, on dying declarations of husband or wife as evidence against the other.

Cited in notes in 13 A. S. R. 268; 40 A. S. R. 414; 44 A. S. R. 71; 44 A. S. R. 202; 62 A. S. R. 915; 65 A. S. R. 349; 40 L. ed. U. S. 534,—on admissibility of dying declarations.

Distinguished in *Lipscomb v. State*, 75 Miss. 559, 23 So. 210, holding that general objection to evidence of dying declaration should be overruled if any part of declaration admissible.

34 AM. REP. 483, GREEN v. CHILTON, 57 MISS. 598.

What constitutes money held "in trust" under bankruptcy act.

Cited in *Chipley v. Frierson*, 18 Fla. 639; *Du Pont v. Beck*, 81 Ind. 271,—holding that obligation of factor to principal for proceeds of goods sold is released by discharge in bankruptcy; *Svanoe v. Jurgens*, 144 Ill. 507, 33 N. E. 955, holding that money collected by agent for bank was not held "in trust."

Cited in reference note in 77 A. D. 386, as to what are fiduciary debts within meaning of bankrupt and insolvency laws.

Cited in notes in 34 A. R. 338, on collection by bankrupt of note from foreign corporation as fiduciary debt; 39 A. R. 725, on "fiduciary character" of relation of factor to principal within bankruptcy act.

34 AM. REP. 484, MCGEE v. WALLIS, 57 MISS. 638.

Rights of purchaser at void judicial sale.

Cited in *Pershing v. Wolfe*, 6 Colo. App. 410, 40 Pac. 856, holding that restitution of money received from void sale of infant's land must be made where such money has been applied to infant's benefit by his custodian, before infant can assent invalidity; *Martin v. Kelley*, 59 Miss. 652; *Bonner v. Lessley*, 61 Miss. 392,—holding that where extent of right of defendant in ejectment is to fix equitable charge on property he must submit to judgment in ejectment and resort to chancery to enjoin execution until charge is satisfied.

Cited in note in 6 A. S. R. 496, on right of purchaser under void sale to recover for improvements.

—To subrogation.

Cited in *Dutcher v. Hobby*, 86 Ga. 198, 22 A. S. R. 444, 10 L.R.A. 472, 12 S. E. 358, holding that purchaser at void sale under mortgage foreclosure may be subrogated to mortgagee's rights; *Bond v. Montgomery*, 56 Ark. 563, 35 A. S. R. 119, 20 S. W. 525; *Wehrle v. Wehrle*, 39 Ohio St. 365, holding that purchaser of homestead at void sale who paid purchase price may be subrogated to rights of creditors to whom such purchase money was paid by executor.

Cited in note in 69 L.R.A. 47, on relief of purchaser by reimbursement or subrogation on annulling administrators' sales.

34 AM. REP. 491, HOFFMAN v. KUHN, 57 MISS. 746.**Rights of owners of party wall.**

Cited in *Shirley v. Crabb*, 138 Ind. 200, 46 A. S. R. 376, 37 N. E. 130; *Cartwright v. Adair*, 27 Ind. App. 293, 61 N. E. 240,—holding that claim of easement in party wall must be based upon contract express or implied; *Jackson v. Bruns*, 129 Iowa, 616, 3 L.R.A.(N.S.) 510, 106 N. W. 1, holding that owner of second story of building, in absence of contract, cannot compel owner of first story to repair foundation walls; *Lederer v. Colonial Invest. Co.* 130 Iowa, 157, 106 N. W. 357, 8 A. & E. Ann. Cas. 317, holding that under statutes one owner of party wall has no right to extend his joist into wall beyond its center; *McKenna v. Eaton*, 182 Mass. 346, 94 A. S. R. 661, 65 N. E. 382, holding that owner in severalty of one half of double house has no remedy against owner of other half who tears down his half by lawful order of board of health; *Shiverick v. R. J. Gunning Co.* 58 Neb. 29, 78 N. W. 460, holding that party wall is owned in severalty with easement of support; *Odd Fellows' Asso. v. Hegele*, 24 Or. 16, 32 Pac. 679, holding that easements in party walls are mutual, and continue only so long as walls remain safe and suitable for use; *Hawkes v. Hoffman*, 56 Wash. 120, 24 L.R.A.(N.S.) 1038, 105 Pac. 156, holding that use of party wall raises no implied obligation to pay half, express contract being necessary; *Bowhay v. Richards*, 81 Neb. 764, 19 L.R.A.(N.S.) 883, 116 N. W. 677, holding that to have support from party wall entirely upon adjoining property is easement which is terminated by burning of building.

Cited in reference note in 18 A. S. R. 833, on mutual rights where party wall destroyed by fire.

Cited in notes in 92 A. D. 293, on performance of work upon party wall; 92 A. D. 298, on rights of owners upon destruction of party wall; 66 A. S. R. 585; 89 A. S. R. 937,—on destruction of party wall; 89 A. S. R. 930; 92 A. D. 292,—on ownership of party walls and easements incident thereto; 19 L.R.A.(N.S.) 884, on effect of destruction of building to terminate adjoining owner's easement of support.

34 AM. REP. 494, WILLIAMS v. PLANTERS' INS. CO. 57 MISS. 759.**Liability of corporation for torts.**

Cited in *Wachamuth v. Merchants' Nat. Bank*, 96 Mich. 426, 21 L.R.A. 278, 56 N. W. 9; *Richberger v. American Exp. Co.* 73 Miss. 161, 55 A. S. R. 522, 31 L.R.A. 390, 18 So. 922,—holding that corporation is liable for tort of agent committed in course of master's business.

Cited in reference notes in 59 A. R. 571, on corporation's liability for agent's torts; 2 A. S. R. 317; 25 A. S. R. 369,—on liability of private corporation for torts; 36 A. S. R. 668, on municipal liability for torts.

Cited in notes in 50 A. R. 108, on liability of master for tort of servant committed in course of his employment; 12 L.R.A. 113, on liability of railroad company for torts; 51 L.R.A. 469, on liability of partnership for torts; 37 L. ed. U. S. 100, as to when railroad or other corporations are liable for torts.

—Malicious prosecution or false imprisonment.

Cited in *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529, 4 So. 386, holding that corporation may be held liable in exemplary damages for maliciously suing out attachment; *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350,

59 A. R. 571, 13 Pac. 609, holding that action for false imprisonment lies against corporation; *Reed v. Home Sav. Bank*, 130 Mass. 403, 39 A. R. 468, holding that action for malicious prosecution will lie against savings bank; *Willard v. Holmes*, 2 Misc. 303, 21 N. Y. Supp. 998; *Hussey v. Norfolk Southern R. Co.* 28 N. C. 34, 2 A. S. R. 312, 3 S. E. 923,—holding that corporation may be held liable in action for malicious prosecution; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Eichengreen v. Louisville*, 96 Tenn. 229, 54 A. S. R. 833, 31 L.R.A. 702, 34 S. W. 219,—holding that false imprisonment procured by railroad detective renders railroad company liable.

Cited in notes in 34 A. R. 311; 39 A. R. 468; 26 A. S. R. 127, 131; 59 A. S. R. 589; 14 L.R.A. 791; 15 A. S. R. 753,—on liability of corporation for malicious prosecution; 59 A. S. R. 595, on liability of corporation for exemplary damages for malicious prosecution or attachment; 16 E. R. C. 756, on right to maintain action for malicious prosecution against corporation.—Slander.

Cited in *Jordan v. Alabama G. S. R. Co.* 74 Ala. 85, 49 A. R. 800; *Boogher v. Life Asso. of America*, 75 Mo. 319, 42 A. R. 413; *Rivers v. Yazoo & M. R. Co.* 90 Miss. 796, 9 L.R.A.(N.S.) 931, 43 So. 471,—holding corporation liable for slander uttered by its agent acting within scope of his employment and in performance of his duties.

Cited in reference note in 39 A. R. 606, on liability of corporation for libel.

34 AM. REP. 500, PEOPLE EX REL. FRANCIS v. TROY, 78 N. Y. 33.

Followed without discussion in *People ex rel. McArthur v. Troy*, 78 N. Y. 607.

When mandamus lies.

Cited in *People ex rel. Sheppard v. Illinois State Bd. of Dental Examiners*, 110 Ill. 180, holding that state board of dental examiners cannot be compelled by mandamus to give license to graduate of dental college; *State ex rel. Shryer v. Greene County*, 119 Ind. 444, 21 N. E. 1097; *Daviess County v. State*, 141 Ind. 187, 40 N. E. 686,—holding that necessity of building bridge cannot be determined in mandamus proceedings; *People v. Board of Trustees*, 4 Silv. Sup. Ct. 498, 27 N. E. 791; *People ex rel. Lockwood v. Saratoga Springs*, 54 Hun, 16, 7 N. Y. Supp. 125; *People ex rel. Milliken v. Alms House Comrs.* 65 Hun, 169, 20 N. Y. Supp. 21,—holding that decision of officers as to qualifications of soldier refused appointment to position will not be reviewed on mandamus; *People ex rel. Apfel v. Casey*, 66 App. Div. 211, 72 N. Y. Supp. 945, holding that determination as to physical qualification of member of police force by police surgeon cannot be reviewed by mandamus; *People ex rel. Osborn v. Gillon*, 24 Abb. N. C. 125, 9 N. Y. Supp. 563, 18 N. Y. Civ. Proc. Rep. 112, holding that mandamus does not lie to review decision of board of assessors as to person in whose name assessment should be made; *People ex rel. Woodward v. Rosendale*, 76 Hun, 103, 27 N. Y. Supp. 837, holding that office of mandamus is to compel ministerial officer to act; *Lefrois v. Monroe County*, 24 App. Div. 421, 48 N. Y. Supp. 519, to point that office of mandamus is to compel performance of ministerial duty or duty specially directed by statute; *People ex rel. McCabe v. Matthias*, 92 App. Div. 16, 87 N. Y. Supp. 196, holding that mandamus does not lie to review judicial or quasi judicial decision; *Mansfield v. Lockport*, 24 Misc. 25, 52 N. Y. Supp.

571, to point that determination of city council by vote in favor of city improvement cannot be attacked collaterally; *Reg. v. Crothers*, 11 Manitoba, 567, on review of action of commissioners in canceling liquor license.

Cited in notes in 89 A. D. 739, on statute of limitations as affecting right to mandamus; 98 A. S. R. 879, on mandamus to compel auditing and allowing of claims; 3 L.R.A. 56, on how far courts will interfere with public officer by writ of mandamus; 15 E. R. C. 136, on issuing of mandamus to compel court to act.

—As remedy for official inaction.

Cited in *People v. School Trustees*, 42 Ill. App. 60, holding that school trustees cannot be compelled by mandamus to approve of treasurer's bond; *People ex rel. Wooster v. Maher*, 141 N. Y. 330, 36 N. E. 396; *People ex rel. Harris v. Land Office Comrs.* 149 N. Y. 26, 43 N. E. 418,—holding that mandamus does not lie to compel public officer to perform act where law vests in officer's discretion as to its performance.

—To compel public officials to act in particular manner.

Cited in *Cook County v. People*, 78 Ill. App. 586, holding that subordinate body may be compelled to act but not in particular manner; *Nuttall v. Simis*, 31 App. Div. 503, 52 N. Y. Supp. 308 (affirming 22 Misc. 19; 47 N. Y. Supp. 1097), to the point that mandamus does not lie to direct judicial or quasi judicial officer how to act; *People ex rel. Haverly v. Hanes*, 44 Misc. 475, 90 N. Y. Supp. 61, holding that inspectors of election cannot be compelled by mandamus to decide what ballots be counted for or against any candidate; *Re Baird*, 66 Hun, 335, 20 N. Y. Supp. 470, 48 A. S. R. 342, holding that exercise of discretion by board of supervisors in apportioning members of assembly cannot be reviewed by mandamus; *People ex rel. Van Wyck v. Wheeler*, 18 Hun, 540, to point that mandamus lies to compel subordinate body to act but not to interfere with its lawful discretion; *People ex rel. Press v. Martin*, 72 Hun, 354, 25 N. Y. Supp. 775, to point that mandamus does not lie to compel public officer to perform judicial duty in particular manner; *People ex rel. Kings County Gas & Illuminating Co. v. Schieren*, 89 Hun, 220, 35 N. Y. Supp. 64, holding that subordinate body cannot be compelled by mandamus to act in particular manner in matter as to which it has right to exercise judgment; *People ex rel. Cooke v. Stewart*, 77 App. Div. 181, 78 N. Y. Supp. 1054, holding that mandamus does not lie to compel superintendent of buildings to injure building in order to enforce building laws, unless owner of building is made party; *People ex rel. Quinn v. Voorhis*, 115 App. Div. 218, 100 N. Y. Supp. 927, holding that mandamus lies to compel board of election to perform its duty in appointing newspapers to publish list of polling places although designation of particular newspapers was asked; dissenting opinions in *People ex rel. Stapleton v. Bell*, 54 Hun, 567, 8 N. Y. Supp. 939; *People ex rel. Johnson v. New York Produce Exch.* 8 Misc. 552, 29 N. Y. Supp. 307; *People ex rel. Quinn v. Voorhis*, 115 App. Div. 118, 100 N. Y. Supp. 717; *People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785,—on power of court to compel public body to perform ministerial act in particular manner; *People ex rel. Sims v. Collier*, 175 N. Y. 196, 67 N. E. 309, holding that mandamus does not lie to compel civil service commissioners to place salaried officer in register's office in exempt class; *People ex rel. Thurston v. Elmira*, 20 Hun, 151, holding that mandamus lies to compel town auditors to pass specifically upon items of bill.

—As remedy against abuse of official discretion.

Cited in *People ex rel. Brown v. Herkimer County*, 3 How. Pr. N. S. 247, holding that determination of board of supervisors in auditing account will not be interfered with by mandamus; *Territory ex rel. Gramburg v. Nowlin*, 3 Dak. 349, 20 N. W. 430, holding that mandamus does not lie to compel judge of probate to execute deed of land under Town-site act after he has once decided not to; *Sawyer v. Mayhew*, 10 S. D. 18, 71 N. W. 141, holding that mandamus will not lie to review discretionary action of state auditor in determining amount of traveling expenses of public officers; *People ex rel. Assyrian Asphalt Co. v. Kent*, 160 Ill. 655, 43 N. E. 760, holding that determination of board of public works under statute requiring contract to be let to lowest bidder is not reviewable by mandamus; *People ex rel. McKenzie v. Cattaraugus County*, 19 Hun, 11, holding that mandamus does not lie to review appointment by board of supervisors of newspapers to publish session laws; *People ex rel. Equitable L. Assur. Soc. v. Chapin*, 39 Hun, 230, holding that mandamus does not lie to review decision of comptroller denying application for cancelation of sale for taxes; *Abrams v. Hempstead*, 45 Hun, 272, holding that determination of board of audit in granting license under statute will not be reviewed by mandamus; *People ex rel. Keene v. Queens County*, 71 Hun, 97, 24 N. Y. Supp. 563, holding that determination by board of supervisors as to whether construction of bridge between two towns shall be authorized cannot be reviewed by mandamus; *People ex rel. Slater v. Smith*, 83 Hun, 432, 31 N. Y. Supp. 749, holding that mandamus does not lie to review exercise of power judicial or discretionary in character of town board; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794, to point that question of fact is not reviewable on appeal unless statute so provides.

—To review decision of public officer in discharging employee.

Cited in *Jordan v. Board of Education*, 14 Misc. 119, 35 N. Y. Supp. 247, 25 N. Y. Civ. Proc. Rep. 91, holding that mandamus does not lie to compel reinstatement of teacher dismissed by board of education; *People ex rel. Goodwin v. MacLean*, 62 Hun, 42, 16 N. Y. Supp. 401, holding that refusal of police commissioner to reinstate police officer who had resigned because of threats will not be reviewed on mandamus; *People ex rel. Holden v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161, holding that mandamus is not appropriate remedy to review action of street cleaning commissioner in discharging employee; *People ex rel. Price v. Bingham*, 125 App. Div. 722, 110 N. Y. Supp. 136, holding that mandamus does not lie to compel police commissioner to reinstate police officer placed on pension roll because of permanent physical disability.

Liability of public officer in civil action for abuse of discretion.

Cited in *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557, holding that public officer is not liable in civil action for judicial determination, however malicious motive which produced it.

34 AM. REP. 507, FOWLER v. BUTTERLY, 78 N. Y. 68.

Right to change beneficiary in policy.

Cited in *Union Cent. L. Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, holding that wife cannot be divested of contingent interest in endowment insurance policy on husband's life payable to husband, if living, otherwise to wife; *Waltz v. Mutual Aid Soc.* 5 Pa. Co. Ct. 208; *Lockwood v. Michigan Mut. L. Ins. Co.* 108 Mich. 334, 66 N. W. 229,—holding that insured cannot dispose of interest in

life insurance policy where policy is issued in favor of certain beneficiary; *Tolman v. King*, 23 Hun, 480, to point that rights of beneficiary under insurance policy become vested as soon as it is issued where husband procures insurance on his life in favor of wife; *Ætna L. Ins. Co. v. Mason*, 14 R. I. 583, holding that wife is entitled to money due on endowment policy on her life procured by husband, payable to her if living at maturity, although at maturity divorce action was pending; *Foster v. Gile*, 50 Wis. 603, 8 N. W. 217; *Breitung's Estate*, 78 Wis. 33, 47 N. W. 17,—holding that person who procures insurance on his own life for benefit of another and paid premiums thereon may dispose of proceeds thereof by will to exclusion of beneficiary; *Dunn v. Amsterdam Casualty Co.* 67 Misc. 109, 121 N. Y. Supp. 686, holding that beneficiary in ordinary life insurance policy has vested interest, unless insured has reserved right to change beneficiary.

Cited in notes in 56 A. D. 753, on right of wife to insurance where wife was induced to assigned policy by undue influence; 52 A. R. 137, on wife's insurable interest in husband's life.

Right of survivorship between husband and wife.

Cited in *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* 8 App. Div. 192, 40 N. Y. Supp. 450; *McElroy v. Albany Sav. Bank*, 8 App. Div. 46, 40 N. Y. Supp. 422,—holding that savings bank account payable to husband or wife or survivor, entitles wife to survivorship; *Re Meelian*, 59 App. Div. 156, 69 N. Y. Supp. 9, holding that deposit of money in name of husband and wife by husband together with evidence that husband said such money was to be wife's after his death, is sufficient to show right of survivorship in wife; *West v. McCullough*, 123 App. Div. 846, 108 N. Y. Supp. 493, holding that savings bank deposit in name of husband and wife, confers upon wife presumptively right of survivorship; *Augsbury v. Shurtliff*, 108 N. Y. 138, 72 N. E. 927, to point that where husband takes security payable to himself or wife it becomes hers if she survives; *Re Rapelje*, 66 Misc. 414, 123 N. Y. Supp. 287, holding that purchase money mortgage to husband and wife belongs to her upon his death.

Right to avoid contract because of threats by third person.

Cited in *Fairbanks v. Snow*, 145 Mass. 153, 1 A. S. R. 446, 13 N. E. 596, holding that mere threats by stranger made without privity of party are not good ground for avoiding contract induced by them.

34 AM. REP. 512, CHAPIN v. DODSON, 78 N. Y. 74.

Parol evidence as to written instrument.

Cited in *First Nat. Bank v. Prior*, 10 N. D. 146, 86 N. W. 362, holding that oral agreement made by mortgagee, that upon payment of two notes mortgage would be released cannot be shown where mortgage provided that it was security for four; *National Cash Register Co. v. Blumenthal*, 85 Mich. 464, 48 N. W. 622, holding that contemporaneous parol agreement to effect that sale of article was conditioned upon its being satisfactory cannot be shown; *Kidd v. New Hampshire Traction Co.* 74 N. H. 160, 66 Atl. 127, holding that all contemporaneous parol stipulations are merged in written instrument; *Eichenauer v. Rentz Candy Co.* 43 Misc. 151, 88 N. Y. Supp. 260, holding that written contract of employment at fixed pice per week, but not mentioning any term, cannot by parol be shown to be yearly contract; *Williams v. Aylesworth*, 4 Silv. Sup. Ct. 44, 7 N. Y. Supp. 111 (dissenting opinion), on admissibility of parol evidence to show parol agreement collateral to writing; *Caldwell v. Perkins*, 93 Wis. 89, 67 N. W. 29, holding

that furniture and tools used in stone building cannot be shown by parol to be included in written agreement for sale of building; *Braun v. Wisconsin Rendering Co.* 92 Wis. 245, 66 N. W. 196, holding that evidence of contemporaneous oral agreement by which payments of rent were to be applied on purchase price was not admissible; *Gilbert v. Stockman*, 76 Wis. 62, 20 A. S. R. 23, 44 N. W. 845, holding that parol evidence is inadmissible to show that by contemporaneous oral agreement vendor should pay taxes assessed prior to agreement where contract provided that vendee should pay all prior taxes; *Anderson v. Matheny*, 17 S. D. 225, 95 N. W. 911 (dissenting opinion), on right of party to show that written instrument was only to be effective upon happening of certain event; *McNeeley v. McWilliams*, 13 Ont. App. Rep. 324, holding that parol evidence is not admissible to show that delivery of stone was only to take place if water was of certain depth.

Cited in notes in 13 L. R.A. 621, on inadmissibility of parol evidence to vary terms of written instrument; 13 L.R.A. 633, on admissibility of parol evidence to show waiver.

— Where contract is complete in itself.

Cited in *Singer Mfg. Co. v. Sults*, 17 Ind. App. 639, 47 N. E. 341; *Coleman v. Rung*, 10 Misc. 456, 31 N. Y. Supp. 456; *Hall v. Beston*, 16 Misc. 523, 38 N. Y. Supp. 979; *Doolittle v. Fitchett*, 35 Misc. 529, 71 N. Y. Supp. 1124,—holding that written contract complete in itself cannot be varied by contemporaneous parol agreement; *Burt v. Quackenbush*, 72 App. Div. 547, 75 N. Y. Supp. 1031, holding that contract will not be reformed where writing is complete in itself; *Gordon v. Parke & L. Mach. Co.* 10 Wash. 18, 38 Pac. 755, holding that written agreement that gives details of agreement cannot be varied by parol proof.

— As to when title to property sold on instalment passes.

Cited in *The Poconoket*, 67 Fed. 262, holding that parol evidence is admissible to show that title to vessel which was to be paid for in installments passed before delivery.

— Where part only of contract has been reduced to writing.

Cited in *Chamberlain v. Lesley*, 39 Fla. 452, 22 So. 736; *Sutton v. Weber*, 127 Iowa, 361, 101 N. W. 775; *Kelsey v. Continental Casualty Co.* 131 Iowa, 207, 8 L.R.A. (N.S.) 1014, 108 N. W. 221,—holding that parol provisions of contract, partly in writing and partly oral can only be proven where thing added to writing is not inconsistent therewith; *Brosty v. Thompson*, 79 Conn. 133, 64 Atl. 1; *Neal v. Flint*, 88 Me. 72, 33 Atl. 669; *Graffan v. Pierce*, 143 Mass. 386, 9 N. E. 819; *State v. Cunningham*, 154 Mo. 161, 55 S. W. 232; *Liebke v. Methudy*, 14 Mo. App. 65; *Barnett v. Pratt*, 37 Neb. 349, 55 N. W. 1050,—holding that rule forbidding parol evidence does not apply where original contract was verbal and entire and part only was reduced to writing; *Adams v. Van Brunt*, 11 N. Y. S. R. 659; *Arms v. Arms*, 13 N. Y. S. R. 196; *Lamson Consol. Store Service Co. v. Hartung*, 46 N. Y. S. R. 191, 10 N. Y. Supp. 233; *Naylor v. McSwegan*, 2 Misc. 255, 21 N. Y. Supp. 930,—to point that rule forbidding parol evidence does not apply where original contract was verbal and entire and part only was reduced to writing; *Juilliard v. Chaffee*, 92 N. Y. 529; *Brigg v. Hilton*, 99 N. Y. 517, 52 A. R. 63, 3 N. E. 51,—to point that parol evidence may be used to show that writing does not contain all of contract; *Cooper v. Payne*, 186 N. Y. 334, 78 N. E. 1076, to point that where original contract was verbal and entire and only part thereof was reduced to writing parol evidence is admissible to explain

writing; *Studwell v. Bush Co.* 126 App. Div. 818, 111 N. Y. Supp. 293, holding parol evidence admissible to show subjects not embodied in and not contradictory to written contract.

Cited in notes in 6 L.R.A. 44, on admissibility of parol evidence as to contracts partly written and partly parol; 11 E. R. C. 228, on admissibility of parol evidence to complete an incomplete written agreement.

— Where writing shows on face that it contains but part of contract.

Cited in *Vickers v. Battershall*, 84 Hun, 496, 32 N. Y. Supp. 314; *Weeks v. Biens*, 85 Hun. 70, 32 N. Y. Supp. 64; *Lawrence v. Sullivan*, 79 App. Div. 453, 80 N. Y. Supp. 499,—holding that parol evidence of real contract is admissible where face of writing shows contract is incomplete; *Briggs v. Groves*, 30 N. Y. S. R. 953, 9 N. Y. Supp. 765, holding that parol evidence as to basis of figuring profits of business is admissible where written contract of employment provides for share of profits as compensation, but is silent as to basis; *Louis De Jonge & Co. v. Priatz*, 49 Misc. 112, 96 N. Y. Supp. 750, holding that parol evidence is admissible to explain order for goods which only incompletely expresses intention of parties; *Duane v. Paige*, 82 Hun, 139, 31 N. Y. Supp. 310, holding that parol agreement inconsistent with writing is not admissible although writing does not contain whole agreement; *Ferguson v. Baker*, 116 N. Y. 257, 22 N. E. 400 (affirming 5 N. Y. S. R. 842), holding that agreement in writing to dissolve partnership does not include agreement as to money to be collected; *Reynolds v. Robinson*, 37 Hun, 561; *Engelhorn v. Reitlinger*, 122 N. Y. 76, 9 L.R.A. 548, 25 N. E. 297 (affirming 23 Jones & S. 485),—to the point that where writing on face contains only part of real contract parol evidence is admissible; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961, on admissibility of parol evidence to complete entire agreement of which writing is only part; *Rochester Folding Box Co. v. Browne*, 55 App. Div. 444, 66 N. Y. Supp. 867; *Puget Sound Iron & Steel Works v. Clemmons*, 32 Wash. 36, 72 Pac. 465,—on admissibility of parol evidence of contemporaneous oral agreement where it appears whole contract was not reduced to writing.

— As to repair of building leased.

Cited in *Thompson Foundry & Mach. Co. v. Glass*, 136 Ala. 648, 33 So. 811, holding that parol evidence is admissible to show agreement as to repairs contemporaneous with lease; *Clenighan v. McFarland*, 16 Daly, 402, 11 N. Y. Supp. 719; *Cartledge v. Crespe*, 5 Misc. 349, 25 N. Y. Supp. 515,—holding that parol evidence is admissible to show that lease was not to become binding contract unless certain repairs were made; *Averill v. Sawyer*, 62 Conn. 560, 27 Atl. 73; *Chapman v. Frank*, 12 Daly, 402; *Heintze v. Erlacher*, 1 N. Y. City Ct. Rep. 465; *Butler v. Smith's Homeopathic Pharmacy*, 5 N. Y. S. R. 885,—holding that all parol promises are merged in written lease; *Lamphire v. Slaughter*, 61 How. Pr. 36, holding that verbal agreement collateral to lease that certain repairs were to be made may be shown; *Sire v. Rumbold*, 39 N. Y. S. R. 85, 14 N. Y. Supp. 925, holding that evidence of parol agreement to accept less than amount of rent specified in lease while repairs were being made is admissible; *Hamilton v. Emerson*, 31 Misc. 257, 64 N. Y. Supp. 48, holding that contradictory contemporaneous parol agreement as to tenantability cannot be proved; *Van Derhoef v. Hartmann*, 63 App. Div. 419, 71 N. Y. Supp. 552, holding that evidence of concurrent oral agreement to repair is inadmissible; *Tribelhorn v. Hanavan*, 65 Misc. 22, 25, 119 N. Y. Supp. 262; *Herschmann-Tucker Furniture Co. v. Barth*, 64 Misc. 77, 117

N. Y. Supp. 962,—holding parol evidence admissible to show landlord's agreement as to repairs and alterations.

—To explain meaning of technical words in contract.

Cited in *Bach v. Levy*, 18 Jones & S. 519; *Hilliard v. Smith*, 14 Misc. 239, 35 N. Y. Supp. 717; *McCaskey Register Co. v. Green*, 57 Misc. 549, 109 N. Y. Supp. 970,—holding that parol evidence is admissible to explain technical words in writing; *Behrman v. Little*, 47 Hun, 530, holding that parol evidence is admissible to explain phrase "cold storage" used in contract; *Snowden v. Guion*, 101 N. Y. 458, 5 N. E. 322, holding that parol evidence may be used to interpret technical phrase in policy of marine insurance; *Schmittler v. Simon*, 114 N. Y. 176, 11 A. S. R. 621, 21 N. E. 162; *House v. Walch*, 144 N. Y. 418, 39 N. E. 327,—on admissibility of parol evidence to explain meaning of technical terms contained in contract; *Bagley & S. Co. v. Saranac River Pulp & Paper Co.* 135 N. Y. 626, 32 N. E. 132, 4 Silv. Ct. App. 632, 48 N. Y. S. R. 44, holding that parol evidence is admissible to identify machine named in contract; *Routledge v. Worthington Co.* 119 N. Y. 592, 23 N. E. 1111; *Emmett v. Penoyer*, 151 N. Y. 564, 45 N. E. 1041,—holding that parol evidence is admissible to supply terms of incomplete or ambiguous writing.

—Where contract is evidenced by letters.

Cited in *Sun Printing & Pub. Asso. v. Edwards*, 51 C. C. A. 279, 113 Fed. 445, holding that parol evidence is inadmissible to show agreement contemporaneous with contract of employment evidenced by letters; *Ropes v. Arnold*, 81 Hun, 476, 30 N. Y. Supp. 997, holding that contract made by correspondence may, if incomplete, be explained by parol evidence.

—To show independent collateral agreement.

Cited in *Stowell v. Greenwich Ins. Co.* 20 App. Div. 188, 46 N. Y. Supp. 802, holding that independent collateral agreement between insurance company and its agent may be shown although contract of agency is in writing; dissenting opinions in *Kervan v. Townsend*, 25 App. Div. 256, 49 N. Y. Supp. 137; *Thompson v. Thompson*, 70 App. Div. 242, 75 N. Y. Supp. 401,—on admissibility of parol evidence of independent collateral agreement; *Brantingham v. Huff*, 43 App. Div. 414, 60 N. Y. Supp. 157, holding that parol evidence of agreement to make adopted child heir is admissible; *Indelli v. Lester*, 130 App. Div. 548, 115 N. Y. Supp. 46; *Gibbons v. Bush Co.* 52 App. Div. 211, 65 N. Y. Supp. 215,—holding that independent collateral agreement may be shown by parol evidence; *Dodge v. Zimmer*, 110 N. Y. 43, 17 N. E. 399, holding that independent collateral parol agreement is admissible; *Chicago & N. W. R. Co. v. Kendall*, 93 C. C. A. 422, 167 Fed. 62, 16 A. & E. Ann. Cas. 560, on admissibility of parol evidence to prove independent oral agreement; *Tobin v. McArthur*, 56 Wash. 523, 106 Pac. 180, holding parol evidence of collateral agreement inadmissible, when writing includes complete contract on subject-matter.

Cited in note in 17 L.R.A. 274, on admissibility of oral evidence of collateral separate agreements.

—To show extent of party's liability on contract.

Cited in *White v. Boyce*, 21 Fed. 228, holding that parol evidence is inadmissible to show that party did not assume absolute obligation to pay for stock purchased where sale is evidenced by writing; *Gorrell v. Home L. Ins. Co.* 11 C. C. A. 240, 24 U. S. App. 188, 63 Fed. 371, holding parol evidence inadmissible to show note absolute in terms is payable only out of particular fund; *Ostrander v. Say-*

der, 73 Hun, 378, 26 N. Y. Supp. 263, holding that parol evidence is admissible to show paper purporting to be due bill was memorandum of agreement of money furnished to make joint investment; *Bank of Hamilton v. Klock*, 73 Hun, 304, 26 N. Y. Supp. 259, holding that parol evidence as to condition upon which guarantor of note will be liable is admissible; *Beckwith v. Burlingame*, 16 Misc. 217, 39 N. Y. Supp. 191, holding that parol evidence is admissible to show that person who indorsed note was real debtor.

— To show that party to contract was acting as agent.

Cited in *Black Hills Nat. Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1071, holding that parol evidence is inadmissible to show that party who signed contract on principal was acting as agent of other parties to contract.

— To show warranty of article sold.

Cited in *Thompson v. Wheeler & W. Mfg. Co.* 29 Kan. 476, holding that verbal warranty that sewing machine sold was in good condition may be shown where memoranda does not contain whole contract; *McCray Refrigerator & Cold Storage Co. v. Woods*, 99 Mich. 269, 41 A. S. R. 599, 58 N. W. 320 (dissenting opinion), on existence of implied warranty upon sale of article for particular purpose; *Naumberg v. Young*, 44 N. J. L. 331, 43 A. R. 380, holding that parol warranty of engine and boiler leased cannot be shown where lease is in writing; *Wise v. Rosenblatt*, 16 Daly, 496, 12 N. Y. Supp. 288, 34 N. Y. S. R. 1005, to point that parol evidence is admissible to show warranty where only part of contract of sale is reduced to writing; *Chamberlain v. Campen*, 7 N. Y. S. R. 99, holding parol evidence inadmissible to show warranty of article sold where sale was evidenced by writing; *Smith v. Killam*, 16 N. Y. S. R. 569, holding that parol evidence of warranty as to quantity of timber upon land conveyed is inadmissible; *Pryor v. Foster*, 17 N. Y. S. R. 472, 1 N. Y. Supp. 774, holding that parol evidence of statements of owner as to heating capacity of furnace party was about to rent is admissible though lease is in writing; *Akberg v. John Kress Brewing Co.* 65 Hun, 182, 19 N. Y. Supp. 956, holding that oral warranty made by agent that chattel mortgage assigned by writing was good may be shown; *Grand Rapids Veneer Works v. Forsythe*, 83 Hun, 230, 31 N. Y. Supp. 601, holding that parol evidence is admissible to show that contract for sale of goods was based upon samples shown; *Kirkham v. Bank of America*, 26 App. Div. 110, 49 N. Y. Supp. 767, on right of party to show collateral oral agreement of warranty; *Vaughn Mach. Co. v. Lighthouse*, 64 App. Div. 138, 71 N. Y. Supp. 799, holding that independent oral agreement warranting machine sold may be shown though memorandum of sale is in writing; *Jackson v. Helmer*, 73 App. Div. 134, 77 N. Y. Supp. 835, holding parol evidence is inadmissible to show warranty of article sold where sale was evidenced by writing; *Eighmie v. Taylor*, 98 N. Y. 288, holding that parol evidence of warranty as to yield of oil well is inadmissible where assignment of oil lease is in writing; *Green v. Batson*, 71 Wis. 54, 5 A. S. R. 194, 36 N. W. 849, holding that quality of land may be shown by parol though deed contains only usual covenants, in action for breach of covenant; *Germain Fruit Co. v. J. K. Armsby Co.* 153 Cal. 585, 96 Pac. 319, holding that parol evidence that apricots were to be equal in quality to sample is inadmissible.

Cited in notes in 43 A. R. 128, on admissibility of proof of parol warranty on written contract of sale; 5 A. S. R. 197, on parol evidence to show warranty outside of contract; 19 L.R.A. (N.S.) 1185, on right to show parol warranty in connection with contract of sale of personalty.

— As between others than parties or privies.

Cited in *Emmett v. Penoyer*, 76 Hun, 551, 28 N. Y. Supp. 234, holding that rule excluding parol evidence to vary writing is applicable only as between parties and privies; *Weigley v. Kneeland*, 18 App. Div. 47, 79 N. Y. S. R. 388, 45 N. Y. Supp. 388; *Condit v. Cowdrey*, 123 N. Y. 463, 25 N. E. 946,—holding that parol evidence is admissible to prove what contract is where writings are merely collateral matter to which neither party are privy.

— To show agreement not to engage in rival business.

Cited in *Wels v. Rhodius*, 87 Ind. 1, 44 A. R. 747, holding that party may bind himself by parol agreement made contemporaneously with lease of hotel not to engage in rival business; *Costello v. Eddy*, 34 N. Y. S. R. 565, 12 N. Y. Supp. 236, holding that parol evidence of agreement not to engage in same business is inadmissible where contract of sale of business and good will was reduced to writing.

— Where writing was procured by giving parol agreement.

Cited in *Singer Mfg. Co. v. Forsythe*, 108 Ind. 334, 9 N. E. 372; *Eugene Dietzgen v. Kokosky*, 113 La. 449, 66 L.R.A. 503, 37 So. 24,—to point that where execution of written agreement is procured by giving parol agreement, latter may be shown; *Carraher v. Mulligan*, 28 N. Y. S. R. 439, 8 N. Y. Supp. 42, holding that as between parties to written contract any agreement may be proved that will show that enforcement of contract will be inequitable; *Beagle v. Harby*, 73 Hun, 310, 26 N. Y. Supp. 375; *Medical College Laboratory v. New York University*, 76 App. Div. 48, 78 N. Y. Supp. 673,—holding that parol evidence is admissible to show real agreement rested in parol where deed was executed in part performance thereof.

— As to failure of consideration.

Cited in *Braly v. Henry*, 71 Cal. 481, 60 A. R. 543, 11 Pac. 385, holding that parol evidence is admissible to show partial failure of consideration for note; *Sturmdorf v. Saunders*, 117 App. Div. 762, 104 N. Y. Supp. 1042, holding that recital of consideration where merely evidence of a fact is subject to explanation by parol evidence; *Catlin v. Harris*, 7 Wash. 342, 35 Pac. 385, holding that parol evidence is inadmissible to prove that note does not represent true amount due from maker to payee.

— To show time and manner of payment of consideration.

Cited in *Van Gorden v. Sackett*, 2 Silv. Sup. Ct. 582, 6 N. Y. Supp. 860, 25 N. Y. S. R. 177, holding that parol evidence as to time and manner of payment is admissible where writing contains no provision upon subject; *Taylor v. Elmira Storage & Supply Co.* 54 Misc. 363, 104 N. Y. Supp. 557, on admissibility of parol evidence to show that consideration for contract was that party should use his personal endeavors to sell certain articles; *Willae v. Whitaker*, 22 Hun, 242, holding that indorser of note cannot show by parol evidence that note payable one day after date was not due until certain other date; *Finch v. Skilton*, 79 Hun, 531, 29 N. Y. Supp. 925, holding that oral evidence of extension of time of payment of note is admissible.

— To show reservation of life estate as against deed in fee.

Cited in *Woodward v. Foster*, 64 Hun, 147, 18 N. Y. Supp. 827, holding that reservation of life estate cannot be established by parol as against deed in fee.

— To show trust where deed is absolute.

Cited in *Mee v. Mee*, 113 Tenn. 453, 106 A. S. R. 865, 82 S. W. 830, holding that

parol evidence is inadmissible to show trust by verbal agreement under absolute deed with discretion.

Right to change cause of action by amendment of pleading.

Cited in *Shaw v. Bryant*, 65 Hun, 57, 18 N. Y. Supp. 618, 47 N. Y. S. R. 227; holding that under code cause of action on contract cannot by amendment be changed to action in tort; *Eighmie v. Taylor*, 39 Hun, 366, holding that court had power to allow amendment changing cause of action from contract to tort.

Presumption as to law governing contracts.

Cited in *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 13 L.R.A. 52, 28 N. E. 163, holding that contracts are presumed to be made with reference to law of place where they are entered into.

Presumption as to law of other state.

Cited in *Schofield v. Palmer*, 134 Fed. 753, holding that presumption exists that rate of interest is same in each state; *Stewart v. Union Mut. L. Ins. Co.* 155 N. Y. 257, 42 L.R.A. 147, 49 N. E. 876; *Mount v. Tuttle*, 183 N. Y. 356, 2 L.R.A. (N.S.) 426, 76 N. E. 873,—to point that presumption exists that common law of other states is same as it is here.

Law governing remedies for breach of contract.

Cited in *Bullock v. Bullock*, 51 N. J. Eq. 444, 27 Atl. 435, to point that forms of remedies are regulated by law of place where action is instituted.

Implied warranty of fitness.

Cited in reference note in 41 A. S. R. 606, on implied warranty of article bought for particular purpose.

Cited in notes in 22 L.R.A. 187, on implied warranty of fitness of property bought for special purpose; 22 L.R.A. 194, on knowledge of purpose as affecting implied warranty or fitness of property bought.

34 AM. REP. 518, FARMERS' & M. NAT. BANK. v. HAZELTINE, 78 N. Y. 104.

Extent of power of consignee with power of disposal.

Cited in *Drexel v. Pease*, 32 N. Y. S. R. 853, 11 N. Y. Supp. 138, holding that consignee of goods with power of disposition has power to make contract with bankers for general lien.

Presumption as to knowledge of title to stock purchased from executor.

Cited in *White v. Price*, 39 Hun, 394, holding that person buying stock from executor is chargeable with knowledge of his lack of authority.

Liability of carrier for delivery to wrong person.

Cited in *Clegg v. Southern R. Co.* 135 N. C. 148, 65 L.R.A. 717, 47 S. E. 667 (dissenting opinion), on liability of carrier for negligently delivering goods to wrong party.

Effect of special indorsement of bill of lading.

Cited in notes in 25 L. ed. U. S. 893; 38 A. D. 422,—on effect of special indorsement of bill of lading.

Enforcement of conditions against bona fide purchaser.

Cited in note in 12 L.R.A. 701, on enforceability against bona fide purchaser of conditions as to title when goods have been delivered before performance of condition.

34 AM. REP. 522, PEOPLE v. SECURITY L. INS. & ANNUITY CO. 78 N. Y. 114.**Rights of policy holders where insurer is insolvent.**

Cited in *Reliance Lumber Co. v. Brown*, 4 Ind. App. 92, 30 N. E. 625; *Taylor v. North Star Mut. Ins. Co.* 46 Minn. 198, 48 N. W. 772,—holding that upon insolvency of life insurance company policy holders are only entitled to surrender value of policies; *American Casualty Ins. Co.'s Case*, 82 Md. 535, 38 L.R.A. 97, 34 Atl. 778, holding that policy holder in accident company can only recover value of policy, where loss happened after insolvency; *Wolfe v. Washington L. Ins. Co.* 63 Misc. 571, 118 N. Y. Supp. 599, holding that contract of insurance implies that company will continue business and keep funds required by law during term of policy; *Voss v. Northwestern Nat. L. Ins. Co.* 137 Wis. 506, 118 N. W. 212 (dissenting opinion), on distinction between mutual and other insurance as to rights of insured.

Cited in reference note in 124 A. S. R. 635, on liability of insolvent life insurance company to policy holders for breach of contract.

Cited in notes in 19 L.R.A.(N.S.) 640, on right to return of premiums on adjudication of insolvency of insurer; 69 L.R.A. 146, on rights of policy holders of insolvent insurance companies.

—When status of claims under policy fixed.

Cited in *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120; *Taber v. Royal Ins. Co.* 124 Ala. 681, 26 So. 252,—holding that upon insolvency policy holder has right to present value of policy as of day fixed by court; *Re Equitable Reserve Fund Life Asso.* 131 N. Y. 354, 30 N. E. 114; *People v. Commercial Alliance L. Ins. Co.* 154 N. Y. 95, 47 N. E. 968,—holding that claims under policies against life insurance company in receiver's hands must be determined and status fixed as of date of commencement of action for dissolution.

—Preference in distribution of funds.

Cited in *Gilbert v. Washington Beneficial Endowment Asso.* 21 App. D. C. 344, to point that death claims which had matured were not entitled to preference over claims of unmatured policy claims upon insolvency; *Relfe v. Columbia L. Ins. Co.* 76 Mo. 495, holding that death claims occurring prior to dissolution are not entitled to preference over policies running at that date; *People v. Knickerbocker L. Ins. Co.* 34 Hun, 476, holding that policy must be valued as death claim where insured died after appointment of receiver and before settlement; *Re Equitable Reserve Fund Life Asso.* 61 Hun, 299, 16 N. Y. Supp. 80, holding that death claims maturing prior to dissolution of company were entitled to payment as first charge upon death fund; *Atty. Gen. v. Continental L. Ins. Co.* 64 How. Pr. 73, holding that revaluation of policies are not to be allowed because of death of insured after receiver appointed; *Atty. Gen. v. Continental L. Ins. Co.* 88 N. Y. 77, holding that court may order revaluation of policy where insured died after expiration of time for presentation of claims to receiver; *People v. American Loan & T. Co.* 172 N. Y. 371, 65 N. E. 200, holding that as between preferred and unpreferred creditors no interest is allowed after receiver takes charge of insolvent corporation.

Cited in note in 38 L.R.A. 103, on priorities of assets of insurance company.

—To surplus as trust.

Cited in *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 46, 53 L. ed. 691, 29 Sup. Ct. Rep. 404; *Everson v. Equitable Life Assur. Co.* 68 Fed. 258, 25 Pittab. L. J. N. S. 369; *Brown v. Equitable L. Assur. Soc.* 142 Fed. 835,—holding that

surplus held by mutual life insurance company is not held in trust for policy holders; *Pierce v. Equitable Life Assur. Soc.* 145 Mass. 56, 1 A. S. R. 433, 12 N. E. 858, holding that by law of New York surplus held by insurance company under tontine plan is not held in trust; *Re Youth's Temple of Honor*, 73 Minn. 319, 76 N. W. 59, holding that endowment fund set apart to pay matured certificates as trust fund is trust fund for payment of all certificates, upon dissolution.

— To refuse to pay premiums.

Cited in *Taylor v. Charter Oak L. Ins. Co.* 9 Daly, 489, holding that policy holder was not justified in refusing to pay premium because company violated charter if it continued to do business; *Re Empire Mut. L. Ins. Co.* 64 How. Pr. 51, holding reinsurance of policies by company no excuse for failure by policy holders to pay premiums; *People v. Globe Mut. L. Ins. Co.* 32 Hun, 147, on what must be shown to justify neglect of holder of life insurance policy to pay premium where company insolvent.

— Right of unsuccessful claimant to costs.

Cited in *People v. Security L. Ins. & Annuity Co.* 23 Hun, 596, holding that unsuccessful claimants, under insurance policies upon funds in receiver's hands are not entitled to costs.

Relationship between policy holder and company.

Cited in *Insurance Commissioner v. People's F. Ins. Co.* 68 N. H. 51, 44 Atl. 82, holding that policy holder in stock company is creditor of company; *Bewley v. Equitable L. Assur. Soc.* 61 How. Pr. 344; *Russell v. Pittsburgh Life & T. Co.* 132 App. Div. 217, 116 N. Y. Supp. 841; *Grobe v. Erie County Mut. Ins. Co.* 24 Misc. 462, 53 N. Y. Supp. 628,—holding that policy holder in mutual life insurance company is not partner in company; *Re Abbett*, 29 Misc. 567, 61 N. Y. Supp. 1067; *Young v. Equitable Life Assur. Soc.* 49 Misc. 347, 99 N. Y. Supp. 446; *Watts v. Equitable L. Assur. Soc.* 55 Misc. 454, 105 N. Y. Supp. 363; *People v. Mechanics' & T. Sav. Inst.* 28 Hun, 375,—to point that policy holders in mutual company are not partners but creditors; *National Park Bank v. Clark*, 92 App. Div. 262, 87 N. Y. Supp. 185, holding that policy holders are interested in fund in receiver's hands in same way only as other creditors; *Michaelsen v. Security Mut. L. Ins. Co.* 83 C. C. A. 334, 154 Fed. 356, 12 A. & E. Ann. Cas. 37; *People v. Empire Mut. L. Ins. Co.* 92 N. Y. 105,—holding that implied contract of life insurance company with policy holders is that it will continue in business and keep on hand funds required by law; *Hencken v. United States L. Ins. Co.* 11 Daly, 282; *Swan v. Mutual Reserve Fund Life Asso.* 20 App. Div. 255, 46 N. Y. Supp. 841; *Uhlman v. New York L. Ins. Co.* 109 N. Y. 121, 4 A. S. R. 482, 17 N. E. 363,—holding that policy holder in mutual life insurance company is not partner, but rights are measured by terms of policy.

Cited in reference note in 1 A. S. R. 440, on relations sustained by life insurance company to policy holders.

Relationship of stockholder in mutual life insurance company to company.

Cited in *Lord v. Equitable Life Assur. Soc.* 47 Misc. 187, 94 N. Y. Supp. 65, holding that stockholders of mutual life insurance company are members of corporation.

Law governing corporation as part of contract.

Cited in *Boswell v. Security Mut. L. Ins. Co.* 119 App. Div. 723, 104 N. Y. Am. Rep. Vol. XVII.—53.

Supp. 130; *People v. Globe Mut. L. Ins. Co.*, 91 N. Y. 174, 64 How. Pr. 435,—holding that person contracting with life insurance company is deemed to have done so with knowledge of law governing its existence.

Distinguished in *Black v. Homœopathic Mut. L. Ins. Co.* 47 Hun, 210, holding that no rule of law exists requiring that statutes of state should be considered as though inserted in insurance policy.

Right of receiver to commissions on premium notes of insolvent life insurance company.

Cited in *Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 94 (affirming 26 Hun, 294), holding that premium notes are not assets upon which receiver is entitled to commissions, they constitute merely offsets against company's liability.

Value of life insurance policy wrongfully forfeited.

Cited in *Toplitz v. Bauer*, 161 N. Y. 325, 55 N. E. 1059, holding that value of policy wrongfully forfeited in face thereof less premium that fell due before insured's death where insured was not insurable at time of forfeiture; *Clemmitt v. New York L. Ins. Co.* 76 Va. 355; *Merrick v. Northwestern Nat. L. Ins. Co.* 124 Wis. 221, 109 A. S. R. 931, 102 N. W. 593,—holding that wife is entitled to value of policy upon husband's life, at time it was wrongfully declared forfeited by company.

Cited in notes in 38 L.R.A. 102, on valuation and adjustment of claims against insolvent insurance company; 38 L.R.A. 102, on finding value of immature policies of insolvent insurance company.

Power of legislature to amend charter of life insurance company.

Cited in *Lord v. Equitable Life Assur. Soc.* 109 App. Div. 252, 96 N. Y. Supp. 10, on power of legislature to alter or amend charter of life insurance company.

Notice to present claims against insolvent life insurance company.

Cited in *People ex rel. Atty. Gen. v. Security L. Ins. & Annuity Co.* 79 N. Y. 267, to point that receiver of insolvent insurance company may obtain order to publish notice requiring claims to be presented within certain time; *Atty. Gen. v. Atlantic Mut. L. Ins. Co.* 11 Abb. N. C. 139, holding that notice to be given by receiver of life insurance requiring presentation of claims, under act of 1869 is within court's discretion.

Right of insured to cut off beneficiary's interest.

Cited in *Travelers' Ins. Co. v. Healey*, 25 App. Div. 53, 49 N. Y. Supp. 29, holding that policy payable to wife or children, may be converted into cash by husband where it contains option permitting him to do so after fifteen years.

How value of annuities computed.

Cited in *Atty. Gen. v. North American L. Ins. Co.* 82 N. Y. 172, to the point that in computing value of annuities Northampton Table, with interest at six per cent should be used.

Cited in note in 40 L.R.A. 558, on tables of expectancies of life as evidence.

Measure of damages against insolvent insurer — By holder of unmaturing policy.

Cited in *People v. Highland Mut. L. Ins. Co.* 26 Misc. 205, 56 N. Y. Supp. 83, holding that measure of damages on nonassessable policy, as against permanent receiver of mutual life insurance company is loss as adjusted, less interest to time when loss became payable by terms of policy; *Langan v. American L. H.* 34 Misc. 629, 70 N. Y. Supp. 663, holding that measure of damages for breach of

contract of mutual life insurance where member not reinsurable is present value of policy less assessment which would have to pay if no breach occurred; *Gerard v. Cowperthwait*, 2 Misc. 371, 21 N. Y. Supp. 1092, to point that where policy became inoperative on holder's failure to pay premium damages in action on bond for which policy was given as security in value of policy; *People v. Commercial Alliance L. Ins. Co.* 17 App. Div. 376, 45 N. Y. Supp. 223, on measure of damages of policy holder where company becomes insolvent; *Stokes v. Amerman*, 121 N. Y. 337, 24 N. E. 819, to point that unmaturred life insurance policies possess present value in distribution of assets of insolvent insurance companies; *Com. ex rel. Atty. Gen. v. American L. Ins. Co.* 162 Pa. 586, 42 A. S. R. 844, 29 Atl. 660, on measure of damages in action by policy holder against insolvent life insurance company; *Barney v. Dudley*, 42 Kan. 212, 16 A. S. R. 476, 21 Pac. 1079; *Farley v. Union Mut. L. Ins. Co.* 41 Hun, 303; *Univeraal L. Ins. Co. v. Binford*, 76 Va. 103,—holding that each policy holder was entitled to sum which, on day of company's insolvency, would purchase from solvent company policy of same kind, for same amount and for same rate of premium.

— **Where insured died subsequent to insolvency.**

Cited in *People v. Knickerbocker L. Ins. Co.* 40 Hun, 44; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 82 N. Y. 336,—holding that beneficiaries of policy holders who die subsequent to appointment of receiver and subsequent to time premium is paid are entitled to present value of policy less unpaid premium.

34 AM. REP. 532, PEOPLE v. MERCHANTS' & M. BANK, 78 N. Y. 269.

What constitutes a trust fund.

Cited in *Ward v. Higgins*, 9 N. Y. S. R. 641, holding bona fide receiver of money not liable because payment was made with funds from sale of firm property; *Re Greene*, 2 Connolly, 166, 20 N. Y. Supp. 94, holding particular fund appropriated for payment of claim trust fund; *Houghton v. Davenport*, 74 Me. 590, holding that equity will protect against guardian's creditors' title to property purchased with his own funds after using trust funds in his own business; *Denton v. Merrill*, 43 Hun, 224, as to whether public money used in firm business constitutes trust fund making liability preferred claim; *Warren-Scharf Asphalt Pav. Co. v. Dunn*, 8 App. Div. 205, 40 N. Y. Supp. 209, holding bank liable for proceeds of warrants traceable into assets in hands of receiver; *Welles v. Stout*, 38 Fed. 808, as to whether funds contributed by stock holders to retire securities of bank are trust funds.

Cited in note in 10 L.R.A.(N.S.) 930, on right of holder of draft to have trust declared on funds of bank.

— **Deposits in bank generally.**

Cited in *Hurd v. Farmers' Loan & T. Co.* 63 How. Pr. 314, holding moneys deposited in bank to pay interest on city bonds, trust funds not subject to attachment; *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407, holding money deposited in bank for payment of certified checks not trust funds; *Freiberg v. Stoddard*, 161 Pa. 259, 28 Atl. 111 (affirming 7 Kulp, 157), holding assets of bank not chargeable with proceeds of draft charged to drawee's account.

— **Collections by bank.**

Cited in *Harrison Nat. Bank v. Elliott*, 31 Kan. 173, 1 Pac. 593, holding bank not liable as trustee by taking new note in place of one left for collection; *Sunderlin v. Mecosta County Sav. Bank*, 116 Mich. 281, 74 N. W. 478, denying

that bank's assets are trust funds from which to pay checks collected by charging drawer's account; *Union Nat. Bank v. Citizens' Bank*, 153 Ind. 44, 54 N. E. 97, holding that bank taking check in payment of note received for collection and remitting by draft becomes owner's "debtor."

Cited in notes in 86 A. S. R. 786, on title to proceeds of paper deposited with bank for collection; 32 L.R.A. 718, on trust in proceeds of collection made by bank when insolvent as against claims of bank's representatives where bank has received no fund.

Distinguished in *People v. Bank of Dansville*, 39 Hun, 187, holding that bank receiving draft for collection becomes drawer's agent and moneys received are trust funds; *Lafort v. Carpenter*, 91 Hun, 76, 36 N. Y. Supp. 168, holding that bank holds proceeds of bond left for collection as trust fund; *Blair v. Hill*, 50 App. Div. 33, 63 N. Y. Supp. 670, holding that owner of check forwarded for collection may follow proceeds where insolvent bank has intermingled funds; *McLeod v. Evans*, 66 Wis. 401, 57 A. R. 287, 28 N. W. 173, holding bank using proceeds of draft received for collection liable as trustee; *People v. City Bank*, 96 N. Y. 32, holding that bank's acceptance of checks sent by depositor to pay notes which bank had sold, makes bank trustee of proceeds.

Criticised in *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 59 A. S. R. 572, 69 N. W. 115, holding bank trustee of money received to pay note bank had for collection but subsequently sold.

Collecting bank as agent.

Cited in *Indig v. National City Bank*, 80 N. Y. 100, denying that bank's forwarding note to another bank for customer by mail for collection makes latter its agent.

Check as assignment.

Cited in *Harrison v. Wright*, 100 Ind. 515, 50 A. R. 805, denying that check operates as assignment whereby payee acquires preference over general creditors.

Cited in notes in 89 A. D. 442; 96 A. D. 133, 134; 9 L.R.A. 109; 19 A. S. R. 610,—as to whether check is an assignment of the fund.

Distinguished in *Abt v. American Trust & Sav. Bank*, 159 Ill. 467, 50 A. S. R. 175, 42 N. E. 854, holding check not assignment of deposit by law of New York.

Propriety of collecting bank sending directly to drawee.

Cited in *Kershaw v. Ladd*, 34 Or. 375, 44 L.R.A. 236, 56 Pac. 402, holding sending check by mail to drawee bank proper presentment; *German Nat. Bank v. Burns*, 12 Colo. 539, 13 A. S. R. 247, 21 Pac. 714, holding mailing certificate of deposit to bank on which it was drawn, not proper presentation for payment.

Cited in note in 27 L.R.A. 249, on sending check directly to drawee bank.

34 AM. REP. 536, WILLY v. MULLEDY, 78 N. Y. 310.

Violation of statute as proof of negligence.

Cited in *Billings v. Breinig*, 45 Mich. 65, 7 N. W. 722, holding it negligence to disregard positive regulation that boats moving at night shall exhibit lights; *Fath v. Tower Grove & L. R. Co.* 105 Mo. 537, 13 L.R.A. 74, 16 S. W. 913, holding street railway company liable in private action by person injured by reason of its neglect of ordinance requiring street cars to be stopped on appearance of danger to persons on track; *Monteith v. Kokomo Wood Enameling Co.* 159 Ind. 149, 58 L.R.A. 944, 64 N. E. 610; *Nugent v. Vanderweer*, 39 Hun, 322; *Pauley v. Steam Gauge & Lantern Co.* 61 Hun, 254, 16 N. Y. Supp. 820; *Barry v. Port*

Jervis, 64 App. Div. 268, 72 N. Y. Supp. 104,—to point that whenever one owes another a duty whether imposed by contract or by statute, breach of duty causing damage gives right to cause of action; Stay v. DuBois, 74 Hun, 134, 26 N. Y. Supp. 240, holding that person excluded from theater because of color in violation of statute, has right of action against proprietor; Curley v. Electric Vehicle Co. 68 App. Div. 18, 74 N. Y. Supp. 35, to point that person who is driving horse on street has right to expect driver of other vehicle will comply with law; Ziegler v. Brennan, 75 App. Div. 584, 78 N. Y. Supp. 342, holding failure to comply with statute evidence of negligence but not conclusive; Rosin v. Lidgerwood Mfg. Co. 89 App. Div. 245, 86 N. Y. Supp. 49; MacMullen v. Middletown, 112 App. Div. 81, 98 N. Y. Supp. 145; Rochester v. Campbell, 123 N. Y. 405, 20 A. S. R. 760, 10 L.R.A. 393, 25 N. E. 937; Weeks v. McNulty, 101 Tenn. 495, 70 A. S. R. 693, 43 L.R.A. 185, 48 S. W. 809,—to point that where statute requires thing to be done by another's benefit failure to do such thing gives latter right of action; Racine v. Morris, 136 App. Div. 467, 121 N. Y. Supp. 146, holding that violation of building code is prima facie evidence of negligence.

— In action by employee generally.

Cited in Commonwealth Electric Co. v. Rose, 214 Ill. 545, 73 N. E. 780, holding violation by electric company of ordinance requiring it to guard wires, prima facie evidence of negligence towards lineman; Pelin v. New York C. & H. R. R. Co. 102 App. Div. 71, 92 N. Y. Supp. 468, holding railroad company which violates statute relating to working employees overtime, liable for injuries sustained by employee which is proximate result of such violation.

— In action by employee under Factory Act.

Cited in Clements v. Potomac Electric Power Co. 26 App. D. C. 482, holding that right of private action for failure to comply with statute is not taken away because penalty is provided for; Landgraf v. Kuh, 188 Ill. 484, 59 N. E. 501, holding that under statute question whether owner should have erected fire escape is for jury; Schwandner v. Birge, 33 Hun, 186, holding in action for death of employee in fire question of defendant's negligence in not providing fire escape was for jury; Gorman v. McArdle, 67 Hun, 484, 22 N. Y. Supp. 479, holding that employee was not bound to examine as to whether building had fire escapes, and could rely upon employer performing duty; Freeman v. Glens Falls Paper Mill Co. 70 Hun, 530, 24 N. Y. Supp. 403, to point that where employee is injured because of failure to guard elevator in building as required by statute he may recover against employer; Pauley v. Steam Gauge & Lantern Co. 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999, holding that under act of 1886 requiring fire escapes to be placed upon certain factories, employee injured by failure to comply with act, may recover from employer therefor; Huda v. American Glucose Co. 154 N. Y. 474, 40 L.R.A. 411, 48 N. E. 897, to point that statute of 1887 created duty of providing fire escapes and in effect gave cause of action to person injured by its breach; Maker v. Slater Mill & Power Co. 15 R. I. 112, 23 Atl. 63, holding that action cannot be maintained for failure to furnish fire escapes under statute relative to fire escapes where statute is too indefinite to impose criminal liability for failure to furnish them; Bullock v. Butler Exch. Co. 24 R. I. 50, 52 Atl. 122, holding that person has right to expect that person managing and owning elevator will comply with statute.

— In action by minor employee.

Cited in Hickey v. Taaffe, 32 Hun, 7; Marino v. Lehmaier, 62 App. Div. 43, 70 N. Y. Supp. 790; Marino v. Lehmaier, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E.

572,—holding that employment of minor contrary to statute is *prima facie* evidence of negligence in action for injury to minor; *White v. Witteman Lithographic Co.* 58 Hun, 381, 12 N. Y. Supp. 188, holding that employment of boy thirteen years of age in violation of statute does not establish negligence; *Bolin v. R. J. Reynolds Tobacco Co.* 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 391, 8 A. & E. Ann. Cas. 638, on employment in factory of child under twelve years of age in violation of statute as evidence of negligence; *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 49 A. S. R. 935, 30 L.R.A. 82, 32 S. W. 460, holding that employment of infant contrary to statute constitutes negligence and makes employer *prima facie* liable for injury; *Lee v. Sterling Silk Mfg. Co.* 134 App. Div. 123, 118 N. Y. Supp. 852 (dissenting opinion), on employment of child under fourteen in violation of Labor Law as evidence of negligence; *Fahey v. Jephcott*, 2 Ont. L. Rep. 449, holding that employment of girl under eighteen near moving machinery in violation of Factory Act renders master *prima facie* liable.

Waiver of presumption of negligence arising from violation of statute.

Cited in *Fitzgerald v. New York C. & H. R. R. Co.* 59 Hun, 225, 12 N. Y. Supp. 932, holding that railroad brakeman who knows that no signal has been placed to give warning of approach to overhead bridge cannot recover for injury caused by being struck by bridge; *Armaindo v. Ferguson*, 87 App. Div. 160, 55 N. Y. Supp. 769, holding that guest who occupied room not supplied with rope for fire escape, for six months was presumed to have waived right of action against proprietor for failure to supply such rope; *Knisley v. Pratt*, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986, holding that employee may by continuing in employment with knowledge of facts waive performance of duty of employer under Factory Act.

Constitutionality of statute requiring erection of fire escapes.

Cited in *Arms v. Ayer*, 192 Ill. 601, 85 A. S. R. 357, 58 L.R.A. 277, 61 N. E. 851, to point that statute delegating to inspector, location, material and construction of fire escapes is not unconstitutional.

Cited in reference note in 85 A. S. R. 364, on constitutionality of statutes regulating fire escapes.

Cited in note in 93 A. S. R. 410, on constitutionality of building regulations intended to promote health, safety, and morals.

Right of legislature to authorize city to impose new duties.

Cited in *Koch v. Fox*, 71 App. Div. 288, 75 N. Y. Supp. 913, to the point that legislature may delegate authority to city to impose new duty for protection of public.

Right to recover under indemnity clause of contract for subcontractor's negligence.

Cited in *Montgomery v. Halse*, 148 Ala. 194, 40 So. 665, holding that person injured by reason of failure of water company to supply water to put out fires cannot recover under company's contract with city.

Distinguished in *Haefelin v. McDonald*, 96 App. Div. 213, 89 N. Y. Supp. 395, holding that person whose abutting property was injured through negligence of subcontractor cannot enforce claim for damages under indemnity clauses of contract.

Statutory duty as dependent upon action of superintending officer.

Cited in *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479, 63 N. E. 239; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153,—holding that exercise of duty im-

posed by statute as to guarding elevator wells is not dependent upon action of superintendent of buildings; *People v. Davis*, 1 Ill. C. C. 245; *Carrigan v. Stillwell*, 97 Me. 247, 61 L.R.A. 163, 54 Atl. 389; *Arnold v. National Starch Co.* 121 App. Div. 889, 105 N. Y. Supp. 420, to point that exercise of duty to provide fire escapes does not depend upon action of superintending officer; *Arnold v. National Starch Co.* 194 N. Y. 42, 21 L.R.A.(N.S.) 42, 86 N. E. 815, holding that provision of Labor Law as to fire escapes is mandatory and owner cannot delay action until ordered by factory inspector.

Liability for injury caused by defective premises.

Cited in *Woodruff v. Bowen*, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113, to point that duty may be imposed upon owner of building in city to keep building safe for firemen or other officers whose duty calls them there; *Pitcher v. Lennon*, 12 App. Div. 856, 42 N. Y. Supp. 156 (affirming 16 Misc. 609; 38 N. Y. Supp. 1907), holding that person who was injured by fall of building resulting from known violation of building laws by owner may recover from latter; *Rooney v. Brogan Constr. Co.* 107 App. Div. 258, 95 N. Y. Supp. 1, holding that person who is injured through violation of duty imposed by section 20 of Labor Law may maintain action against person guilty of violation.

Cited in note in 15 L.R.A. 161, 162, on liability for injuries caused by absence of fire escapes on buildings.

—Liability of landlord generally.

Cited in *Brennan v. Lachat*, 14 Daly, 197; *Brady v. Valentine*, 3 Misc. 20, 21 N. Y. Supp. 776,—holding that owner of tenement house is liable to visitor thereto who was injured by reason of defective stairs and banister where latter was unaware of defect; *Hamilton v. Feary*, 8 Ind. App. 615, 52 A. S. R. 485, 35 N. E. 48; *Atkinson v. Abraham*, 45 Hun, 238,—holding that when landlord owes duty to tenant breach of duty causing damage gives cause of action; *Acton v. Reed*, 104 App. Div. 507, 93 N. Y. Supp. 911, holding that person who was injured in hotel fire because of failure to provide standpipes required by Building Code may recover against proprietor; *Paltey v. Egan*, 122 App. Div. 512, 107 N. Y. Supp. 444, holding that tenant whose goods have been injured by collapse of building cannot recover from landlord, because latter while excavating on adjoining lands failed to comply with building code.

Cited in note in 50 A. D. 777, on liability of lessor to tenant for nuisances or injury from failure to repair.

—Landlord's neglect of duty as to fire escapes.

Cited in *Johnson v. Snow*, 102 Mo. App. 233, 76 S. W. 675, holding that under act of 1901, guest injured in hotel that was prior to that time used as dwelling, can recover of lessee for injury caused by failure to erect fire escape; *Rose v. King*, 49 Ohio St. 213, 15 L.R.A. 160, 30 N. E. 267, holding that tenant who receives injury because of neglect of owner to comply with statute relative to fire escapes may recover damages therefor from landlord.

Cited in reference note in 119 A. S. R. 792, on duty of owners of buildings to furnish fire-escapes.

Cited in notes in 23 L.R.A. 157, on liability of landlord as to condition of fire escape; 19 E. R. C. 56, on liability of landlord failing to provide fire-escapes.

—Liability of tenant of portion of building.

Cited in *Malloy v. New York Real Estate Asso.* 13 Misc. 496, 34 N. Y. Supp. 679, holding one who occupies only upper floors of building not liable for injury caused by removal of guard chain from elevator entrance on first floor, by some

other person; *Harris v. Perry*, 89 N. Y. 308, holding that action does not lie against one tenant of building for injury caused by person falling in elevator well because trap-door was left open where building is occupied by several tenants, unless shown that such tenant left door open.

Private action for violation of statute.

Cited in note in 51 A. R. 14, on injunction at suit of private party to restrain act in violation of statute or ordinance; 9 L.R.A.(N.S.) 344, on beneficiaries of statutes indirectly conferring right of private action for violation thereof; 9 L.R.A.(N.S.) 379, on private action for violation of statutes as to fire escapes; 9 L.R.A.(N.S.) 388, on private action for violation of statutes specifically penalizing their violations; 9 L.R.A.(N.S.) 388, 389, on remedy for violation of statute not expressly conferring private action.

Distinction between mandatory and directory statutes.

Cited in reference note in 28 A. S. R. 335, on distinction between mandatory and directory statutes.

34 AM. REP. 539, HOOK v. PRATT, 78 N. Y. 371.

Effect of indorsement of negotiable paper for collection.

Cited in *First Nat. Bank v. Yost*, 34 N. Y. S. R. 180, 11 N. Y. Supp. 862, holding that indorsement of check for collection does not as to drawee, guarantee signature of drawer; *Iselin v. Chemical Nat. Bank*, 16 Misc. 437, 40 N. Y. Supp. 388, to the point that indorsement of draft for collection confers no title; *Corn Exch. Bank v. Farmers' Nat. Bank*, 118 N. Y. 443, 7 L.R.A. 559, 23 N. E. 923 (dissenting opinion), on effect of endorsing check "for collection" as transferring title; *Williams v. Jones*, 77 Ala. 294; *National City Bank v. Westcott*, 118 N. Y. 468, 16 A. S. R. 771, 23 N. E. 900,—holding that person who receives check for collection takes no title to it and can confer none; *City Bank v. Weiss*, 67 Tex. 331, 60 A. R. 29, 3 S. W. 299, holding that bank which receives draft for collection cannot appropriate proceeds thereof to payment of debt of owner.

Cited in note in 4 E. R. C. 363, on indorsement as affecting negotiability of paper.

Validity of settlement of bastardy proceedings which provides for child's support.

Cited in *Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001, holding that deed by father for benefit of his illegitimate child is upon sufficient consideration; *Wallace v. Rappleye*, 103 Ill. 665 (dissenting opinion), on validity of agreement between putative father and mother of bastard child; *Peoples' Bank & T. Co. v. Weidinger*, 73 N. J. L. 433, 64 Atl. 179, holding that agreement between putative father and mother of bastard child that father would pay mother weekly sum for its support is not enforceable by latter before latter performed any part of agreement; *Hanley v. Supreme Tent, K. O. T. M.* 38 Misc. 161, 77 N. Y. Supp. 246, to point that agreement by putative father with mother of bastard child for their support is enforceable; *Dresner v. Fredericks*, 91 App. Div. 224, 86 N. Y. Supp. 589; *Randolph v. Stokes*, 125 App. Div. 679, 110 N. Y. Supp. 20,—holding that agreement by putative father to pay sum of money for support of child is enforceable, although support is to be furnished by child's mother; *Todd v. Weber*, 95 N. Y. 181, 47 A. R. 20, holding that natural obligation arising out of relation of father of bastard to child is sufficient consideration for contract for its support; *Billingley v.*

Clelland, 41 W. Va. 234, 23 S. E. 812, holding that note given to woman in compromise or bastardy proceedings is valid; *Mayer v. Hoffman*, 67 Wis. 279, 30 N. W. 355, holding that money paid by putative father while under arrest in bastardy proceedings cannot be recovered back; *Meyer v. Meyer*, 123 Wis. 538, 102 N. W. 52, holding that bond given in settlement of bastardy proceedings in consideration of discontinuance of proceedings is not against public policy.

Cited in notes in 71 A. S. R. 204, on enforcement of promise to parent for benefit of illegitimate child; 18 E. R. C. 83, on validity of promise by putative father to pay mother for support of illegitimate child.

Presumption of consideration for note.

Cited in note in 12 L.R.A. 846, on presumption as to consideration for negotiable paper.

Moral obligation as consideration.

Cited in notes in 35 A. R. 69; 12 L.R.A. 471,—on moral obligation as consideration; 53 L.R.A. 356, on moral obligation as a consideration for promise to pay for past support of relative.

34 AM. REP. 544, WHITE v. MILLER, 78 N. Y. 393.

When interest recoverable upon unliquidated demand.

Cited in *Stephens v. Phoenix Bridge Co.* 71 C. C. A. 374, 139 Fed. 248, holding that interest is not recoverable on demand which is unliquidated and which is subject to unliquidated counterclaim; *Moriarity v. New York City*, 59 Misc. 204, 110 N. Y. Supp. 842; *Gray v. Central R. Co.* 157 N. Y. 483, 52 N. E. 555 (dissenting opinion),—on right to interest upon unliquidated demands from time of demand of payment where amount is ascertainable from fixed market values; *Sloan v. Baird*, 12 App. Div. 481, 42 N. Y. Supp. 38; *Day v. New York C. R. Co.* 22 Hun, 412; *Gray v. Central R. Co.* 89 Hun, 477, 35 N. Y. Supp. 378; *Mansfield v. New York C. & H. R. R. Co.* 114 N. Y. 331, 4 L.R.A. 566, 21 N. E. 735,—holding that interest is not allowable on claim for unliquidated damages for breach of contract unless means are ascertainable for ascertaining amount by computation or otherwise; *Sweeny v. New York*, 69 App. Div. 80, 74 N. Y. Supp. 589, holding that interest does not run on claim against city until report of referee allowing same, where amount was not ascertainable by computation; *Schmitt Bros. v. Boston Ins. Co.* 82 App. Div. 234, 81 N. Y. Supp. 767, holding that interest runs on amount due on insurance policy from sixty days after loss where honest appraisal would have shown loss to amount of policy; *Re Burke*, 117 App. Div. 477, 102 N. Y. Supp. 785, holding that it is only where amount due for breach of contract is incapable of being ascertained by computation that allowance of interest is improper; *Kervin v. Utter*, 120 App. Div. 610, 104 N. Y. Supp. 1061, holding that claim against one of several cotenants for breach of contract to pay his share for drilling oil wells on property draws interest from demand; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417, holding that unliquidated claim against state for breach of contract does not draw interest from filing of petition, where amount is unascertainable; *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. 752; *Lacock v. Parker*, 103 Wis. 161, 79 N. W. 327,—holding that interest from time of demand is allowed upon claim capable of ascertainment by reference to reasonably certain market values of items; *Shafer Fruit & Cold Storage Co. v. E. M. Upton Cold Storage Co.* 133 App. Div. 796, 118 Supp. 8, holding

that, to allow interest on unliquidated demand, amount of claim must be ascertainable by mere computation.

Cited in reference note in 31 A. R. 498, as to when interest is allowable on damages for breach of contract.

Cited in notes in 51 A. D. 278, on allowance of interest; 62 A. D. 137, on right of plaintiff to interest on damages awarded in action for breach of contract; 28 L.R.A. (N.S.) 27, 47, 50, on interest on unliquidated damages; 38 L. ed. U. S. 782, as to when interest is recoverable; 14 E. R. C. 563, on right to collect interest.

— Arising out of contract of employment.

Cited in *Speirs v. Union Drop Forge Co.* 180 Mass. 87, 61 N. E. 825, holding that interest may be allowed from date of writ of assessment of damages for breach of contract of employment to manufacture bicycles for certain period; *Crawford v. Mail & Exp. Pub. Co.* 22 App. Div. 54, 47 N. Y. Supp. 747, holding that interest should not be allowed in action for wrongful discharge of employee brought before expiration of term of employment; *Hand v. Church*, 39 Hun, 303, holding that claims for services as attorney draws interest from presentation and demand of undisputed items; *De Carricarti v. Blanco*, 121 N. Y. 230, 24 N. E. 284, 3 Silv. Ct. App. 63, holding that in action for unliquidated demand for services interest is not act running until demand is made in shape of account showing balance claimed; *Robbins v. Carll*, 93 N. Y. 656, holding that interest is allowable on account for work done after presentation and demand for payment; *Sweeny v. New York*, 173 N. Y. 414, 66 N. E. 101, holding that in action upon contract for work done and material furnished which provides for specific price for each item, interest is allowable from time of demand of payment.

— Arising out of warranty of goods sold.

Cited in *Riss v. Messmore*, 26 Jones & S. 23, 9 N. Y. Supp. 320, holding that interest is not allowable in action brought to recover for breach of warranty of goods sold.

— In action for tort.

Cited in *Johanssen v. The Eloina*, 4 Fed. 573, holding that interest was not allowable on demurrage occasioned by collision between vessels in harbor; *Lackin v. Delaware & H. Canal Co.* 22 Hun, 309, holding that interest is allowable upon value of animal killed on railroad track by negligence of company; *Hood v. Hayward*, 48 Hun, 330, 1 N. Y. Supp. 566, holding that surety on executor's bond is chargeable with interest from date of decree revoking letters issued to executors; *Wilson v. Troy*, 60 Hun, 183, 14 N. Y. Supp. 721, holding that in action for permanent injury to horse, caused by negligence jury may give interest on sum found by them to represent depreciation in value from date of injury; *Sayre v. State*, 123 N. Y. 291, 25 N. E. 163, holding that unliquidated damages arising from tort do not draw interest; *Wilson v. Troy*, 135 N. Y. 96, 31 A. S. R. 817, 18 L.R.A. 449, 32 N. E. 44, 48 N. Y. S. R. 367, holding that interest is allowable by jury, in estimating amount of damages sustained by party through injury to his property caused by negligence.

Profits as measure of damages in action for breach of contract.

Cited in *Bell v. Reynolds*, 78 Ala. 511, 56 A. R. 52, holding that measure of damage for refusal to deliver quantity of guano to be used in raising cotton crop is difference between value of cotton raised where guano was used and value of crop where it was not used; *Wakeman v. Wheeler & W. Mfg. Co.* 101

N. Y. 205, 54 A. R. 676, 4 N. E. 264, holding that prospective profits provable and which would certainly have been realized but for defendant's default are allowable as damages, although amount is uncertain; *Swain v. Schieffelin*, 134 N. Y. 471, 18 L.R.A. 385, 31 N. E. 1025, holding that profits lost and expenses incurred may be recovered for breach of warranty of goods sold for particular purpose.

Cited in reference notes in 42 A. S. R. 129; 93 A. S. R. 478,—on measure of liability for breach of warranty as to quality of seed sowed.

Cited in notes in 60 A. R. 488, on loss of profits as damages; 52 L.R.A. 235, on loss of profits of purchase for special purpose as damages on breach of warranty by vendor; 6 E. R. C. 626, on measure of damages recoverable on breach of a contract.

34 AM. REP. 550, ARTHUR v. HOMESTEAD F. INS. CO. 78 N. Y. 462.

Extent of attorney's power to bind client.

Cited in *Richardson Drug Co. v. Dunagan*, 8 Colo. App. 308, 46 Pac. 227, holding that agreement by attorney not to enforce judgment does not bind client; *Re Neufeld*, 50 Misc. 215, 100 N. Y. Supp. 444, to the point that attorney has no right to compromise pending suit without special authority; *Wood v. New York*, 44 App. Div. 299, 60 N. Y. Supp. 759, holding that attorney has no authority to satisfy judgment except upon payment in full; *Re New York*, 112 App. Div. 160, 98 N. Y. Supp. 331, holding that offer to sell land selected for condemnation at specified price cannot properly be made by attorney without accompanying proof of his authority; *Lewis v. Duane*, 141 N. Y. 302, 36 N. E. 322, holding that attorney cannot compromise rights of client outside of his conduct of action, nor subject him to new cause of action; *Bush v. O'Brien*, 164 N. Y. 205, 58 N. E. 1061, holding that corporation counsel of city has no power to make offer of judgment in action against city; *Herzfeld v. Strauss*, 24 App. Div. 93, 48 N. Y. Supp. 1016, holding that attorney cannot surrender client's right or bind him to any release.

Necessity of reply to new matter in answer.

Cited in *Babcock v. Maxwell*, 21 Mont. 507, 54 Pac. 943; *Avery v. New York C. & H. R. R. Co.* 24 N. Y. S. R. 918, 6 N. Y. Supp. 547; *Springer v. Bien*, 16 Daly, 275, 10 N. Y. Supp. 530,—holding that new matter in answer, not stating counterclaim, is deemed controverted, and may be traversed or avoided in any way; *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828, holding that in action to foreclose mortgage plaintiff may show that discharge thereof set up as defense was made through mistake; *Brophy v. Downey*, 26 Mont. 252, 67 Pac. 312, holding that under code where in action on note answer alleges note was secured by mortgage not foreclosed reply is not necessary; *Bennett v. Agricultural Ins. Co.* 15 Abb. N. C. 234; *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 A. R. 617,—holding that proof in reply to company's claim of breach of warranty and fraud is admissible without reforming contract or asking for equitable relief, in action on life insurance policy; *O'Meara v. Brooklyn City R. Co.* 16 App. Div. 204, 44 N. Y. Supp. 721, holding that in action for personal injuries party may show that release signed by her was procured by fraud; *Sullivan v. Traders' Ins. Co.* 169 N. Y. 213, 62 N. E. 146, to point that evidence of mistake in omitting mention of incumbrance in application for insurance is admissible without pleading, in action on policy; *Wilson*

v. Central Ins. Co. 135 App. Div. 649, 110 N. Y. Supp. 955 (dissenting opinion), on proof of matter in avoidance of defense of statute of limitations.

Limitation of time for commencement of action on policy — Validity of.

Cited in *Goddard v. Casualty Co.* 93 C. C. A. 212, 167 Fed. 750; *Baker v. Baker*, 139 Ill. App. 217,—holding provision in contract that no action is maintainable thereon unless commenced within certain period, valid; *Rogers v. Home Ins. Co.* 35 C. C. A. 402, 95 Fed. 109, to point that stipulation in contract limiting time for commencement of action is valid; *Harrison v. Hartford F. Ins. Co.* 102 Iowa, 112, 47 L.R.A. 700, 71 N. W. 220, holding that provision in insurance policy that no suit thereon shall be sustainable unless commenced within one year is valid; *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478; *Matthews v. American Cent. Ins. Co.* 9 App. Div. 339, 41 N. Y. Supp. 304; *Muse v. London Assur. Corp.* 108 N. C. 240, 13 S. E. 94; *Hocking v. Howard Ins. Co.* 130 Pa. 170, 18 Atl. 614, 47 Phila. Leg. Int. 109, 20 Pittsb. L. J. N. S. 212,—holding that action on insurance policy is barred after one year from accrual of action, where policy so provides; *Kelly v. Supreme Council*, C. M. B. A. 46 App. Div. 79, 61 N. Y. Supp. 394, holding that provision in life insurance policy that no action shall be brought under policy unless commenced within two years from date of death is valid; *Tolmie v. Fidelity & C. Co.* 95 App. Div. 352, 88 N. Y. Supp. 717, holding that provision in indemnity insurance policy that no action can be maintained against company after certain period unless at expiration of such period action is pending against insured is valid; *Hon Sling v. Royal Ins. Co.* 8 Utah, 135, 30 Pac. 307, holding that suit on insurance policy is not barred because of expiration of year referred to in policy where policy also provides that no action shall be maintained until after award.

Cited in reference notes in 86 A. D. 371, on validity of conditions in insurance policy which require as prerequisite of recovery that action be brought thereon in limited time; 2 A. S. R. 572, on what is compliance with condition in insurance policy limiting time for bringing suit.

— Waiver of.

Cited in *McIntyre v. Michigan State Ins. Co.* 52 Mich. 188, 17 N. W. 781, holding that provision in policy of domestic insurance company limiting time for commencement of action is not suspended for period occupied in attempting to sue in foreign jurisdiction; *McArdle v. German Alliance Ins. Co.* 98 App. Div. 594, 90 N. Y. Supp. 485, to point that but slight evidence is required to sustain waiver of limitation clause in insurance policy; *Sullivan v. Prudential Ins. Co.* 172 N. Y. 482, 65 N. E. 268 (reversing 63 App. Div. 280, 71 N. Y. Supp. 525), holding that acceptance of proof of death and policy and assignment of latter by life insurance company soon after death and retention of same does not operate as waiver of provision against action after six months from death.

Cited in note in 22 L. ed. U. S. 557, on waiver of and estoppel as to contracts limiting time within which action must be brought.

— When period commences to run.

Cited in *Traveler's Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L.R.A. 769, 45 N. W. 703, holding that period of limitation of action fixed by policy of insurance runs from date of fire although under other provisions of policy cause of action does not accrue until some time after fire; *Maril v. Home Ins. Co.* 97 Ga. 722, 25 S. E. 189, holding that action brought after expiration of stipulated period of limitation contained in policy is barred though brought within

six months after granting of nonsuit in former action; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507, 20 N. W. 782, holding that period of limitation did not begin to run until sixty days after proofs of loss were furnished in accordance with terms of policy.

Jurisdiction of equity to reform contract.

Cited in note in 3 L.R.A. 189, on jurisdiction of equity to reform written instrument.

Abolishment of distinction between law and equity actions.

Cited in note in 62 A. D. 159, on abolishment of distinction between actions at law and suits in equity.

34 AM. REP. 555, BUEL v. PEOPLE, 7 N. Y. 492.

Homicide as result of commission or attempted commission of other crime.

Cited in *State v. Wells*, 61 Iowa, 629, 47 A. R. 822, 17 N. W. 90, holding that person who unlawfully administers poison without intention to kill is guilty of murder in first degree where death ensues; *People v. Cole*, 2 N. Y. Crim. Rep. 108, holding that killing effected by person engaged in commission of felony is murder in first degree, though act producing death was not intended to kill; *People v. Stacy*, 119 App. Div. 743, 104 N. Y. Supp. 615; *People v. McKeon*, 31 Hun, 449,—holding that person who causes death of another while engaged in assault and battery upon him is guilty of manslaughter in first degree; *People v. Greenwall*, 115 N. Y. 520, 22 N. E. 180, holding that under code killing of any human being by one engaged in commission of felony is murder in first degree; *People v. Sullivan*, 173 N. Y. 122, 39 A. S. R. 582, 63 L.R.A. 353, 65 N. E. 989, 17 N. Y. Crim. Rep. 180, holding that under code in prosecution for murder in first degree case may be submitted to jury on theory of pre-meditated design to take life, and also that killing was done while in commission of felony; *People v. Hunter*, 184 N. Y. 237, 77 N. E. 6, to point that person engaged in commission of rape who resorts to violence which unintentionally produces death is guilty of murder; *State v. Greenleaf*, 71 N. H. 606, 54 Atl. 38, holding that homicide in furtherance of design to commit rape is murder in first degree.

Cited in reference note in 36 A. R. 178, on criminal liability of one unintentionally killing another while attempting to commit a crime.

Cited in notes in 90 A. S. R. 580, on unintentional homicide in perpetrating rape or sodomy; 63 L.R.A. 355, 358, 362, 367, 368, on homicide in commission of felony; 63 L.R.A. 383, on homicide in commission of unlawful acts not felonious.

—Presumption of premeditation in.

Cited in *People v. Milton*, 145 Cal. 169, 78 Pac. 549; *Henry v. State*, 51 Neb. 149, 66 A. S. R. 450, 70 N. W. 924; *Morgan v. State*, 51 Neb. 672, 71 N. W. 788; *Rhea v. State*, 63 Neb. 461, 88 N. W. 789,—holding that under statute deliberate and premeditated malice is presumed from fact that killing was committed while committing or attempting to commit certain felonies; *State v. Greenleaf*, 71 N. H. 606, 54 Atl. 38, holding that to warrant conviction of murder in first degree state must show beyond reasonable doubt that killing was done in malice, and unless done while committing felony, that killing was deliberate and pre-meditated; *People v. Kelly*, 35 Hun, 295, to point that in crime charged, for killing whilst engaged in commission of felony, premeditation, or intent to kill is not necessary ingredient of crime.

Distinction between premeditated and intentional killing.

Cited in *Cook v. State*, 46 Fla. 20, 35 So. 665, on distinction between deliberate and premeditated killing and intentional killing.

Right of review in capital cases.

Cited in *Price v. Territory*, 1 Okla. Crim. Rep. 508, 99 Pac. 157; *Moett v. People*, 85 N. Y. 373,—holding that charge in murder trial not excepted to, cannot be reviewed; *Leighton v. People*, 10 Abb. N. C. 261, holding that denial of motion for new trial on ground of newly discovered evidence, though excepted to cannot be reviewed upon writ of error brought to review conviction.

Duty of court to charge as to degrees of crime.

Cited in *People v. Rego*, 36 Hun, 129, holding that court should charge as to grades of manslaughter, in murder case, where evidence entitled defendant to have question as to whether he had committed murder or manslaughter submitted to jury; *People v. Schleiman*, 187 N. Y. 383, 27 L.R.A.(N.S.) 1075, 80 N. E. 950, 18 A. & E. Ann. Cas. 588, on duty to charge in reference to lower degree of felonious homicide.

34 AM. REP. 561, FLYNN v. EQUITABLE L. INS. CO. 78 N. Y. 568.**Effect of false statements in application upon validity of policy.**

Cited in *Dacey v. Agricultural Ins. Co.* 21 Hun, 83, holding fire insurance company estopped from controverting value of premises as stated in application where its agent was present and examined it at time application was made; *New York L. Ins. Co. v. Russell*, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94, holding that company is bound by knowledge of agent where after being told by applicant that latter had diabetes, agent had him examined by local examiner who told applicant to say he did not have diabetes; *Sternaman v. Metropolitan L. Ins. Co.* 49 App. Div. 473, 65 N. Y. Supp. 674 (dissenting opinion), on effect of false statements in application for life insurance written by agent.

— Where knowingly inserted by company's agent.

Cited in *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 528, 25 S. W. 835, holding that insured is bound to notify company, if after receiving policy of insurance, he discovers agent inserted untruthful answers in application; *Dimick v. Metropolitan L. Ins. Co.* 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291, on effect of untruthful statements in application for policy of life insurance upon validity of policy, where truthful statements were made to examiner who wrote in untruthful ones; *Bentley v. Owego Mut. Ben. Asso.* 1 Silv. Sup. Ct. 177, 5 N. Y. Supp. 223, 23 N. Y. S. R. 470, holding that where application is drawn by company's agent and answers truthfully given by insured, company is bound though incorrect answers are inserted in application by such agent; *Bernard v. United L. Ins. Co.* 17 Misc. 115, 39 N. Y. Supp. 356; *Ames v. Manhattan L. Ins. Co.* 31 App. Div. 180, 62 N. Y. Supp. 759; *Ames v. Manhattan L. Ins. Co.* 40 App. Div. 465, 58 N. Y. Supp. 244, to the point that where insured gives truthful answers and examiner writes untruthful answers in application without insured's knowledge company is bound; *Kenyon v. Knights Templers & M. Mut. Aid Asso.* 48 Hun, 278, holding that life insurance company is estopped from controverting truth of answers written by and at suggestion of its own agent; *O'Brien v. Home Ben. Soc.* 51 Hun, 495, 4 N. Y. Supp. 275, holding life insurance company liable on policy where insured informed agent he had certain disease but agent wrote contrary answer in application; *Alger v. Metropolitan*

L. Ins. Co. 84 Hun, 271, 32 N. Y. Supp. 323, holding that life insurance company cannot defend upon ground that application contains false statements where insured stated them correctly to examiner.

Cited in notes in 77 A. D. 724; 21 L.R.A. 343; 16 L.R.A.(N.S.) 1170; 16 L.R.A.(N.S.) 1215; 107 A. S. R. 111,—on effect of false answer inserted in application for insurance by agent and medical examiners; 16 L.R.A.(N.S.) 1253, 1254, on estoppel because of agent's interpretation to avoid policy void at inception; 20 L. ed. U. S. 617, on effect of agent's filing in untrue answers in application without knowledge of assured.

Distinguished in Wilkens v. Mutual Reserve Fund Life Asso. 54 Hun, 294, 7 N. Y. Supp. 589, holding that recovery cannot be had on policy if application contains false statements even though insured informed agent correctly where certificate of insurance makes acts of agent acts of insured.

— **When inserted by mistake of agent.**

Cited in Mutual Ben. L. Ins. Co. v. Robinson, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723; Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 A. R. 617; Grattan v. Metropolitan L. Ins. Co. 92 N. Y. 274, 44 A. R. 372; Bennett v. Agricultural Ins. Co. 106 N. Y. 243, 12 N. E. 609 (affirming 15 Abb. N. C. 234); Sternaman v. Metropolitan L. Ins. Co. 170 N. Y. 13, 88 A. S. R. 626, 57 L.R.A. 318, 62 N. E. 763; Farmers' Ins. Co. v. Williams, 39 Ohio St. 584, 48 A. R. 474,—holding that insurance company is bound by mistakes made by soliciting agent in filling out application.

Right of insured to return of premium where agent inserts false statements in application.

Cited in Bennett v. Massachusetts Mut. L. Ins. Co. 107 Tenn. 371, 64 S. W. 758, holding that assured may, upon discovery of insertion of incorrect answers in application for insurance by medical examiner, sue for rescission of policy and return of premiums.

Necessity of return of premium where insurance policy was obtained by fraud.

Cited in Dowd v. American F. Ins. Co. 16 N. Y. S. R. 342, 1 N. Y. Supp. 31; Weddington v. Piedmont F. Ins. Co. 141 N. C. 234, 54 S. E. 271, 8 A. & E. Ann. Cas. 497,—holding that fire insurance company is not bound upon notice of breach of condition of policy, to declare policy forfeited or to do anything to make forfeiture effectual; Supreme Lodge, K. H. v. Metcalf, 15 Ind. App. 135, 43 N. E. 893 (dissenting opinion), on necessity of returning premium before rescission of life insurance policy obtained through false statements.

Effect of failure to produce evidence in party's possession.

Cited in McGuire v. Hartford F. Ins. Co. 7 App. Div. 575, 40 N. Y. Supp. 300, holding that every inference warranted by evidence may be indulged against party who knowing truth of matter and having evidence in possession fails to produce it.

Parol evidence to show mistake.

Cited in note in 11 E. R. C. 227, on admissibility of parol evidence to show mistake in written contract.

34 AM. REP. 567, HURD v. KELLY, 78 N. Y. 588.

Want of consideration as defense to action on contract.

Cited in Wallace v. Hood, 89 Fed. 11, holding that stockholder, by purchase of

shares in national bank which had conducted business for six years, cannot defend against assessment on ground that original stock was not paid in full; *Skordal v. Stanton*, 89 Minn. 511, 95 N. W. 449; *Sickels v. Herold*, 15 Misc. 116, 36 N. Y. Supp. 488 (affirming 11 Misc. 583; 32 N. Y. Supp. 1083),—holding that directors of bank who have given notes to make good impairment of capital in order that it might continue in business, cannot set up want of consideration; *State Bank v. Kirk*, 216 Pa. 452, 65 Atl. 932, holding that notes made by director of bank with impaired capital to be held by bank in order that impairment of capital would not appear, and to be paid out of profits, are made upon sufficient consideration.

Distinguished in *Newton Nat. Bank v. Newbegin*, 33 L.R.A. 727, 20 C. C. A. 339, 40 U. S. App. 1, 74 Fed. 135, holding that insolvency of corporation will not prevent cancellation of stock subscription for fraud if subscriber acted with due diligence in discovering fraud and before any considerable indebtedness was contracted.

Estoppel by silence.

Cited in *Forbes v. McCoy*, 24 Neb. 702, 40 N. W. 132, holding that party who knowingly permits another to purchase land and expend money thereon, will not afterwards be permitted to claim ownership as against such purchaser; *Work v. Prall*, 26 Pa. Super. Ct. 104, holding that party is only estopped when his conduct or representations induce action in another which cannot be withdrawn from without loss.

Compliance with contract when provisions are in disjunctive.

Cited in *Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. 83, to point that where condition of contract is in disjunctive it may be complied with by performance of either.

When party signing contract is bound.

Cited in *Naylor v. Stene*, 96 Minn. 57, 104 N. W. 685, holding that party who signs instrument and delivers it is bound although it is not executed by all parties for whose signature it was prepared where obligee is not aware of condition and no loss of remedy as to contribution results from failure of other parties to sign.

34 AM. REP. 572, SINGER MFG. CO. v. GRAHAM, 8 OR. 17.

What constitutes a conditional sale.

Cited in *Hays v. Jordan*, 85 Ga. 741, 9 L.R.A. 373, 11 S. E. 833; *Herring-Marion Co. v. Smith*, 43 Or. 315, 72 Pac. 704,—holding that contract is one of conditional sale though by it certain “monthly rent” is to be paid before title will pass.

Cited in notes in 40 A. R. 22, on what constitutes conditional sale; 12 L.R.A. 447, on sale of personal property on instalment plan.

Right of conditional vendee to sell.

Cited in *Singer Mfg. Co. v. Bullard*, 62 N. H. 129, holding that title to machine sold and delivered upon agreement that certain sum be paid monthly until certain amount was paid does not pass until whole sum is paid; *Christenson v. Nelson*, 38 Or. 473, 63 Pac. 648, holding that under conditional sale contract vendee may transfer his interest and such purchaser may compel performance of contract by vendor; *Schneider v. Lee*, 33 Or. 578, 17 Pac. 269; *Russell v. Harkness*, 4 Utah, 197, 7 Pac. 865,—holding that conditional vendee of article cannot convey title to purchaser as against rights of conditional vendor.

Cited in reference note in 44 A. R. 598, on title acquired by bona fide purchaser of personalty from one holding under unrecorded conditional sale.

Cited in notes in 37 A. R. 668, on interest of vendee under conditional sale; 3 A. S. R. 198, on effect of purchaser of chattels from vendee in conditional sale.

Necessity of judge's certificate to case on appeal.

Cited in *Connell v. McLoughlin*, 29 Or. 230, 42 Pac. 218, holding that original stenographic evidence cannot be considered on appeal unless certified to by judge.

When foreign corporation must have power of attorney recorded where agent is located.

Cited in *New England Mortg. Secur. Co. v. Vader*, 28 Fed. 265, holding that it is not necessary for foreign corporation not engaged in insurance, banking, express or exchange business, to appoint attorney, before doing business in another state; *Pacific States Sav. Loan & Bldg. Co. v. Hill*, 40 Or. 280, 91 A. S. R. 477, 56 L.R.A. 163, 67 Pac. 103, holding that foreign corporation making loans on real estate and pledges of its own stock is not "bank corporation" under statute requiring such corporation to record power of attorney in each county where it has resident agent.

Sufficiency of title of statute.

Cited in *State ex rel. Fitzgerald v. Moore*, 37 Or. 536, 62 Pac. 26, on constitutionality of act which deprives public officer of fees without mentioning his office, either in title or body of act.

34 AM. REP. 575, DICE v. WILLAMETTE TRANSP. & LOCKS CO. 8 OR. 60.

Liability of carrier for injury to passenger.

Cited in *Alabama G. S. R. Co. v. Coggins*, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455; *Dodge v. Boston & B. S. S. Co.* 148 Mass. 207, 12 A. S. R. 541, 2 L.R.A. 83, 19 N. E. 373; *Abbott v. Oregon R. Co.* 46 Or. 549, 114 A. S. R. 885, 1 L.R.A.(N.S.) 851, 80 Pac. 1012, 7 A. & E. Ann. Cas. 961, holding that passenger may leave car at intervening station for reasonable time and if injury occurs to him on company's premises he may recover.

Cited in reference note in 2 A. S. R. 40, on rights of passengers on freight trains.

Cited in notes in 64 A. D. 524, on duty of carriers of passengers by steamships; 1 L.R.A. 158, on negligence regarding stations; 15 L.R.A. 399, on rights and liabilities of parties when passenger temporarily leaves car.

34 AM. REP. 578, FINDLEY v. HILL, 8 OR. 247.

Release of surety—By extension of time.

Cited in *Bunn v. Commercial Bank*, 98 Ga. 647, 26 S. E. 63, holding that agreement to extend time of payment for indefinite period does not release surety; *Cellers v. Meachem*, 49 Or. 186, 10 L.R.A.(N.S.) 133, 89 Pac. 426, 13 A. & E. Ann. Cas. 997; *Hoffman v. Habighorst*, 49 Or. 379, 89 Pac. 952,—holding that surety is discharged from liability where payee of note extends time for payment without surety's consent.

—Effect of failure to sue principal at surety's request.

Cited in *Rockwell v. Portland Sav. Bank*, 39 Or. 241, 64 Pac. 388; *White Am. Rep. Vol. XVII.—54.*

v. Savage, 48 Or. 604, 87 Pac. 1040,—holding that failure of creditor to proceed against principal debtor on request of surety does not release latter.

Cited in reference note in 47 A. R. 304, on creditor's neglect to sue principal as discharge of surety.

Parol evidence as to liability of parties to note.

Cited in Hoffman v. Habighorst, 38 Or. 201, 53 L.R.A. 908, 63 Pac. 610, holding that true relation of parties to note may be shown by parol as against holder with knowledge of facts.

34 AM. REP. 581, MORELAND v. BRADY, 8 OR. 303.

Effect of misdescription of property.

Cited in Collins v. Capps, 235 Ill. 560, 126 A. S. R. 232, 85 N. E. 934; Whitcomb v. Rodman, 156 Ill. 116, 47 A. S. R. 181, 28 L.R.A. 149, 40 N. E. 553,—holding that false description in will may be stricken out where sufficient remains to identify premises intended to be devised; Black v. Richards, 95 Ind. 184, holding that description of land in will not naming state or county where located may be identified by parol evidence; Pate v. Bushong, 161 Ind. 533, 100 A. S. R. 287, 63 L.R.A. 593, 69 N. E. 291; Seebrook v. Fedawa, 33 Neb. 413, 29 A. S. R. 488, 50 N. W. 270,—holding that error in description of subject-matter in will does not operate to avoid will, if sufficient remains to show with reasonable certainty what was intended; Huberman v. Evans, 46 Neb. 784, 65 N. W. 1045, holding that general description of premises in petition to sell infant's land, as all real estate of infant in state is not valid for indefiniteness; Portland Trust Co. v. Beatie, 32 Or. 305, 52 Pac. 89, to point that where testator misdescribes estate as to locality such description will not defeat intention of testator where sufficient appears on face of will to show description was mistake.

Cited in reference notes in 39 A. R. 61, on effect of partially false description in mortgage of realty; 41 A. R. 493, on construction of will when there is mistake in description of land devised; 29 A. S. R. 492, on sufficiency of description in wills.

Cited in notes in 46 A. R. 72, on admissibility of parol evidence to identify land described in devise; 9 L.R.A. 552, on dedication of land by platting and sale of lots; 6 L.R.A.(N.S.) 954, on correction of misdescription of land in will in case of patent ambiguities and parol proof; 6 L.R.A.(N.S.) 955, on testator's relations, environment, and estate as affecting misdescription of land in will; 6 L.R.A.(N.S.) 975, on correction of misdescription of land in will in cases of devises without ownership; 14 E. R. C. 815, as to what lands will pass by deed or will under general description with addition of words particularly denoting certain subject comprised in general description.

34 AM. REP. 585, GERRISH v. GERRISH, 8 OR. 351.

Construction of statutes adopted from other state.

Cited in Hardenbergh v. Ray, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305; Barmore v. State Medical Examiners, 21 Or. 301, 28 Pac. 8,—holding that decisions of courts construing statute where enacted will be followed here where statute of another state is adopted here.

Validity of will not providing for children.

Cited in Boman v. Boman, 1 C. C. A. 274, 7 U. S. App. 63, 49 Fed. 329, holding that clause in will devising "to each of my heirs at law one dollar"

will not take will out of operation of statute providing against leaving children unprovided for; *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598, holding that under statute providing that if testator leave child at his death not named or provided for in his will, he shall be deemed to have died intestate, parol proof is inadmissible to show that by devise to wife he intended to provide for child; *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373, holding that provision for all of testator's children as class, without expressly naming them, is sufficient; *Neal v. Davis*, 53 Or. 423, 99 Pac. 69, holding that testator, leaving all his property to wife for life with power to sell for benefit of herself and her heirs, dies intestate as to children.

Cited in reference note in 17 A. S. R. 260, on rights of child whose name is omitted from parent's will.

Cited in note in 39 A. D. 740, 743, on rights of child or issue unintentionally omitted from will.

Effect of referring in attested document to unattested document.

Cited in *Re Soher*, 78 Cal. 477, 21 Pac. 8, to point that attested document may refer to documents which were not attested as part thereof; *Nightingale v. Phillips*, 29 R. I. 175, 72 Atl. 220, holding that papers referred to in will, if there is no doubt as to their existence and identity, are part thereof.

Cited in reference note in 49 A. R. 454, on sufficiency of reference in will to other papers to constitute them part of will.

Cited in notes in 68 L.R.A. 374, on identification of extrinsic document by reference in will; 85 A. D. 762; 25 E. R. C. 465,—on incorporating paper in will by reference.

34 AM. REP. 587, SPRAGUE v. FLETCHER, 8 OR. 367.

Effect of waiver of notice of protest.

Cited in *Blatchford v. Harris*, 115 Ill. App. 160, holding that waiver of notice of protest does not waive demand of payment; *Bank of Montpelier v. Montpelier Lumber Co.* 16 Idaho, 730, 102 Pac. 685, holding that waiver of protest and notice of protest waives presentment and demand for payment.

Cited in reference note in 51 A. R. 536, on sufficiency and effect of waiver of protest of negotiable instrument.

34 AM. REP. 590, STATE v. DUCKER, 8 OR. 394.

What constitutes larceny.

Cited in reference notes in 39 A. R. 194, on conspiracy to induce one to intrust money to conspirators to bet on a game, without possibility of winning, as larceny; 80 A. S. R. 38, on keeping overpayments as larceny.

Cited in notes in 88 A. S. R. 579, on larceny of money given to another for purpose of having it changed; 57 A. D. 280; 88 A. S. R. 599, 600; 52 L.R.A. 138, 139,—on larceny of money or property delivered by mistake.

Disapproved in *People v. Miller*, 4 Utah, 410, 11 Pac. 514, holding that where person took property innocently, under mistake of fact, and afterwards converted it with felonious intent, he is not guilty of larceny.

34 AM. REP. 592, LICHTENSTEIN v. MELLIS, 8 OR. 464.

What constitutes infringement of trademark.

Cited in *Miakell v. Prokop*, 58 Neb. 628, 79 N. W. 552, holding that trade

name or sign is not infringement of another, if ordinary attention of customers would disclose difference.

Cited in reference note in 1 A. S. R. 421, as to when right to use trademark is protected.

Cited in notes in 47 A. D. 295, on name of patented article after patent expires; 85 A. S. R. 95, on descriptive names as trademarks; 85 A. S. R. 115, on trade sign as trademark; 85 A. S. R. 118; 37 A. R. 365, 594,—on right to trademark in figures, letters, and words; 15 L.R.A.(N.S.) 630, on relief against infringement of tradename not used in connection with manufactured article.

34 AM. REP. 597, ST. JOSEPH CHURCH v. TAX ASSESSORS, 12 R. I. 19.

What property exempt from taxation.

Cited in *Massenburg v. Grand Lodge*, F. & A. M. 81 Ga. 212, 7 S. E. 636, holding that lodge building of grand lodge of masons of Georgia is not exempt from taxation; *Broadway Christian Church v. Com.* 112 Ky. 488, 66 S. W. 32; *Third Congregational Soc. v. Springfield*, 147 Mass. 396, 18 N. E. 68,—holding that parsonage erected for religious society on its land near church is not exempt from taxation; *Brown University v. Granger*, 19 R. I. 704, 36 L.R.A. 847, 36 Atl. 720, to point that it is to be presumed that legislature does not intend to deprive state of any part of its sovereign power unless intent to do so is clearly expressed or arises from necessary implication; *Re Pawtucket*, 24 R. I. 86, 52 Atl. 679, holding that land and buildings thereon used in part for religious worship and in part for residence of sisters of mercy who teach in parochial schools is not exempt from taxation.

Cited in notes in 9 L.R.A. 629, as to what property comes under exemption from taxation; 19 L.R.A. 291, on effect of secular use of property of religious association upon its right to exemption from taxation.

Construction of term "public schools."

Cited in *State ex rel. Moodie v. Bryan*, 50 Fla. 293, 39 So. 929, on construction of term "public schools" as used in statutes as being comprehensive and not narrowed or restricted.

34 AM. REP. 598, WAKEFIELD v. NEWELL, 12 R. I. 75.

Liability for injury by surface water.

Cited in *Bernard v. Woonsocket Bobbin Co.* 23 R. I. 581, 51 Atl. 209, holding that party is liable for damage caused by collecting surface water on his land and causing it to flow in volume upon another's.

Cited in note in 21 L.R.A. 603, on correlative rights as to casting down surface water in improving property.

—Liability of municipality.

Cited in *Burford v. Grand Rapids*, 53 Mich. 98, 51 A. R. 105, 17 N. W. 571, to point that city is not liable to owner of land for damages caused by turning surface water onto land by grading street; *Weis v. Madison*, 75 Ind. 241, 39 A. R. 135; *Adams v. Oklahoma City*, 20 Okla. 519, 95 Pac. 975; *Almy v. Coggeshall*, 19 R. I. 549, 36 Atl. 1124,—holding city not liable to owner of land abutting on street caused by surface water turned onto land by change of grade of street; *Smith v. Tripp*, 13 R. I. 152; *Murray v. Allen*, 20 R. I. 263, 38 Atl. 497,—holding that town is not liable to owner of land abutting on highway

for injury caused by surface water turned onto land in consequence of allowing highway to remain out of repair; *O'Donnell v. White*, 24 R. I. 483, 53 Atl. 633, holding that for escape of natural flow of surface water from highway onto adjacent land, by reason of filling of highway, no action will lie; *Willoughby v. Allen*, 25 R. I. 531, 56 Atl. 1109; *Johnson v. White*, 26 R. I. 207, 65 L.R.A. 250, 58 Atl. 658,—holding city liable for damages caused by discharge of surface water upon party's land; *Champion v. Crandon*, 84 Wis. 405, 19 L.R.A. 856, 54 N. W. 775, holding that town has right to change natural flow of surface water by improvements, even though such water is thereby caused to flow upon adjoining lands.

Cited in notes in 35 A. R. 543, on municipal liability for flowing private lands; 30 A. S. R. 391, on municipal liability for interference with surface waters by grading streets; 65 L.R.A. 254, on duty of municipality to care for surface water on raising grade of street; 65 L.R.A. 259, on duty of municipality to care for surface water upon gathering it in body; 41 L. ed. U. S. 839, on drainage of surface water.

Sufficiency of complaint for municipal negligence.

Cited in note in 59 L.R.A. 248, on sufficiency of general allegations of municipal negligence in regard to defective or dangerous streets or highways.

34 AM. REP. 600, ELIOTT v. GOWER, 12 R. I. 79.

Power of married woman to contract in reference to separate estate.

Cited in *Heal v. Niagara Oil Co.* 150 Ind. 483, 50 N. E. 482, holding that married woman may make lease of her lands to gas and oil company for purpose of operating gas wells without her husband joining in lease; *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567, holding that married woman may bind her statutory personal separate estate by executory contract expressly charging estate by instrument creating liability; *Dean v. Rounds*, 18 R. I. 436, 27 Atl. 515, to point that married woman may charge separate estate for payment of debts incurred for its benefit.

Cited in reference notes in 37 A. R. 817, on liability of married woman's estate for goods purchased; 9 A. S. R. 326, on married woman's right to convey or encumber her equitable separate estate.

Cited in note in 30 A. D. 240, on power of feme covert over separate estate in absence of statutory regulation.

34 AM. REP. 603, KING PHILIP MILLS v. SLATER, 12 R. I. 82.

Right of party first in default to maintain action for subsequent breach of contract.

Cited in *Rice v. Fidelity & D. Co.* 43 C. C. A. 270, 103 Fed. 427; *H. D. Williams Cooperage Co. v. Scofield*, 53 C. C. A. 23, 115 Fed. 119; *National Surety Co. v. Long*, 60 C. C. A. 623, 125 Fed. 887,—holding that person who commits first substantial breach of contract cannot maintain action against other contracting party for subsequent breach; *Phenix Ins. Co. v. Guarantee Co. of N. A.* 53 C. C. A. 360, 115 Fed. 964 (dissenting opinion), on right of party who commits first breach of contract to maintain action against other contracting party for subsequent breach; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *McDonald v. Kansas City Bolt & Nut Co.* 8 L.R.A.(N.S.) 1110, 79 C. C. A. 298, 149 Fed. 360,—holding that in entire contract for successive deliveries of goods sold vendor's breach in earlier

deliveries may relieve vendee from liability for subsequent deliveries if prompt notice is given by latter; *Griggs v. Moore*, 168 Mass. 354, 47 N. E. 128, to point that party is entitled to stand upon contract made in absence of acts or conduct which would render it unjust to take advantage of condition precedent; *Cresswell Ranch & Cattle Co. v. Martindale*, 11 C. C. A. 33, 27 U. S. App. 277, 63 Fed. 84; *Ohio Valley Buggy Co. v. Anderson Forging Co.* 168 Ind. 593, 81 N. E. 574, 11 A. & E. Ann. Cas. 1045; *Rugg v. Moore*, 110 Pa. 234, 17 W. N. C. 183, 1 Atl. 320, 16 Pittsb. L. J. N. S. 158, 43 Phila. Leg. Int. 27,—holding that if by contract goods are to be paid for at each delivery, refusal to pay for any delivery, without sufficient cause, authorizes rescission of contract; *West v. Bechtel*, 125 Mich. 144, 51 L.R.A. 791, 84 N. W. 69, holding that mere refusal to pay for delivery of instalment of wood upon delivery under contract for certain quantity to be delivered in carload lots and paid for at time of delivery does not justify seller in repudiating contract; *Morrison v. Leiser*, 73 Mo. App. 95, holding that purchaser of goods to be delivered in two instalments may rescind as to last instalment when goods delivered in first instalment are inferior in quality; *Providence Coal Co. v. Coxe Bros.* 19 R. I. 380, 35 Atl. 210, holding that neglect or refusal to take shipments of coal for one month made under contract for monthly deliveries of certain quantity justifies seller in rescinding contract; *Harris Lumber Co. v. Wheeler Lumber Co.* 88 Ark. 491, 115 S. W. 168, holding that vendee in default for instalment of purchase money cannot insist upon performance by vendor as condition precedent to his performance.

Cited in reference note in 54 A. R. 159, on contract of sale by successive deliveries and payments as affected by default as to one or more.

When contracts are severable.

Cited in notes in 54 A. R. 624, 630, on whether contract is entire or severable; 18 E. R. C. 617, on independent and dependent covenants.

Remedy for breach of continuing contract.

Cited in notes in 59 A. S. R. 278, as to when complete performance is essential to cause of action ex contractu on entire contract; 30 L.R.A. 73, on right to rescind or abandon continuing contract because of other party's default; 33 A. R. 753; 23 E. R. C. 550,—on action for damages for breach of contract of sale when deliveries are to be made in instalments.

34 AM. REP. 612, KENT v. GERHARD, 12 R. I. 92.

Right to vendor's lien.

Cited in *Reynolds v. Hennessy*, 17 R. I. 169, 20 Atl. 307, to point that vendor of land is entitled to lien for unpaid purchase price.

Cited in reference note in 3 A. S. R. 721, on subsistence of vendor's liens against married women.

Cited in notes in 4 A. S. R. 704, on lien for unpaid purchase money as equitable mortgage; 137 Am. St. R. 186, 205, on waiver of vendor's lien.

34 AM. REP. 615, KELLEY v. SILVER SPRING CO. 12 R. I. 112.

Assumption of risk of employment by servant.

Cited in *McGrath v. New York & N. E. R. Co.* 15 R. I. 95, 22 Atl. 927, to point that servant who is ignorant of special risk cannot be held to have assumed it; *King v. Interstate Consol. R. Co.* 23 R. I. 583, 70 L.R.A. 924, 51 Atl. 301, holding that servant employed to remove snow from railroad tracks

in open country assumes risk that feet may be injured by freezing as incidental to employment; *Collins v. Harrison*, 25 R. I. 489, 64 L.R.A. 156, 56 Atl. 678; *Dalton v. Rhode Island*, 25 R. I. 574, 57 Atl. 383,—holding that in action by servant against master for negligence, complaint should negative assumption of known risk or state excuse for continuing work if known.

Cited in reference note in 1 A. S. R. 631, on assumption by servant of risk of defects in machinery or appliances.

—Effect of knowledge of risk.

Cited in *Umbach v. Lake Shore & M. S. R. Co.* 83 Ind. 191; *Disano v. New England Steam Brick Co.* 20 R. I. 452, 40 Atl. 7,—holding that servant takes upon himself all obvious risks incident to employment where with knowledge of danger he continues in employment; *Schroeder v. Michigan Car Co.* 56 Mich. 132, 22 N. W. 220, holding that workman who is injured by exposed cogs of planing machine, with danger of which he was familiar, cannot recover for injury; *Gaffney v. New York & N. E. R. Co.* 15 R. I. 456, 7 Atl. 284, holding that brakeman who was injured while climbing up side of moving car by striking lumber pile which he knew was alongside track, cannot recover; *Henson v. Beckwith*, 20 R. I. 165, 78 A. S. R. 847, 38 L.R.A. 716, 37 Atl. 702, to point that one who works exposed to manifest danger cannot look to his employer if he is injured; *McGar v. National & P. Worsted Mills*, 22 R. I. 347, 47 Atl. 1092; *Baumler v. Narragansett Brewing Co.* 23 R. I. 430, 50 Atl. 841,—holding that when servant consents to work in given place, knowing and appreciating danger, he assumes risk incident to employment; *Day v. Achron*, 23 R. I. 627, 50 Atl. 654, holding that minor injured by being caught in machinery of laundry where she worked could not recover therefor where she knew of danger and how to avoid it.

Cited in reference note in 26 A. S. R. 52, on liability of master for defective machinery of which defect servant is ignorant.

Cited in note in 4 L.R.A. 53, on servant's continuance in employment after knowledge of danger as assumption of risk.

—Effect of master's promise to remedy defect.

Cited in *Swensen v. Bender*, 51 C. C. A. 627, 114 Fed. 1, to point that servant does not necessarily assume risk from obvious danger by remaining in employment where induced to do so by assurances that it would be remedied.

Liability for injury to servant by defective appliances.

Cited in *Guedelhofer v. Ernsting*, 23 Ind. App. 188, 55 N. E. 113, holding that employer was not chargeable with actionable negligence on account of his failure to place guards over revolving knives of wood jointing machine, where danger was obvious; *Bajus v. Syracuse, B. & N. Y. R. Co.* 103 N. Y. 312, 57 A. R. 723, 8 N. E. 529, holding that railroad company is not liable for accident causing injury to servant, though accident would not have occurred had more powerful engine been employed; *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204, holding that servant who was injured by defective elevator, of which defects he had no knowledge, may recover; *McDonald v. Postal Teleg. Co.* 22 R. I. 131, 46 Atl. 407, holding that jury was justified in finding telegraph lineman was not guilty of contributory negligence in not inspecting crossarm on pole to discover defects before placing his weight upon it.

Cited in reference notes in 1 A. S. R. 330; 32 A. S. R. 827,—on duty of master to furnish servant safe machinery; 27 A. S. R. 285, on master's liability for defective machinery; 27 A. S. R. 638, on master's duty to furnish

machinery in general use; 43 A. S. R. 798, on employer's right to use machinery in general use.

Cited in notes in 92 A. D. 218, on duty of employer to furnish safe premises and conditions in and under which to work; 54 A. R. 726, on duty of master as to appliances.

34 AM. REP. 626, BUTCHER v. PROVIDENCE GAS CO. 12 R. I. 149.

Liability of gas company for injury by escaping gas.

Cited in *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547, holding that whether gas company has used due care in discovering and repairing brake in its pipes is question for jury; *Aurora Gaslight Co. v. Bishop*, 81 Ill. App. 493, holding that gas company is liable to person whose property is injured by gas escaping from its pipes because of its failure to repair breaks, whether caused by its own fault or that of another; *Sipple v. Laclede Gaslight Co.* 125 Mo. App. 81, 102 S. W. 608, holding that in action against gas company for damages caused by negligence in permitting gas to escape, prima facie case is made out by showing break in main and consequent escape of gas.

Cited in reference notes in 28 A. S. R. 205, on liability of gas companies for negligence; 76 A. S. R. 176, on negligence in escape of gas.

Cited in notes in 70 A. D. 488, on care required of gas company in its business; 29 L.R.A. 338, 339, 341, on liability for negligence in escape and explosion of gas; 29 L.R.A. 343, 344, on evidence as to negligence in escape and explosion of gas; 29 L.R.A. 356, on questions for and instructions to jury in actions for negligence in escape and explosion of gas; 29 L.R.A. 358, on effect of negligence of third person in escape and explosion of gas; 15 L.R.A. (N.S.) 538, on liability for injury by escape of gas stored on one's premises; 10 L.R.A. (N.S.) 891, on liability for injury to trees by gas escaping from pipes or mains; 15 L.R.A. (N.S.) 959, on liability for turning steam or other dangerous vapors or gases into sewer.

Liability of town for injury by obstructions in highway.

Cited in *Seamons v. Fitts*, 20 R. I. 443, 40 Atl. 3, holding that town is bound to exercise supervision over making excavations which it permits in its highways.

Care required of person using dangerous instrument.

Cited in *Paden v. Van Blaricum*, 181 Mo. 117, 79 S. W. 1195 (affirming 100 Mo. App. 185; 74 S. W. 124), holding that degree of care required from person using dangerous instrument increases with degree of danger.

34 AM. REP. 628, BENNETT v. LOVELL, 12 R. I. 166.

Liability for injury by fright of horse by object in street.

Cited in *Bostock-Ferari Amusement Co. v. Broeksmith*, 34 Ind. App. 566, 107 A. S. R. 260, 73 N. E. 281, holding that owner of docile bear is not liable to person who was injured by kick from horse frightened at bear on street.

Cited in notes in 73 A. D. 410, on duty of person transporting unusual machinery over highway to warn and assist other travelers; 48 A. S. R. 380, on unusual machinery in road; 10 L.R.A. 475, on municipal liability for damages by horses frightened by obstruction in street; 33 L. ed. U. S. 335, on

liability of municipalities and individuals for obstructions or nuisances in street or want of repair thereof.

34 AM. REP. 631, GOODELL v. FAIRBROTHER, 12 R. I. 233.

What constitutes a conditional sale.

Cited in *Carpenter v. Scott*, 13 R. I. 477, holding that contract, purporting to be lease of personalty by which upon payment of certain sum in instalments title passes to lessee, is conditional sale.

Cited in reference note in 2 A. S. R. 579, on effect of contracts of sale or lease providing for payments in instalments.

Cited in notes in 94 A. S. R. 251, on distinction between conditional sale and lease; 12 L.R.A. 447, on sale of personal property on instalment plan.

Right of conditional vendee to transfer title.

Cited in *Russell v. Harkness*, 4 Utah, 197, 7 Pac. 865; *Woods v. Nichols*, 21 R. I. 537, 48 L.R.A. 773, 45 Atl. 548,—holding that conditional vendee cannot convey title to purchaser as against conditional vendor.

Cited in note in 37 A. R. 668, on interest of vendee under conditional sale.

Right to new trial because of errors at trial.

Cited in *Collier v. Jenks*, 19 R. I. 493, 34 Atl. 998; *Agulino v. New York, N. H. & H. R. Co.* 21 R. I. 263, 43 Atl. 63; *Ryer v. Hyde*, 21 R. I. 485, 44 Atl. 719; *Clark v. Corey*, 24 R. I. 137, 62 Atl. 811,—holding that party is not necessarily entitled to new trial because of errors committed during jury trial.

Attachment of property held under conditional sale.

Cited in reference notes in 36 A. R. 511, on right of creditors to seize chattels sold on credit, title to remain in vendor until paid for; 68 A. S. R. 675, on liability to attachment of property held under conditional sale.

34 AM. REP. 635, HUNT v. JONES, 12 R. I. 265.

Law governing contracts.

Cited in *Davis v. Tandy*, 107 Mo. App. 437, 81 S. W. 457, holding that parties will be presumed to select place which recognizes their contract as valid instead of place of performance where contract will be void; *Rauen v. Prudential Ins. Co.* 129 Iowa, 725, 106 N. W. 198, on statutes affecting actions on insurance contracts made in other states as referring only to matters of remedy and procedure; *Emery v. Burbank*, 163 Mass. 326, 47 A. S. R. 456, 28 L.R.A. 57, 39 N. E. 1026, holding oral agreement to make will not enforceable here where statute requires writing, though valid in foreign state where made.

Cited in notes in 3 L.R.A. 524, on when contract is governed by law of place of performance; 19 L.R.A. 793, on conflict of laws as to statute of frauds; 64 L.R.A. 122, on conflict of laws as to statute of frauds as between law of forum and substantive law of contract; 5 E. R. C. 867, on universal validity of contract valid where made.

—Of married woman.

Cited in *Carey v. Mackey*, 82 Me. 516, 17 A. S. R. 500, 9 L.R.A. 113, 20 Atl. 84, holding contract made, delivered and partly performed here between husband and wife for her separate support enforceable here though prohibited in foreign state where both reside; *F. B. Hauck Clothing Co. v. Sharpe*,

83 Mo. App. 385, holding married woman bound upon accommodation note made here where disability removed, though incapacitated in foreign state where payable.

Place of contract.

Cited in *Perry v. Mount Hope Iron Co.* 15 R. I. 380, 2 A. S. R. 902, 5 Atl. 632, holding contract made here upon delivery of telegram for transmission to another state where contract to be performed.

Cited in notes in 99 A. D. 670, on where contract for sale of personality is deemed to have been made; 55 A. S. R. 50, on place of performance of contract for sale of personality.

Distinguished in *Windward v. Lincoln*, 23 R. I. 476, 64 L.R.A. 160, 51 Atl. 106, holding relation of principal and agent created in state where broker first accepted order transmitted from this state by telephone or letter.

34 AM. REP. 638, CARPENTER v. McLAUGHLIN, 12 R. I. 270.

Liability of indorser of note before inception.

Cited in *Sawyer v. Brownell*, 13 R. I. 141, 43 A. R. 19, to point that person who indorses note payable to another prior to issue is liable as joint maker; *Atwood v. Lester*, 20 R. I. 660, 40 Atl. 866, holding that knowledge of payee of note of relationship between person indorsing note payable to another before issue does not affect liability of such indorser; *Jackson Bank v. Irons*, 18 R. I. 718, 30 Atl. 420; *McLean v. Bryer*, 24 R. I. 599, 54 Atl. 373; *Downey v. O'Keefe*, 26 R. I. 571, 59 Atl. 929,—holding that prior to negotiable instrument act one who indorsed note payable to another before its issue was liable to payee as joint maker.

Cited in reference note in 39 A. R. 101, on admissibility of parol evidence to vary the apparent contract of indorsement of negotiable instrument before utterance.

Cited in notes in 72 A. S. R. 679, on effect of indorsement by stranger before delivery; 18 L.R.A. 33, on liability of stranger who indorses commercial paper before delivery.

Liability of successive endorser of note.

Cited in *Crompton v. Spencer*, 20 R. I. 330, 38 Atl. 1002, holding that in absence of agreement affecting liability of successive indorsers their liability is determined by order in which names appear on note.

Cited in note in 4 E. R. C. 549, on order of liability of parties to bill or note.

34 AM. REP. 640, SHURTLEFF v. MILLARD, 12 R. I. 272.

Liability of infant on contracts.

Cited in *Dube v. Beaudry*, 150 Mass. 448, 15 A. S. R. 228, 6 L.R.A. 146, 23 N. E. 222, holding that infant who agreed to work for creditor of deceased father one half of agreed wages to be retained by creditor to apply on father's debt, may at majority sue for wages applied on debt; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, holding that infant who has purchased unnecessary article may rescind contract and recover money paid; *O'Rourke v. John Hancock Mut. L. Ins. Co.* 23 R. I. 457, 91 A. S. R. 643, 57 L.R.A. 496, 50 Atl. 834, holding that life insurance company cannot set up falsity of warranties made by infant as defense to suit on policy by beneficiary; *Wuller v. Chuse Grocer Co.* 241 Ill. 398, 132 A. S. R. 216, 28 L.R.A. (N.S.) 128, 89 N. E. 796, 16 A. & E. Ann. Cas 522, holding that infant may rescind stock subscription and recover money paid.

Cited in reference note in 1 A. S. R. 384, on power of infant to avoid his contract.

Cited in notes 18 A. S. R. 586, on infant's executory contract to sell real property; 18 A. S. R. 685, on infant's right to recover back money paid on disaffirmance; 15 L.R.A. 211, on right of infant to repudiate contract for services and sue on quantum meruit; 24 L.R.A. 233, on forfeiture of wages on part performance of contract.

34 AM. REP. 646, ORDWAY v. REMINGTON, 12 R. I. 319.

When rent due.

Cited in *Curtis v. Hammond*, 43 Colo. 277, 95 Pac. 921, holding that rent is not due until it is earned, in absence of contract to contrary.

Cited in notes in 29 A. R. 218, on date rent becomes due; 15 E. R. C. 616, on when rent payable quarterly is due.

Extent of liability of garnishee in attachment.

Cited in *National Park Bank v. Levy Bros.* 17 R. I. 746, 19 L.R.A. 475, 24 Atl. 777, to point that attaching creditors take only such rights against garnishees as principal defendant had against them at time of service of writ.

34 AM. REP. 648, AUSTIN v. COGGESHALL, 12 R. I. 329.

Right of municipal corporation to plead ultra vires.

Cited in *Stevens v. St. Mary's Training School*, 144 Ill. 336, 36 A. S. R. 438, 18 L.R.A. 832, 32 N. E. 962, holding that municipality which has entered into void contract will not be estopped from taking advantage of its incapacity; *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526; *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588,—holding that municipality is not estopped from taking advantage of its incapacity when sued on its contract; *McTwiggon v. Hunter*, 19 R. I. 265, 29 L.R.A. 526, 33 Atl. 5; *Ecroyd v. Coggeshall*, 21 R. I. 1, 79 A. S. R. 741, 41 Atl. 260; *Dube v. Peck*, 22 R. I. 443, 48 Atl. 477,—holding that person dealing with agents of municipal corporation must ascertain limits of their powers at their peril.

Cited in note in 1 L.R.A. 192, on notice of limitation of agents power.

For what purposes municipality may expend money.

Cited in *Parsons v. Van Wyck*, 56 App. Div. 329, 67 N. Y. Supp. 1054, to point that city has no implied authority to expend money for entertainment of visitors; *Love v. Raleigh*, 116 N. C. 296, 28 L.R.A. 192, 21 S. E. 503, holding that city has no implied power to provide for fireworks on Fourth of July.

Cited in reference note in 79 A. S. R. 960, on right of municipality to indemnify officer for loss incurred in discharging official duty.

34 AM. REP. 652, PROVIDENCE STEAM ENGINE CO. v. PROVIDENCE & S. S. S. CO. 12 R. I. 348.

Rights of vendee where land is described by reference to plat.

Cited in *Demopolis v. Webb*, 87 Ala. 659, 6 So. 408; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639,—holding that purchaser of land by reference to recorded plat is entitled to use of street appearing on plat adjoining his lot; *Dawson v. Broome*, 24 R. I. 359, 53 Atl. 151, holding that where riparian owner makes plat and conveys by deed lots platted thereon boundary of lots whether in whole or in part under high water is fixed by plat.

Rights of riparian owner to shore.

Cited in *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 28 A. S. R. 600,

15 L.R.A. 618, 30 N. E. 654, holding that owner of land bounded on navigable river is entitled to damages amounting to diminished rental value of property, from railroad company which constructs road across water front, thus depriving owner from access to stream; *Wilson v. Welch*, 12 Or. 353, 7 Pac. 341; *Allen v. Allen*, 19 R. I. 114, 61 A. S. R. 738, 30 L.R.A. 497, 32 Atl. 166,—holding that private rights which riparian owner on tidewater has to shore between high and low water mark are in nature of easement, fee being in state in trust for public; *Lincoln v. Davis*, 53 Mich. 375, 51 A. R. 116, 19 N. W. 103; *Providence v. Comstock*, 27 R. I. 537, 65 Atl. 307,—to point that riparian owner might fill out flats or build wharves until forbidden by state; *Newport News Shipbuilding & Dry Dock Co. v. Jones*, 105 Va. 503, 6 L.R.A.(N.S.) 247, 54 S. E. 314, holding that navigable waters beyond low water mark and soil beneath them within limits of state, are property of state; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L.R.A. 632, 26 Pac. 539 (dissenting opinion), on right of riparian owner to construct landing wharf or pier for his own use or for use of public.

Cited in notes in 8 L.R.A. 89, on title to soil below ordinary high-water mark; 45 L.R.A. 239, on title to land between high and low water mark; 23 E. R. C. 162, on rights of riparian owners; 23 E. R. C. 186, on riparian rights, titles, and boundaries.

Rights of person entitled to possession of riparian land.

Cited in *Hanford v. St. Paul & D. R. Co.* 43 Minn. 104, 7 L.R.A. 722, 44 N. W. 1144, holding that person entitled to exclusive right to possess and use of land abutting on navigable water is, though he does not own fee, entitled to enjoy riparian rights incident to land.

Construction of term "beach" and "water mark."

Cited in *Coburn v. San Mateo County*, 75 Fed. 520, to point that term "beach" in description of land is deemed equivalent of word "shore;" *East Boston Co. v. Com.* 203 Mass. 68, 89 N. E. 236, 17 A. & E. Ann. Cas. 146, on interpretation of phrase "ordinary low water mark."

Riparian rights of state.

Cited in *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 18 L.R.A. 679, 25 Atl. 718, holding that large natural ponds are held by state in trust for public use.

Cited in note in 12 L.R.A. 634, as to how far the territorial jurisdiction of the state extends seaward.

34 AM. REP. 668, LEE v. UNION R. CO. 12 R. I. 383.

Proximate cause of injury.

Cited in *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 39 A. S. R. 251, 33 N. E. 795, holding that proximate cause of injury is not necessarily immediate cause but to authorize recovery, must be efficient cause which set in motion chain of circumstances leading up to injury; *Willis v. Providence Telegram Pub. Co.* 20 R. I. 285, 38 Atl. 947, holding that person who tries to prevent his horse from running away is not necessarily guilty of negligence even though person in charge of horse is not in carriage and does not have hold of reins at time; *Benard v. Woonsocket Bobbin Co.* 23 R. I. 581, 51 Atl. 209, holding that person who turns water on highway without right in icy weather, when it is likely to freeze, is liable for injuries sustained owing to condition; *Howard v. Union R. Co.* 25 R. I. 652, 65 L.R.A. 231, 57 Atl. 867, 1 A. & E. Ann. Cas. 217, holding that street railway company is not liable to person injured by obstruction in street which company removed from its tracks for purpose of running its cars.

Cited in reference notes in 40 A. R. 230, on blast from locomotive whistle as proximate cause of injury; 2 A. S. R. 675, on what negligence constitutes proximate cause.

Cited in notes in 35 A. R. 650, on act of railroad company as proximate cause of fire; 52 A. R. 165, on necessity that negligence be proximate cause of injury to give right of action for damages; 36 A. S. R. 833, on remote and proximate consequences of frightening animals; 7 L.R.A. 133, on instances of proximate cause of injury; 9 L.R.A.(N.S.) 551, on obstructions in highway as proximate cause of injury notwithstanding intervening cause.

34 AM. REP. 670, BALDWIN v. BARNEY, 12 R. I. 392.

Violation of statute as defense.

Cited in *Broschart v. Tuttle*, 59 Conn. 1, 11 L.R.A. 33, 21 Atl. 925, holding that fact that person injured by collision with wagon in street was driving at speed exceeding statutory limit will not defeat recovery unless such violation of statute contributed to accident; *Tackett v. Taylor County*, 123 Iowa, 149, 98 N. W. 730, holding that person driving threshing engine over highway bridge may recover for injury sustained by defect therein though he violated statute requiring plank to be placed under engine, where such violation did not contribute to injury; *Kansas City v. Orr*, 62 Kan. 61, 50 L.R.A. 783, 61 Pac. 397; *Platz v. Cohoes*, 89 N. Y. 219, 42 A. R. 286 (affirming 24 Hun, 101),—holding that city cannot set up as defense to action for injury caused by defective streets that party was injured while travelling on Sunday; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Solarz v. Manhattan R. Co.* 8 Misc. 656, 29 N. Y. Supp. 1123, 31 App. N. C. 426; *Hoadley v. International Paper Co.* 72 Vt. 79, 47 Atl. 169; *Eagan v. Maguire*, 21 R. I. 189, 42 Atl. 506,—holding that employer cannot set up as defense to action for negligence in not furnishing safe appliances, that employee was injured while working on Sunday; *Dion v. Richmond Mfg. Co.* 24 R. I. 187, 52 Atl. 889, holding that in action by infant against master for negligence defendant will not be permitted to set up its violation of statute in defense to its own negligence in services rendered by minor; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042, to point that person sued in tort cannot justify tort by proving that plaintiff when injured was violating law so long as tort and violation are independent.

Cited in reference note in 11 A. S. R. 620, on recovery of damages for negligence by one who was violating law when injured.

Cited in notes in 30 A. R. 417; 9 A. S. R. 893; 2 L.R.A. 522,—on plaintiff's violation of Sunday law as defense to action for injuries received on that day.

Effect of violation of statute by insured upon validity of accident policy.

Cited in *Duran v. Standard Life & Acci. Ins. Co.* 63 Vt. 437, 25 A. S. R. 773, 13 L.R.A. 637, 22 Atl. 530, holding that person injured while traveling and hunting on Sunday could not recover under accident policy providing against injury occurring while violating law.

34 AM. REP. 675, GLAVIN v. RHODE ISLAND HOSPITAL, 12 R. I. 411.

Liability for negligence of servants — Of charitable institution.

Cited in *Fordyce v. Woman's Christian Nat. Library Asso.* 79 Ark. 550, 7 L.R.A.(N.S.) 485, 96 S. W. 155, holding that property of charity cannot be sold under execution issued on judgment for torts of its agents; *Medical College v.*

Rushing, 1 Ga. App. 468, 57 S. E. 1083, holding that public eleemosynary institutions are liable for torts of agents if they have income, not exclusively devoted to public charity; *Farrigan v. Pevear*, 193 Mass. 147, 118 A. S. R. 484, 7 L.R.A. (N.S.) 481, 8 A. & E. Ann. Cas. 1109, holding that trustees who are administering fund for educating indigent boys and who have exercised reasonable care in selecting servants are not liable for injury to one servant through negligence of another; *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A. (N.S.) 74, 110 N. W. 951, 11 A. & E. Ann. Cas. 150, holding that corporation administering charitable trust cannot claim exemption from liability for torts of agents unless claim is based on contract with person injured by such tort; *Lane v. Minnesota State Agri. Soc.* 62 Minn. 175, 29 L.R.A. 708, 64 N. W. 382, to point that private corporation organized for gain of its members is not exempt from liability for negligence of its servants although public interest is promoted by its existence; *Corbett v. St. Vincent's Industrial School*, 79 App. Div. 334, 79 N. Y. Supp. 369, holding that charitable institution to which boy is committed by magistrate is not liable for injury sustained by boy caused by negligence of foreman of laundry attached to institution; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 6 A. S. R. 745, 1 L.R.A. 417, 22 W. N. C. 248, 15 Atl. 553, 45 Phila. Leg. Int. 444, holding that fire insurance patrol supported by voluntary subscription is not liable for injury caused by negligence of employees

Cited in reference notes in 6 A. S. R. 755, on public charitable institution's liability for agent's acts; 52 A. R. 495, on liability of charitable institutions for assault of their officer on inmate; 44 A. S. R. 245; on assault by officers of state charitable institutions; 86 A. S. R. 854, on liability of one performing gratuitous service.

Cited in notes in 23 L.R.A. 200, on liability of charitable institution for negligence; 66 L.R.A. 944; 7 L.R.A. (N.S.) 483,—on liability of charitable institutions for personal injuries.

Distinguished in *Ketterer v. State Bd. of Control*, 131 Ky. 287, 20 L.R.A. (N.S.) 274, 115 S. W. 200, holding that officials of state lunatic asylum are not liable for beating of inmate by attendants.

Disapproved in *Parks v. Northwestern University*, 218 Ill. 381, 2 L.R.A. (N.S.) 556, 75 N. E. 991, 4 A. & E. Ann. Cas. 103; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453; *Joel v. Woman's Hospital*, 89 Hun, 73, 35 N. Y. Supp. 37; *Abston v. Waldon Academy*, 118 Tenn. 24, 11 L.R.A. (N.S.) 1179, 102 S. W. 351,—holding that charitable institutions are not liable for injuries resulting from negligence of agents.

— Of religious society.

Cited in *Haas v. Missionary Soc.* 6 Misc. 281, 26 N. Y. Supp. 868, holding that recovery cannot be had against religious society for injuries sustained by reason of negligence of employee, where no negligence is shown in selection of servants.

— Of public hospitals.

Cited in *Williams v. Indianapolis*, 26 Ind. App. 628, 60 N. E. 367, holding that action cannot be maintained by patient of city hospital against city for damages for alleged malpractice of hospital physician; *Weinberg v. University of Michigan*, 97 Mich. 246, 56 N. W. 605, on liability of board of managers of public hospital for injury caused by negligence of servants; *Powers v. Massachusetts Homeopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; *Ward v. St. Vincent's Hospital*, 23 Misc. 91, 50 N. Y. Supp. 466,—holding that public hospital

is liable to pay patient for injury caused by negligence of servants only when negligent in selecting servants; *Collins v. New York Post. Graduate Medical School*, 59 App. Div. 63, 69 N. Y. Supp. 106, holding that post graduate school and hospital is not liable for negligent injury in operating on patient who only pays for board and attendance and not for surgeon's services; *Pearl v. West End Street R. Co.* 176 Mass. 177, 79 A. S. R. 302, 49 L.R.A. 826, 57 N. E. 339, to point that physician employed by hospital is not servant; *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566, holding hospital liable for negligence of driver of ambulance in running down pedestrian; *Donaldson v. General Public Hospital Comrs.* 30 N. B. 278, holding commissioners of general public hospital liable for injury to patient from negligence of servants.

— Of corporation maintaining relief department.

Cited in *Union P. R. Co. v. Artist*, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 424, 74 S. W. 456,—holding that railroad company maintaining relief department is only liable to employee injured by unskillfulness of surgeon employed where it was negligent in selecting one not of average skill; *Texas & P. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642, 50 S. W. 173; *Richardson v. Carbon Hill Coal Co.* 6 Wash. 52, 20 L.R.A. 338, 32 Pac. 1012,—holding that in action against corporation for unskillful treatment by surgeon provided by company employee may recover where company retained one dollar per month from wages to pay hospital dues and physician.

Pupil nurse in hospital as servant.

Cited in *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A. (N.S.) 496, 64 Atl. 190, holding that pupil nurse employed in hospital maintained by charitable corporation is servant and not recipient of its bounty.

Lack of consideration as defense.

Cited in *Western U. Teleg. Co. v. Snodgrass*, 94 Tex. 284, 86 A. S. R. 851, 60 S. W. 308, holding it not necessary in order to recover for negligence in delivering telegram, to allege and prove payment to defendant for its transmission.

34 AM. REP. 690, CASSIDY v. ANGELL, 12 R. I. 447.

Burden of proof as to contributory negligence.

Cited in *Judge v. Narragansett Electric Lighting Co.* 23 R. I. 208, 49 Atl. 961; *Judge v. Narragansett Electric Lighting Co.* 21 R. I. 128, 42 Atl. 507,—holding that in absence of evidence to rebut inference of want of due care deducible from special facts of case, jury is not warranted in finding intestate was not guilty of contributory negligence; *Savage v. Rhode Island*, 28 R. I. 391, 67 Atl. 633; *Gulf, C. & S. F. R. Co. v. Shieder*, 88 Tex. 152, 28 L.R.A. 538, 30 S. W. 902,—holding that where undisputed evidence establishes prima facie, contributory negligence, burden of proof is upon plaintiff to show facts upon which he may be found free from negligence; *Texas & St. L. R. Co. v. Orr*, 46 Ark. 182; *North Birmingham Street R. Co. v. Calderwood*, 89 Ala. 247, 18 A. S. R. 105, 7 So. 360,—holding that contributory negligence is matter of defense if there is nothing from which inference may be drawn that plaintiff brought injury upon himself.

Cited in notes in 49 A. R. 622, 628; 58 A. R. 229,—on presumptions and evidence as to contributory negligence; 116 A. S. R. 116, on effect of rule as to burden of proving contributory negligence upon the presumption of due care; 13 L.R.A. (N.S.) 1261, on burden of proving contributory negligence of person in-

jured by defective highway; 28 A. R. 564, on burden of proving contributory negligence.

Presumption where there are no witnesses to death by accident.

Cited in *Nichols v. Baltimore & O. S. W. R. Co.* 33 Ind. App. 229, 71 N. E. 170, holding that presumption arises that person injured on railroad crossing was without fault; *Ames v. Waterloo & C. F. Rapid Transit Co.* 120 Iowa, 640, 95 N. W. 161 (dissenting opinion), on existence of presumption that deceased was in exercise of due care where there are no witnesses to accidental death; *Woolf v. Nauman Co.* 128 Iowa, 261, 103 N. W. 785; *Ellis v. Republic Oil Co.* 133 Iowa, 11, 110 N. W. 20, holding that presumption that deceased was in exercise of due care arises where there were no witnesses to accidental death; *Elliot v. Chicago, M. & St. P. R. Co.* 5 Dak. 523, 3 L.R.A. 363, 41 N. W. 758; *Schwandner v. Birge*, 33 Hun, 186, to point that where there were no witnesses of accident absence of fault on part of deceased may be inferred from circumstances, in connection with ordinary conduct of men; *Burnham v. New York, P. & B. R. Co.* 18 R. I. 494, 30 Atl. 468 (dissenting opinion), on presumption that engineer would, in order to avoid collision, be on alert for all danger signals; *Lundee v. Cudahy Packing Co.* 139 Iowa, 688, 117 N. W. 1063, holding that instruction that person killed will be presumed to have exercised due care is correct; *Devine v. National Safe Deposit Co.* 145 Ill. App. 32, holding that prior knowledge of open unguarded door is not conclusive that deceased was negligent.

Cited in reference note in 42 A. R. 227, on presumption of contributory negligence where person found killed at crossing.

Cited in note in 16 L.R.A. 261, on presumption of care used by person who is found to have been killed by alleged negligence of another.

Admissibility of evidence of carefulness of deceased.

Cited in *Adams v. Chicago, M. & St. P. R. Co.* 93 Iowa, 565, 61 N. W. 1059, holding that in action for death of switchman by negligence evidence that deceased was always careful and on lookout for danger is admissible on question of contributory negligence.

Contributory negligence as question for jury.

Cited in reference note in 1 A. S. R. 680, as to when contributory negligence is question for jury.

34 AM. REP. 694, McKIM v. McKIM, 12 R. I. 462.

Parent's right to custody of infant child.

Cited in *Vetterlein's Petition*, 14 R. I. 378, holding that father is entitled to custody of infant child unless interests of child forbid it; *Hope's Petition*, 19 R. I. 486, 34 Atl. 994, holding that in proceedings relative to custody of infant child paramount consideration is welfare of child; *Dawson v. Dawson*, 57 W. Va. 520, 110 A. S. R. 800, 50 S. E. 613, holding that it is duty of court where parents have separated to confide custody of infants to parent best suited to care for them.

Cited in reference notes in 37 A. R. 255, on custody of infant on separation of parents; 2 A. S. R. 182, on when father will be deprived of custody of child.

Cited in notes in 40 A. R. 327; 2 A. S. R. 58,—on right to custody of children as between parents; 2 A. S. R. 185, on right of mother to custody of child; 89 A. S. R. 277, on control by court of guardian's custody of ward; 6 L.R.A. 682, on custody and support of child in case of divorce; 53 A. R. 545; 14 A. S. R. 731; 13 E. R. C. 54,—on right to custody of child.

34 AM. REP. 702, PECK v. PECK, 12 R. I. 465.

What constitutes valid marriage.

Cited in *Farley v. Farley*, 94 Ala. 501, 33 A. S. R. 141, 10 So. 646; *Wrynn v. Downey*, 27 R. I. 464, 114 A. S. R. 63, 4 L.R.A. (N.S.) 616, 63 Atl. 401, 8 A. & E. Ann. Cas. 912,—to point that in order to constitute marriage at common law there must exist present intention; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, holding that sexual intercourse is not necessary to validity of marriage; *Cartwright v. McGowin*, 121 Ill. 383, 2 A. S. R. 105, 12 N. E. 737, holding that sexual intercourse which parties know to be contrary to law cannot form element of marriage; *Sorensen v. Sorensen*, 68 Neb. 483, 100 N. W. 930, holding that existing agreement between man and woman to marry at future day conclusively negatives claim of present marriage.

Cited in reference notes in 69 A. D. 616, 616, 33 A. S. R. 144,—on validity of marriage *per verba de futuro* followed by cohabitation.

Cited in notes in 124 A. S. R. 109, 110, on contract of marriage by agreement to marry in future; 124 A. S. R. 120, as to when presumption of marriage from cohabitation and reputation is overcome; 17 E. R. C. 175, on validity of common-law marriage.

Estoppel by antenuptial agreement.

Cited in *Rieger v. Schaible*, 81 Neb. 33, 17 L.R.A. (N.S.) 866, 115 N. W. 500, 16 A. E. Ann. Cas. 700; *Staub's Appeal*, 66 Conn. 127, 33 Atl. 616,—holding that woman of full age may by antenuptial contract estop herself from claiming allowance under statute from estate of deceased husband pending its settlement.

34 AM. REP. 704, STATE v. DAVIS, 12 R. I. 492.

Objections to qualifications of grand jurors.

Cited in *United States v. Richardson*, 28 Fed. 61, holding that party under recognizance may raise objection to grand juror by plea in abatement; *State v. Brewster*, 70 Vt. 341, 42 L.R.A. 444, 40 Atl. 1037, to point that if grand jurors answer to demands of law and are duly sworn and charged, indictment is valid; *State v. Duggan*, 15 R. I. 412, 6 Atl. 597; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883,—to point that grand juror may be challenged for cause, as not being freeholder.

Cited in reference notes in 34 A. S. R. 305, on bias of grand jurors as ground for quashing indictment; 48 A. S. R. 296; 36 A. R. 54,—on plea in abatement as proper method of raising objection to qualification of grand juror; 28 L.R.A. 197, on necessity that grand jurors be voters; 27 L. ed. U. S. 858, as to when and how objections to grand jurors must be taken.

Construction of term "liable to assessment."

Cited in *Albert v. Gibson*, 141 Mich. 698, 105 N. W. 19, holding that provision of statute that certain things may be done upon petition of certain number of freeholders liable to assessment for benefits means persons who may be properly assessed for benefits.

34 AM. REP. 707, HATCH v. TUCKER, 12 R. I. 501.

Amount of freight for which consignee is liable.

See *North German Lloyd v. Henle*, 44 Fed. 100, 10 L.R.A. 814, holding consignee, although a factor only, and although he has paid entire amount which the carrier supposed to be due, liable for an excess resulting from concealment of real value of the goods shipped.

Am. Rep. Vol. XVII.—55.

34 AM. REP. 713, FALLON v. O'BRIEN, 12 R. I. 518.**Liability for injury by horse in street.**

Cited in *Briscoe v. Alfrey*, 61 Ark. 196, 54 A. S. R. 203, 30 L.R.A. 607, 32 S. W. 505, holding that under statute owner of unaltered mule is not liable to owner of filly killed by mule while at large where mule was kept in strong stable but had broken out during night; *Baldwin v. Ensign*, 49 Conn. 113, 44 A. R. 205; *Healey v. P. Ballantine & Sons*, 66 N. J. L. 339, 49 Atl. 511,—holding that owner of horse who suffers it to go at large in populous city, is answerable for personal injury done by it; *Eddy v. Union R. Co.* 25 R. I. 451, 105 A. S. R. 897, 56 Atl. 677, 1 A. & E. Ann. Cas. 204, holding that person injured by horse being led in street cannot recover for injury where horse was not vicious; *Patterson v. Wanning*, 2 Ont. L. Rep. 462, holding owner liable for injury to pedestrian knocked down by horse straying on highway and frightened by boy.

Cited in note in 16 L.R.A.(N.S.) 648, on liability of owner for injury to person or property on highway by animal at large thereon in violation of statute.

Case as remedy for consequential damages.

Cited in *Vogel v. McAuliffe*, 18 R. I. 791, 31 Atl. 1, holding that case and not trespass is proper form of action where damages are consequential; *Niles v. Brown*, 25 R. I. 537, 56 Atl. 1030, to point that case is proper remedy for consequential injuries arising from wrongful taking of goods.

34 AM. REP. 716, CARPENTER v. CARPENTER, 12 R. I. 544.**Liability of trustee for loss through negligence.**

Cited in *Tarver v. Torrance*, 81 Ga. 261, 12 A. S. R. 311, 6 S. E. 177, holding that administrator who fails to use ordinary care and thereby loses money belonging to estate is liable for same.

Cited in notes in 75 A. D. 799, on exoneration of trustees by theft, robbery, casualty, failure of bankers and solicitors, defaults of agents, etc.; 75 A. D. 880, on necessity of trustee having exhibited due care, to exonerate him from liability for theft, robbery, or burglary; 75 A. D. 801, on liability of trustee in case of failure or default of agents, solicitors, etc.; 25 E. R. C. 336, on liability of trustee for losses, occurring without fault on his part.

34 AM. REP. 722, HORTON v. CHAMPLIN, 12 R. I. 550.**Attorney's lien.**

Cited in *Bruce v. Anderson*, 176 Mass. 161, 57 N. E. 354, to point that attorney's lien extends to whole sum recovered by judgment; *Tyler v. Superior Ct.* 30 R. I. 107, 23 L.R.A.(N.S.) 1045, 73 Atl. 467, holding that attorney has no lien upon client's right of action for assault and battery and false imprisonment before judgment.

Cited in notes in 51 A. S. R. 258, on attorney's special or charging lien; 51 A. S. R. 272, on enforcement of attorney's charging lien; 19 L. ed. U. S. 994, on lien of attorney for compensation.

—Effect of payment to client with attorney's consent.

Cited in *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649, 16 N. Y. Civ. Proc. Rep. 222, holding that after money has been paid on judgment to client with attorney's consent latter has no lien upon it.

—Upon deposit for special purpose.

Cited in *Anderson v. Bosworth*, 15 R. I. 443, 2 A. S. R. 910, 8 Atl. 339.

holding that attorney who receives from client money in special deposit for special purpose cannot retain his fees out of it.

Right of attorney to sue on judgment without client's consent.

Cited in *Clarke v. Rice*, 15 R. I. 132, 23 Atl. 301, to point that attorney cannot bring suit on judgment without plaintiff's consent.

Cited in reference note in 12 A. S. R. 831, on attorney's right to bring suit in client's name on judgment on which he has a lien.

34 AM. REP. 732, REED v. STATE, 8 TEX. APP. 40.

What constitutes theft.

Cited in *Wilson v. State*, 20 Tex. App. 662, holding that to support conviction for theft, it must appear from evidence that intent to steal existed at very time of taking; *Knutson v. State*, 14 Tex. App. 570, holding that fraudulent taking of property by person with intent to deprive owner of its value and appropriate same to taker's use, is essential element of theft which must be established beyond reasonable doubt; *Dow v. State*, 12 Tex. App. 343, holding that conviction for theft may be had on proof which shows that taking though with owner's consent, was obtained by false pretext.

Cited in note in 57 A. D. 275, on intent as element of larceny.

— Of lost property.

Cited in *State v. Hayes*, 98 Iowa, 619, 60 A. S. R. 219, 37 L.R.A. 116, 67 N. W. 673, holding that where property found is so marked as to be capable of identification, proof of possession and of immediate subsequent conversion of it is admissible to establish corpus delicti; *Wilson v. State*, 14 Tex. App. 205; *Warren v. State*, 17 Tex. App. 207; *Stepp v. State*, 31 Tex. Crim. Rep. 349, 20 S. W. 753; *Worthington v. State*, 53 Tex. Crim. Rep. 178, 109 S. W. 187; *Robinson v. State*, 11 Tex. App. 403, 40 A. R. 790,—holding that to constitute theft of lost property intent to steal must exist at time of finding and finder must know or have reasonable means of knowing owner.

Cited in notes in 24 A. S. R. 860; 60 A. S. R. 224; 88 A. S. R. 592-594; 57 A. D. 283, 284,—on larceny by finders of lost goods or estrays; 88 A. S. R. 603, on intent as element of larceny in case of finding lost property; 37 L.R.A. 124, on belief as element of larceny by finder of property.

34 AM. REP. 736, RAINEY v. STATE, 8 TEX. APP. 62.

Sufficiency of information for carrying pistol in public assemblage.

Cited in *Lomax v. State*, 38 Tex. Crim. Rep. 318, 43 S. W. 92, holding that information for carrying pistol into ballroom is defective unless it contains allegation that there were people assembled there.

Right to carry weapons.

Cited in *Black v. State*, 48 Tex. Crim. Rep. 63, 85 S. W. 1143, holding that special constable is exempt from statute prohibiting carrying pistol into public assemblies.

34 AM. REP. 737, ALBRECHT v. STATE, 8 TEX. APP. 216.

Followed without discussion in *Dean v. Reinecke*, 1 Tex. App. Civ. Caa. (White & W.) 408.

Constitutionality of liquor laws.

Cited in *Ex parte Abrams*, 56 Tex. Crim. Rep. 465, 120 S. W. 883, 18 A. & E. Ann. Cas. 45, holding that act limiting number of saloons in city is valid.

Cited in note in 28 L. ed. U. S. 696, on constitutionality of laws regulating sale of liquor.

Constitutionality of statute imposing taxes.

Cited in *Hill v. Abbeville*, 59 S. C. 396, 38 S. E. 11; *Floeck v. State*, 34 Tex. Crim. Rep. 314; *Ex parte Williams*, 31 Tex. Crim. Rep. 262, 21 L.R.A. 783, 20 S. W. 580,—holding that tax is equal and uniform where all persons in same trade, calling or profession are taxed alike; *Thompson v. State*, 17 Tex. App. 253, holding that it is to be presumed that legislature had good and sufficient reason for passing law taxing certain publications and courts have no right to inquire into sufficiency of their reasons; *Ex parte Williams*, 31 Tex. Crim. Rep. 262, 21 L.R.A. 783, 20 S. W. 580, holding that act prescribing occupation tax is constitutional.

Validity of statute embracing more than one subject.

Cited in *Preston v. Finley*, 72 Fed. 850; *Nichols v. State*, 32 Tex. App. 391,—holding that statutes are to be sustained as long as they are of same nature and come legitimately under general subject expressed in title; *Stowe v. Brown*, 54 Tex. 330, holding that constitution is complied with, if title of act fairly gives such reasonable notice of subject matters of statute itself as to prevent mischief intended to be guarded against; *Johnson v. State*, 9 Tex. App. 249, holding that statute prescribing penalty and mode of procedure, and defining offense is not invalid because embracing more than one subject not expressed in title; *Augustine v. State*, 41 Tex. Crim. Rep. 59, 96 A. S. R. 765, 52 S. W. 77, holding that statute to define and punish murder by mob violence is not unconstitutional as embracing more than one subject.

Cited in notes in 61 A. D. 338, on object of constitutional provision that act of legislature shall embrace but one subject which shall be expressed in title; 61 A. D. 344, as to when statutes are constitutional or unconstitutional under provision that they shall contain but one subject to be expressed in the title.

Construction of statutes.

Cited in *Ollre v. State*, 57 Tex. Crim. Rep. 520, 123 S. W. 1116 (dissenting opinion), on construction of act prohibiting sale of liquor on Sunday.

34 AM. REP. 746, COX v. STATE, 8 TEX. APP. 254.**Admissibility of declarations or acts of coconspirators.**

Cited in *Loggins v. State*, 8 Tex. App. 434; *Loggins v. State*, 12 Tex. App. 65; *Kennedy v. State*, 19 Tex. App. 618,—holding that declarations of coconspirators are admissible if it is shown during trial that they were made during existence of conspiracy, though conspiracy not conclusively shown when they were admitted in evidence; *People v. Sharp*, 45 Hun, 460, 5 N. Y. Crim. Rep. 388; *Simms v. State*, 10 Tex. App. 131; *Avery v. State*, 10 Tex. App. 199; *Cook v. State*, 22 Tex. App. 511, 3 S. W. 749,—holding that declarations of one principal made during progress and in furtherance of common design are competent against all coconspirators; *Smith v. State*, 21 Tex. App. 107, 17 S. W. 552; *Bowen v. State*, 47 Tex. Crim. Rep. 137, 82 S. W. 520,—holding that if there is no evidence tending to show defendant's connection with conspiracy court will exclude all evidence of conduct and declarations of other alleged conspirators from consideration of

jury; *Hudson v. State*, 43 Tex. Crim. Rep. 420, 66 S. W. 668, holding that every person who enters into conspiracy is bound by every act which has been done before or is done after he enters it, by others, in carrying out conspiracy; *Wallace v. State*, 46 Tex. Crim. Rep. 341, 81 S. W. 966, holding that if it is shown that defendant was conspirator with wife of deceased and another to kill deceased it was competent to show as against defendant all that was said and done by such other and wife of deceased pending conspiracy and in furtherance of it; *Richards v. State*, 53 Tex. Crim. Rep. 400, 110 S. W. 432, holding that on charge of murder declarations of conspirator are admissible, whether said conspirator has been acquitted or convicted; *State v. Lewis*, 51 Or. 467, 94 Pac. 831, holding acts and declarations of conspirator admissible before proof of conspiracy; *Gonzalez v. State*, 33 Tex. App. 203, 16 S. W. 978, holding declarations of conspirators admissible to show existence of common design and relations of parties to conspiracy.

— When made after consummation of conspiracy.

Cited in *Holden v. State*, 18 Tex. App. 91; *Willey v. State*, 22 Tex. App. 408, 3 S. W. 570,—holding that confessions of one conspirator, made after consummation of conspiracy and not in presence of coconspirators, cannot be used in evidence against latter; *Armstead v. State*, 22 Tex. App. 51, 2 S. W. 627, holding that acts and declarations of coconspirators, made in defendant's absence, are admissible only if made pending criminal enterprise.

— When made prior to formation of conspiracy.

Cited in *Ford v. State*, 112 Ind. 373, 14 N. E. 241, holding that declarations made by codefendants, not on trial, in absence of defendant, before period at which it is claimed conspiracy was formed looking to its commission, are not admissible in evidence.

What constitutes a conspiracy.

Cited in *Smith v. State*, 48 Tex. Crim. Rep. 233, 89 S. W. 817, holding that when proof shows two persons were acting together with unlawful intent in commission of offense, common design and acting together makes them *ipso facto* conspirators.

Admissibility of declarations of deceased in criminal cases.

Cited in *Tooney v. State*, 8 Tex. App. 452, on admissibility of declarations of deceased as to cause of his condition made upon being found in helpless condition shortly before his death; *Means v. State*, 10 Tex. App. 16, 38 A. R. 640, holding that declarations of deceased made to companion while looking out church window that accused was outside fixing to kill him is admissible, where deceased was shot immediately upon stepping to door.

What provisions of constitution are mandatory.

Cited in *State ex rel. Wood v. Tooker*, 15 Mont. 8, 25 L.R.A. 560, 37 Pac. 840; *Hunt v. State*, 22 Tex. App. 396, 3 S. W. 233,—holding that constitutional provisions are absolutely mandatory; *Ex parte Anderson*, 46 Tex. Crim. Rep. 372, 81 S. W. 973, to point that words of state constitution are mandatory.

— As to form of indictment.

Cited in *Starling v. State*, 90 Miss. 255, 43 So. 952, 13 A. & E. Ann. Cas. 776, holding that it is not necessary that each count in indictment conclude with phrase "against the peace and dignity of the state"; *State v. Campbell*, 210 Mo. 202, 109 S. W. 706, 14 A. & E. Ann. Cas. 403; *Thompson v. State*, 15 Tex. App. 39,—holding that omission of word "the" before word "state" in conclusion of

indictment is fatal to indictment; *Calvert v. State*, 8 Tex. App. 538, holding that all informations shall be presented in name and by authority of State of Texas and shall conclude "against the peace and dignity of the state;" *Valle v. State*, 9 Tex. App. 57, 35 A. R. 719; *Haun v. State*, 13 Tex. App. 383, 44 A. R. 706; *Wade v. State*, 52 Tex. Crim. Rep. 619, 108 S. W. 677,—holding that constitutional provisions in regard to commencement and conclusion of indictments are matters of substance as well as of form and cannot be disregarded by court; *Hudson v. State*, 10 Tex. App. 215, holding that indictment is not invalid because word "against" in formal concluding clause was misspelled; *Slaine v. State*, 14 Tex. App. 144, holding that information commencing "By and with the authority of the state" and omitting words "of Texas" is fatally defective; *King, McR. & Co. v. Robinson*, 2 Tex. App. Civ. Cas. (Willson) 493, holding that writ of attachment must run in name of people of state, under constitution.

Cited in reference note in 71 A. S. R. 275, on validity of conclusion of indictment.

Cited in note in 3 A. S. R. 279, 283, on sufficiency of concluding words in indictment for murder.

Right of court to grant change of venue in criminal case.

Cited in *State ex rel. Rusak v. Budge*, 14 N. D. 542, 105 N. W. 728, 9 A. & E. Ann. Cas. 170, holding that court's discretion in granting change of venue in criminal case will not be reviewed upon appeal unless it clearly appears court has exceeded its legal discretion; *Steagald v. State*, 22 Tex. App. 464, 3 S. W. 771, holding that court should upon its own motion make order for change of place of trial where satisfied that impartial trial could not be had where venue laid; *Webb v. State*, 9 Tex. App. 490; *Bowden v. State*, 12 Tex. App. 246; *Frizzell v. State*, 30 Tex. App. 42, 16 S. W. 751; *Bohannon v. State*, 14 Tex. App. 271,—holding that court has power of its own motion to change venue in criminal case where impartial trial cannot be had where venue is laid; *Ex parte Cox*, 12 Tex. App. 665, on right of judge of court to change venue upon his own motion when satisfied impartial trial cannot be had where venue laid; *Meyers v. State*, 39 Tex. Crim. Rep. 500, 46 S. W. 817 (dissenting opinion), on right of review of discretion of lower court in changing venue in criminal case; *Mischer v. State*, 41 Tex. Crim. Rep. 212, 96 A. S. R. 780, 53 S. W. 627, holding that legislature has power to vest in courts authority to change venue in criminal cases; *Tubb v. State*, 55 Tex. Crim. Rep. 606, 117 S. W. 858; holding refusal to change venue no error, where there is no abuse of court's discretion.

Cited in note in 74 A. D. 242, on necessity for consent of accused to change of venue in criminal case.

Construction of constitutional provision as to act containing but one subject.

Cited in *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321, to point that constitutional provision that act shall not contain more than one subject requires only general ultimate object to be stated in title and not details.

When sufficiency of indictment may be reviewed on appeal.

Cited in *Morris v. State*, 13 Tex. App. 65, holding that it is only when indictment is fatally defective as to matters of substance, that it can be first assailed on appeal.

Construction of repealing statute.

Cited in *Weller v. State*, 16 Tex. App. 200, on repeal of general statute where

repealing statute provides that all civil statutes of general nature are repealed unless expressly therein continued in force.

Constitutionality of special or local act.

Cited in *Brown v. State*, 54 Tex. Crim. Rep. 121, 112 S. W. 80 (dissenting opinion), on constitutionality of jury act applying only to counties having cities of twenty thousand population; *Smith v. State*, 54 Tex. Crim. Rep. 298, 362, 113 S. W. 289, holding that act as to juries in counties with cities of certain population is not local or special law.

Application of sixth amendment of U. S. Constitution.

Cited in note in 7 L.R.A.(N.S.) 670, on application of sixth amendment of U. S. Constitution to Federal courts only.

34 AM. REP. 751, HATCH v. STATE, 8 TEX. APP. 416.

Conduct of counsel as ground for new trial.

Cited in *State v. Kent*, 5 N. D. 516, 35 L.R.A. 818, 67 N. W. 1052, to point that action of trial court should be reversed only in case of clear and prejudicial abuse of discretion in reference to latitude of argument of counsel; *Willingham v. State*, 21 Fla. 761; *State v. Baleh*, 31 Kan. 465, 2 Pac. 609,—holding that it is ground for new trial where prosecuting attorney states in summing up that defendant is guilty because he did not testify in his own behalf; *Willis v. McNeill*, 57 Tex. 465, holding that it is error for court to permit accused to discuss before jury irrelevant questions; *Texas & St. L. R. Co. v. Jarrell*, 60 Tex. 267; *Eams v. State*, 10 Tex. App. 421; *Crawford v. State*, 15 Tex. App. 501,—holding that new trial will be granted where record shows prosecuting attorney indulged unchecked in vituperation and abuse of party; *Jenkins v. State*, 49 Tex. Crim. Rep. 457, 122 A. S. R. 812, 93 S. W. 726, holding that injection of illustration by prosecuting attorney calculated to prove hurtful to defendant, is ground for reversal although no exception was taken to refusal of court to charge in respect to same; dissenting opinions in *United States v. Musser*, 4 Utah, 153, 7 Pac. 389; *State v. Shawen*, 40 W. Va. 1, 20 S. E. 873,—on effect of reference by prosecuting attorney to matters irrelevant or facts not in proof; *State v. Williams*, 28 Nev. 395, 82 Pac. 353, holding that reference by prosecuting attorney in opening to confession is not reversible error.

Cited in reference notes in 48 A. R. 336, 338, on improper comments of counsel at trial; 1 A. S. R. 368, on right and duty of court to stop improper comments of counsel.

Cited in note in 9 A. S. R. 566, on language by counsel calculated to humiliate and degrade defendant as ground for reversal.

—Preference to former conviction on retrial.

Cited in *House v. State*, 9 Tex. App. 567; *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1008; *Benson v. State*, 56 Tex. Crim. Rep. 52, 118 S. W. 1049; *Moore v. State*, 21 Tex. App. 666, 2 S. W. 887,—holding that it is ground for setting aside conviction where prosecuting attorney refers to former conviction of defendant in his summing up; *Clark v. State*, 23 Tex. App. 260, 5 S. W. 115, holding that state cannot prove former trial and conviction where new trial has been granted; *Arnwine v. State*, 54 Tex. Crim. Rep. 213, 114 S. W. 796 (dissenting opinion), on reference by counsel in argument upon second trial to former conviction as reversible error.

Cited in notes in 9 A. S. R. 567, on comment by counsel on former conviction of defendant as ground for reversal; 46 L.R.A. 663, on reference by prosecuting attorney to previous conviction or other crimes of accused as ground for reversal.

Right of accused to fair and impartial trial.

Cited in *Hoback v. Com.* 104 Va. 871, 52 S. E. 575, to point that accused person has right to fair and impartial trial in mode prescribed by law.

34 AM. REP. 759, CALHOUN v. WILLIAMS, 32 GRATT. 18.**What constitutes a "family."**

Cited in *Stuart v. Stuart*, 18 W. Va. 675, holding that where word family is used as designation of beneficiaries in will it excludes parents and is generally confined to children.

Cited in reference note in 35 A. R. 711, on when widow is head of family.

Cited in note in 6 L.R.A. 813, on what constitutes a family and who is its head.

— Under exemption laws.

Cited in *Stanley v. Snyder*, 43 Ark. 429 (dissenting opinion), on what constitutes family in order to be entitled to homestead exemption; *Fullerton v. Sherrill*, 114 Iowa, 511, 87 N. W. 419, holding that widow who purchased house after husband's death and lived therein with her daughters until they married could not claim same as exempt after daughters left; *Fox v. Waterloo Nat. Bank*, 126 Iowa, 481, 102 N. W. 424, holding that residence of divorced husband and adult daughter constituted homestead; *Cross v. Benson*, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558, holding that grandchild who lives with grandparents under such circumstances that she becomes dependent upon them for support, becomes member of family within meaning of homestead provisions of constitution; *Moyer v. Drummond*, 32 S. C. 165, 17 A. S. R. 850, 7 L.R.A. 747, 10 S. E. 952, holding that brother who supports sister in latter's house, is entitled to chattel exemption as head of family; *Weaver v. First Nat. Bank*, 76 Kan. 540, 123 A. S. R. 155, 16 L.R.A.(N.S.) 110, 94 Pac. 273; *Wilkinson v. Merrill*, 87 Va. 513, 11 L.R.A. 632, 12 S. E. 1015,—holding that homestead exemption regularly set apart is not ended by death of householder's family; *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 218, holding that term "head of family" signifies one who occupies such relationship towards person living with him as to entitle them to legal or moral right to look to him for support; *Re McGowan*, 170 Fed. 493, holding that bankrupt is not head of family because he is paying board of sister at school; *Weaver v. First Nat. Bank*, 76 Kan. 540, 123 A. S. R. 155, 16 L.R.A.(N.S.) 110, 94 Pac. 273, holding that homestead exemption may persist for sole surviving member of family.

Cited in reference note in 29 A. S. R. 405, on who is not entitled to homestead as head of family.

Cited in notes in 36 A. R. 249; 1 A. S. R. 618,—on who is head of family and what constitutes family within meaning of exemption laws; 70 A. S. 108, on who is head of family within homestead law; 70 A. S. R. 110, on unmarried man as head of family within homestead law; 4 L.R.A.(N.S.) 386, on single persons as family under homestead and exemption laws.

Effect of becoming householder upon lien of judgment.

Cited in *Kennerly v. Swartz*, 83 Va. 704, 3 S. E. 348, holding that person who becomes householder after judgment lien has fastened on his land is not entitled to homestead exemption as against judgment.

Cited in note in 87 A. D. 281, as to whether homestead is exempt from judgments for torts.

34 AM. REP. 765, GRUBB v. SULT, 32 GRATT. 203.**Survival of causes of action.**

Cited in *Burton v. Mill*, 78 Va. 468, to point that action for breach of contract to marry will not lie against personal representatives of promisor, where no special damage is alleged; *Lee v. Hill*, 87 Va. 497, 24 A. S. R. 666, 12 S. E. 1052, holding that cause of action in tort unconnected with contract and affecting person only and not estate dies with person; *Birmingham v. Chesapeake & O. R. Co.* 98 Va. 548, 37 S. E. 17, holding that claim for indirect and incidental damages to plaintiff's estate arising from purely personal injury does not cause action to recover for such injuries to survivor; *Sperry v. Cook*, 138 Mo. App. 296, 120 S. W. 654 (dissenting opinion), on survival of action for breach of promise of marriage.

Cited in notes in 53 A. R. 526, on survival of action *ex contractu* where injury merely personal; 63 A. D. 548; 9 L.R.A. (N.S.) 1022,—on abatement of action or cause of action for breach of promise of marriage; 23 L.R.A. 707, on effect on contract of death of party thereto; 2 E. R. C. 17, on survival of actions of tort and contract.

—Action for malpractice.

Cited in *Boor v. Lowery*, 103 Ind. 468, 53 A. R. 519, 3 N. E. 151, holding that action for malpractice against physician does not survive death of physician; *Kuhn v. Brownfield*, 34 W. Va. 252, 11 L.R.A. 700, 12 S. E. 519, to point that action for malpractice against physician does not survive death of injured party.

34 AM. REP. 773, GERST v. JONES, 32 GRATT. 518.**When implied warranty exists upon sale of personalty.**

Cited in *Bunch v. Weil*, 72 Ark. 343, 65 L.R.A. 80, 80 S. W. 582, holding that seller impliedly warranted flour to be of grade ordered where he fills order for certain grade; *Callahan v. Morse*, 37 Mo. App. 189, to point that goods sold for particular use are impliedly warranted to be fit therefor; *Coyle v. Baum*, 3 Okla. 695, 41 Pac. 389; *Morse v. Union Stock Yards Co.* 21 Or. 289, 14 L.R.A. 157, 28 Pac. 2,—holding that implied warranty arises upon sale of goods for particular purpose that they should be fit for purpose intended; *Hood v. Bloch Bros.* 29 W. Va. 244, 11 S. E. 910, holding that warranty of merchantableness is implied where goods are sold by manufacturer where vendee has no opportunity to inspect.

Cited in reference notes in 78 A. D. 296, on warranty implied by sale of article for a particular purpose; 44 A. R. 509, on implied warranty of manufacturer to vendee; 16 A. S. R. 759, on implied warranty on sale of personalty.

Cited in notes in 30 A. R. 641, on implied warranty; 102 A. S. R. 617, on implied warranty of quality on sale of goods by manufacturer for particular purpose; 22 L.R.A. 188, on implied warranty of fitness of property bought for special purpose in case of executed or executory contract; 22 L.R.A. 190, 192, on implied warranty of fitness of articles by one manufacturing them for special purpose; 22 L.R.A. 194, on knowledge of purpose as affecting implied warranty of fitness of property bought; 23 E. R. C. 492, on implied warranty of goods bought from dealer or maker of that kind of goods.

When reversal may be had because of errors at trial.

Cited in *Newberry v. Williams*, 89 Va. 298, 15 S. E. 865; *Danks v. Rodeheaver*, 26 W. Va. 274; *Budford v. North Roanoke Land & Improv. Co.* 90

Va. 418, 18 S. E. 914,—to point that court will not set aside verdict on appeal because of errors in admitting evidence where from record court can see party was entitled to verdict without such evidence.

Damages for breach of contract.

Cited in note in 6 E. R. C. 626, on measure of damages recoverable on breach of a contract.

Proximate damages.

Cited in reference note in 94 A. D. 477, on necessity to recovery of damages that they be the natural and proximate result of wrongful act.

34 AM. REP. 780, NASH v. FUGATE, 32 GRATT. 595.

Effect of delivery of instrument in violation of condition.

Cited in Benton County Sav. Bank v. Boddicker, 105 Iowa, 548, 67 A. S. R. 310, 45 L.R.A. 321, 75 N. W. 632, holding that bond delivered by principal in violation of condition on which it was signed by sureties is valid in hands of obligee without notice of condition; Davis v. Gray, 61 Tex. 506, holding bona fide holder of note is unaffected by agreement between two or more makers that note would not be delivered to payee unless signature of third party was procured; Blair v. Security Bank, 103 Va. 762, 50 S. E. 262, holding that if sealed instrument, perfect on face, is delivered in escrow to third person who delivers it to obligee before fulfilment of condition, such delivery is void; Kidd v. Beckley, 64 W. Va. 80, 60 S. E. 1089, holding that payee of note takes it unaffected by violation of condition of other indorsements before delivery.

Cited in reference notes in 35 A. R. 182, on effect of surety's act in leaving blanks in official bond; 53 A. R. 847, on effect of conditional delivery of bond by surety; 58 A. R. 223, on liability of surety on bond signed on condition that other would also sign; 19 A. S. R. 686, on effect of instrument signed by part only of those named as persons to be bound.

Cited in notes in 28 A. D. 679, on validity of bond not signed by all who are expected to sign, of which fact obligee has notice; 28 A. D. 681, on validity of bond not signed by all who are expected to sign, of which fact obligee does not have notice; 54 A. R. 440, on effect of surety's delivery of bond to principal conditionally and in blank; 90 A. S. R. 195, on signing of official bond by surety on condition that others sign; 45 L.R.A. 328, on effect of obligee's knowledge or notice of condition that bond was not to take effect until signed by others; 45 L.R.A. 329, on sufficiency of obligee's knowledge or notice of condition that bond was not to take effect until signed by others.

Parol evidence that delivery of instrument was conditional.

Cited in Winters v. Robison, 14 Pa. Co. Ct. 264, holding that additional seal on bond is not sufficient notice to obligee that surety who signed did so on condition that another name was to be secured; Wendlinger v. Smith, 75 Va. 309, 40 A. R. 727; Humphreys v. Richmond & M. R. Co. 88 Va. 431, 13 S. E. 985,—holding parol evidence admissible to show agreement was delivered to obligee to take effect only upon happening of condition which is shown never to have happened; Solenberger v. Gilbert, 86 Va. 778, 11 S. E. 789, holding parol evidence admissible to show that note sued on was delivered for special purpose only; Catt v. Olivier, 98 Va. 580, 36 S. E. 980, holding parol evidence admissible between original parties to show that notes were delivered on conditions which have not been fulfilled; Baker v. Berry Hill Mineral Springs Co.

109 Va. 776, 65 S. E. 656, holding that parol evidence is admissible to avoid contract procured by fraudulent representations.

Delivery of deed to grantee in escrow.

Cited in *Shelby v. Tardy*, 84 Ala. 327, 4 So. 276, holding that deed cannot be delivered to grantee in escrow unless it is incomplete on face; *Dorr v. Middelburg*, 65 W. Va. 778, 23 L.R.A.(N.S.) 987, 65 S. E. 97, holding that if deed, absolute and complete on face, be delivered to grantee as escrow, condition is void and deed becomes absolute.

Cited in note in 130 Am. St. R. 924, on escrows.

Effect upon validity of bond of third party signing after execution.

Cited in *Standard Underground Cable Co. v. Stone*, 35 App. Div. 62, 54 N. Y. Supp. 383, holding that bond signed by third person after its execution by all parties named therein is not thereby rendered unenforceable.

34 AM. REP. 791, FIRST NAT. BANK v. TURNBULL, 32 GRATT. 695.

Mortgage of property to be manufactured.

Cited in reference note in 37 A. R. 433, on mortgage of property to be manufactured.

Cited in note in 5 E. R. C. 139, as to what personal property may be mortgaged.

Validity of chattel mortgage as to creditors.

Cited in reference notes in 26 A. S. R. 174, as to when a chattel mortgage to one creditor is fraudulent as to others; 12 A. S. R. 244, on priority of lien for rent reserved in lease over mortgage to one having notice.

Record notice of mortgage.

Cited in note in 18 L.R.A. 303, on sufficiency of record notice of mortgage to cover after acquired property.

Right to record contract relating to personalty.

Disapproved in *Braxton v. Bell*, 92 Va. 229, 23 S. E. 289, holding that recording of contract in regard to personalty is not authorized.

Enforcement of defective deed in equity.

Cited in *Clinch River Veneer Co. v. Kurth*, 90 Va. 737, 19 S. E. 878, holding that deed defectively acknowledged may be enforceable in equity as executory contract and will uphold trust deed made on faith of it.

34 AM. REP. 799, HEY v. COM. 32 GRATT. 946.

Exclusion of witnesses from court room.

Cited in *State v. Worthen*, 124 Iowa, 408, 100 N. W. 330, holding that in criminal case court has authority to order defendant's witnesses excluded from court room during examination of other witnesses; *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385, holding that order of separation of witnesses is not so far matter of right that refusal to make order is ground for reversal unless it affirmatively appears that party suffered injury by refusal; *Loose v. State*, 120 Wis. 115, 97 N. W. 526, holding that court has discretion to exclude witnesses from court room until called upon to give testimony.

—Effect of disobedience of order excluding witnesses.

Cited in *Com. v. Crowley*, 168 Mass. 121, 40 N. E. 415, holding that it was within discretion of court to exclude testimony of defendant's witness who

remained in court room after order excluding witnesses was made at defendant's request; *O'Bryan v. Allen*, 95 Mo. 68, 8 S. W. 225, holding that it is reversible error for court to refuse to permit witness to testify because he disobeyed order excluding him from court room during trial; *Com. v. Brown*, 90 Va. 671, 19 S. E. 447, holding that witness not summoned who had heard part of testimony is competent, although court had ordered witnesses excluded from court room until called to testify; *State v. Stewart*, 63 W. Va. 597, 60 S. E. 591, holding that witness is not rendered incompetent by disobedience of order excluding him from court room.

Conviction of receiving stolen goods.

Cited in note in 22 L.R.A.(N.S.) 839, on knowledge necessary to convict one of receiving stolen goods.

34 AM. REP. 803, OREGON STEAM NAV. CO. v. HALE, 1 WASH. TERR. 283, Reversed in 20 Wall. 64, 22 L. ed. 215.

Contracts in restraint of trade.

Cited in notes in 4 A. S. R. 343; 22 L. ed. U. S. 316,—on contracts in restraint of trade; 92 A. D. 759, on restraint as to space in contracts in restraint of trade.

34 AM. REP. 808, GOODMAN v. CODY, 1 WASH. TERR. 329.

Quotient verdict as ground for new trial.

Cited in *Williams v. State*, 66 Ark. 264, 50 S. W. 517; *Long v. Collins*, 12 S. D. 621, 82 N. W. 95; *Gordon v. Travathan*, 13 Mont. 387, 40 A. S. R. 452, 34 Pac. 185,—holding that agreement by jury to return "quotient" verdict is ground for new trial; *Kunkel v. Hughes*, 6 Pa. Dist. R. 356, 14 Lanc. L. Rev. 256, to point that oath of juror is not admissible to impeach verdict alleged to be quotient verdict.

Cited in reference notes in 44 A. R. 701, on validity of quotient verdict as to term of imprisonment; 54 A. R. 404, on chance verdict in criminal case; 8 A. S. R. 149, on validity of quotient verdict for damages; 40 A. S. R. 459, on validity of chance verdicts; 35 A. S. R. 185, on avoiding chance verdicts.

34 AM. REP. 816, HARMON v. HALE, 1 WASH. TERR. 422.

Parol evidence of character of parties to note.

Cited in reference notes in 11 A. S. R. 726, on admissibility of parol evidence to show that apparent joint maker of note is surety; 60 A. S. R. 897, on parol evidence as to real character of apparent maker of note.

Cited in notes in 55 A. S. R. 843, on parol evidence as to true relation of parties to note; 20 L.R.A. 711, on distinction between suits at law and equity as to admissibility of extrinsic evidence as to relation of parties to note as principal and surety.

Release of surety by extension of time of payment.

Cited in *Gillett v. Taylor*, 14 Utah, 190, 60 A. S. R. 890, 46 Pac. 1099, holding that extension of time of payment made by payee of note releases joint maker who is, as between makers, only surety, where payee has knowledge of agreement.

NOTES

ON THE

AMERICAN REPORTS.

CASES IN 35 AM. REP.

35 AM. REP. 1, WALKER v. STATE, 63 ALA. 49.

What constitutes burglary.

Cited in *Carter v. State*, 68 Ala. 96, holding that to constitute burglary there must be breaking, removing, or putting aside of something material, constituting part of dwelling and is relied on as security against intrusion; *Green v. State*, 68 Ala. 539, holding entry into store-house through open window without force or violence not burglarious; *Miller v. State*, 77 Ala. 41, holding person not guilty of burglary where he abstracted corn from crib through opening already made; *State v. Crawford*, 8 N. D. 539, 73 A. S. R. 772, 46 L.R.A. 312, 80 N. W. 193, holding person guilty of burglary where in night time he bores holes in granary with auger thus causing wheat to escape which he takes away.

Cited in reference notes in 54 A. R. 529; 73 A. S. R. 775,—on what is a burglarious entry.

Cited in note in 2 A. S. R. 384, on what constitutes "breaking" in burglary.

35 AM. REP. 4, CARTER v. STATE, 63 ALA. 52.

Competency of child as witness.

Cited in *Beason v. State*, 72 Ala. 191, holding child eleven years of age incompetent as witness in trial for rape where she manifested want of instruction as to nature and effect of oath; *Kelly v. State*, 75 Ala. 21, 51 A. R. 422, holding that fact that infant female incompetent to testify on trial for rape does not affect her competency on subsequent trial of same case; *McKelton v. State*, 88 Ala. 181, 7 So. 38, holding child under fourteen years of age incompetent as witness where he did not possess requisite capacity to understand sanctity of oath and know consequences of false swearing; *Walker v. State*, 134 Ala. 86, 32 So. 703, holding child ten years of age competent as witness where she attends church, says prayers, believes in God and understands nature of falsehood; *Castleberry v. State*, 135 Ala. 24, 33 So. 431, holding child eight years old competent as witness where it is shown she understands nature of

an oath; *White v. State*, 136 Ala. 58, 34 So. 177, holding child under twelve years of age incompetent as witness where he does not know nature of an oath; *Jones v. State*, 145 Ala. 51, 40 So. 979, holding child nine years of age incompetent to testify where she stated it was wrong to tell lie and that God could put her in jail if he wanted to; *State v. Meyer*, 135 Iowa, 507, 124 A. S. R. 291, 113 N. W. 322, 14 A. & E. Ann. Cas. 1, holding child who understands that it is wrong to tell falsehood and appreciates nature of oath, qualified to testify although unable to define words "oath" and "testimony."

Cited in reference notes in 38 A. R. 265; 58 A. R. 245,—as to when young child is competent witness.

Cited in notes in 16 A. S. R. 31; 40 A. S. R. 281; 19 L.R.A. 608, 610; 40 L. ed. U. S. 245, 246,—on competency of child as a witness.

—Duty of court to determine.

Cited in *Com. v. Reagan*, 175 Mass. 335, 78 A. S. R. 496, 56 N. E. 577, holding that it is duty of judge to decide on competency of witness when it is objected that by reason of insanity or youthfulness witness does not understand nature of oath; *Simmons v. State*, 158 Ala. 8, 48 So. 606, holding it within discretion of court to examine witness as to his knowledge of obligation of an oath; *Donnelley v. Territory*, 5 Ariz. 291, 52 Pac. 368, holding that it is duty of court to examine child in regard to obligation of oath and then to decide on his competency as witness; *Taylor v. McGrath*, 9 Ind. App. 30, 36 N. E. 163, holding that whether child under ten years of age is competent witness must be determined by court; *State v. King*, 117 Iowa, 484, 91 N. W. 768, holding that it is duty of court when competency of child as witness is questioned by proper objections, to decide as to her competency.

Cited in note in 124 A. S. R. 302, 307, on discretion of court as to competency of children as witnesses.

Competency of irreligious person as witness.

Cited in reference note in 14 A. S. R. 697, on incompetency of witnesses on account of religious belief.

Cited in note in 124 A. S. R. 300, on religious belief as test of competency of children as witnesses.

35 AM. REP. 8, WASHINGTON v. STATE, 63 ALA. 135.

Jurors as judges of law.

Cited in *State v. Burpee*, 65 Vt. 1, 36 A. S. R. 775, 19 L.R.A. 145, 25 Atl. 964, holding jurors not paramount judges of law in criminal cases.

Cited in reference note in 36 A. S. R. 802, on jury as judges of the law.

35 AM. REP. 9, LOWDER v. STATE, 63 ALA. 143.

What constitutes burglary.

Cited in *Carter v. State*, 68 Ala. 96, holding that to constitute burglary, there must be breaking, removing or putting aside of something material which constitutes part of dwelling house and is relied on as security against intrusion.

Cited in reference note in 27 A. S. R. 328, on breaking in burglary.

Cited in note in 2 A. S. R. 380, on what constitutes "breaking" in burglary.

—By servant.

Cited in *Hild v. State*, 67 Ala. 39, holding employee left in charge of house who enters closed room and steals therefrom, when, by virtue of employment.

he had no right to go there, guilty of burglary; *Young v. Com.* 126 Ky. 474, 128 A. S. R. 326, 104 S. W. 266, 15 A. & E. Ann. Cas. 1022, holding laborer occupying house with owner and who while on leave of absence obtained key by fraud with intent to steal therefrom guilty of breaking and entering; *State v. Howard*, 64 S. C. 344, 92 A. S. R. 804, 58 L.R.A. 685, 42 S. E. 173, holding that servant, having right to lodge in master's dwelling but who comes in either by opening door or raising sash, not with intent to lodge but with intent to steal, and actually steals and carries away master's goods, commits burglary.

Cited in reference note in 92 A. S. R. 809, on burglary by servant entrusted with key.

35 AM. REP. 13, MOBILE & G. R. CO. v. COPELAND, 63 ALA. 219.

Liability of carrier for goods beyond terminus.

Cited in *South & North Ala. R. Co. v. Wood*, 71 Ala. 215, 46 A. R. 309, to point that when railroad company stipulates for delivery of freight at point of destination beyond terminus of its road, consignee can hold first, road liable for non-delivery at point of destination, no matter on which intervening road loss occurred; *Lotspeich v. Central R. & Bkg. Co.* 73 Ala. 306, holding that bills of lading by railroad company to deliver freight beyond its line bind company for safe delivery at agreed point of destination; *Louisville & N. R. Co. v. Meyer*, 78 Ala. 597; *Alabama G. S. R. Co. v. Mt. Vernon Co.* 84 Ala. 173, 4 So. 356; *Jones v. Cincinnati, S. & M. R. Co.* 89 Ala. 376, 8 So. 61,—holding railroad company, in absence of express agreement, liable as common carrier for loss of goods consigned to place beyond terminus of its road.

Cited in reference note in 2 A. S. R. 325, on liability of connecting carriers.

Cited in notes in 72 A. D. 231, 234, on effect under English rule of carrier's receiving goods consigned to point beyond terminus; 42 A. R. 667, on connecting carrier's liability beyond its line; 106 A. S. R. 605, on liability of an initial carrier for torts or negligence of connecting lines in absence of special contract; 36 A. R. 762; 31 L.R.A.(N.S.) 5,—on liability of connection carrier for loss beyond own line; 21 L. ed. U. S. 299, on liability of common carrier for goods to be transported beyond termination of his line; 5 E. R. C. 348, on effect of receipt by carrier of goods destined for point beyond its line.

— Under agreement for mere delivery to connecting carrier.

Cited in *Montgomery & E. R. Co. v. Culver*, 75 Ala. 587, 51 A. R. 483, holding that where contract of receiving company is for delivery merely to connecting company, liability for nondelivery at point of destination is prima facie on receiving company; *Salter v. Alabama G. S. R. Co.* 142 Ala. 474, 39 So. 87, holding delivering carrier liable only for injuries to property occurring on its own line.

Distinguished in *Alabama G. S. R. Co. v. Thomas*, 83 Ala. 343, 3 So. 802, holding railroad company, receiving cattle, as common carrier, to be delivered at its terminus to next connecting road liable only for safe transportation over its own road.

35 AM. REP. 17, LOEB v. PETERS, 63 ALA. 243.**Right of stoppage in transitu.**

Cited in *The Vidette*, 34 Fed. 396, holding that seller who has sent goods to buyer, at distance, may stop them at any time before they reach buyer on ground of buyer's insolvency; *McElwee v. Metropolitan Lumber Co.* 16 C. C. A. 232, 37 U. S. App. 266, 69 Fed. 302, holding that right of stoppage in transitu will not be defeated by attachment by creditors of vendee; *Smith v. Barker*, 102 Ala. 679, 15 So. 340, holding insolvency chief basis of right of stoppage in transitu; *Bayonne Knife Co. v. Unbenhauer*, 107 Ala. 496, 54 A. S. R. 114, 18 So. 175, holding that attachment of goods before delivery to vendee will not defeat vendor's right of stoppage in transitu; *Branan Bros. v. Atlanta W. P. R. Co.* 108 Ga. 70, 75 A. S. R. 26, 33 So. 836, holding that right of stoppage in transitu of goods sold on credit, when consignee is insolvent exists until there has been actual delivery of goods to consignee; *Symms v. Schlotten*, 35 Kan. 310, 10 Pac. 828, holding that vendor's right of stoppage in transitu continues until goods have actually reached possession of vendee; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L.R.A. 147, holding right of stoppage in transitu mere extension of vendor's lien; *Evans Garden Cultivator Co. v. Missouri, K. & T. R. Co.* 64 Mo. App. 306, holding that there must be change of circumstances after shipment in order to justify stoppage of goods by vendor; *Crass v. Memphis & C. R. Co.* 96 Ala. 447, 11 So. 480; *Farrell v. Richmond & D. R. Co.* 102 N. C. 390, 11 A. S. R. 760, 3 L.R.A. 647, 9 S. E. 302,—holding that vendor's right of stoppage in transitu is not affected by vendee's insolvency at time of sale provided vendor was ignorant of the facts; *Gass v. Mills*, 134 App. Div. 184, 118 N. Y. Supp. 982, holding owner and consignor entitled to exercise right of stoppage in transitu as against transferee of bill of lading marked "not negotiable."

Cited in reference notes in 11 A. S. R. 766, on vendor's right to invoke stoppage in transitu upon learning of vendee's insolvency; 54 A. S. R. 117, on right of stoppage in transitu on purchaser's insolvency.

Cited in notes in 38 A. D. 422, on effect of indorsement of bill of lading on right of stoppage in transitu; 4 E. R. C. 797, on necessity that assignee of bill of lading give new consideration in order to defeat right of stoppage in transitu; 23 E. R. C. 433, as to when right of stoppage in transitu ceases.

Who are bona fide purchasers for value.

Cited in *Robinson v. Peabworth*, 71 Ala. 240, to point that to constitute purchase so as, in absence of notice to cut off equities, something valuable must be parted with by transferee; *Spira v. Hornthall*, 77 Ala. 137, holding that merely agreeing to take goods in payment of indebtedness past due and entering credit on account for price, without surrendering any thing valuable, does not constitute creditor a purchaser for value; *Ex parte Jones*, 77 Ala. 330, holding when insolvent bank draws bill in favor of depositor which is dishonored on presentation because of intervening assignment by bank, payee cannot rescind contract in absence of intentional fraud on part of bank; *First Nat. Bank v. Nelson*, 105 Ala. 180, 16 So. 707, holding that crediting by bank on unindorsed check payable to existing person or bearer, to account of insolvent debtor delivering it does not constitute bank bona fide purchaser for value; *American Nat. Bank v. Henderson*, 123 Ala. 612, 82 A. S. R. 147, 26 So. 498, holding that pledge of bill of lading received in good faith operated as vesture of title to corn in claimant as against consignor and his creditors; *Conrad v. Fisher*,

37 Mo. App. 352, 8 L.R.A. 147; *Skilling v. Bollman*, 73 Mo. 665, 29 A. R. 537,—holding transferee of bill of lading as mere collateral security for pre-existing debt, not bona fide purchaser for value; *Goodwin v. Massachusetts Loan & T. Co.* 152 Mass. 189, 25 N. E. 100, holding pledgee of chattels pledged merely to secure pre-existing debt, not holder for value.

Cited in reference note in 63 A. S. R. 378, on assignment of bills of lading as collateral security.

Cited in notes in 32 A. S. R. 713, on rights as bona fide holder of one taking collateral to secure pre-existing debt; 36 L.R.A. 107, on pre-existing debt as consideration for bona fide purchase of property not negotiable; 52 L.R.A. 799, on liability of bank or other depository applying trust funds deposited by agent, fiduciary, or other representative to its own claim against agent, etc.; 4 E. R. C. 331, on creditor accepting negotiable paper given for pre-existing debt as bona fide holder.

Proof of insolvency.

Cited in *Abbott v. Gillespy*, 75 Ala. 180, holding that insolvency may be shown by evidence of issue of executions on other judgments against defendant in execution and of returns thereon of "no property found."

35 AM. REP. 20, BOSWELL v. STATE, 63 ALA. 307.

Defenses to crime.

Cited in *State v. Harrison*, 36 W. Va. 729, 18 L.R.A. 224, 15 S. E. 982, on "right and wrong" test in murder charge.

Cited in notes in 27 A. S. R. 811; 60 A. R. 212; 60 A. S. R. 213, 219, 686,—on insanity as defense in criminal case; 36 A. D. 407, on test of responsibility where insanity interposed as defense.

—Emotional insanity.

Cited in *Walker v. State*, 91 Ala. 76, 9 So. 87; *Cawley v. State*, 133 Ala. 128, 32 So. 227,—holding emotional insanity no defense to murder; *Goodwin v. State*, 96 Ind. 550, holding that "perversion of affections" does not constitute such mental unsoundness as will absolve one from responsibility for crime of murder.

—Insane delusions.

Cited in notes in 63 A. S. R. 104, on insane delusions as a defense; 37 L.R.A. 268, on what are insane delusions; 37 L.R.A. 266, on necessity that insane delusions be sufficient to excuse if true.

—Moral insanity.

Cited in *Leache v. State*, 22 Tex. App. 279, 58 A. R. 638, 3 S. W. 539, holding that moral insanity which consists of irresistible impulse coexisting with mental sanity has no support either in psychology or law.

Cited in note in 76 A. S. R. 90, on moral insanity as an excuse or defense for crime.

—Uncontrollable impulse.

Cited in notes in 63 A. S. R. 100, on uncontrollable impulse as a defense; 18 L.R.A. 228, on effect of disease to create irresistible impulse upon its validity as defense to crime.

—Drunkenness.

Cited in *Fonville v. State*, 91 Ala. 39, 8 So. 688, holding when drunkenness is set up as defense to assault with intent to murder, accused must prove by Am. Rep. Vol. XVII.—56.

preponderance of evidence such degree of intoxication as renders him insane at time act was committed.

Degree of proof of insanity.

Cited in *Parsons v. State*, 81 Ala. 577, 60 A. R. 103, 2 So. 854 (dissenting opinion), on measure of proof required to establish insanity when set up as defense to murder; *Ford v. State*, 71 Ala. 385; *Gunter v. State*, 83 Ala. 196, 3 So. 600; *Maxwell v. State*, 89 Ala. 150, 7 So. 824,—holding when insanity is set up as defense in criminal case defendant must prove it by preponderance of evidence and reasonable doubt of its existence does not require verdict in his favor; *Martin v. State*, 119 Ala. 1, 25 So. 255, holding that accused must prove insanity when relied on as defense to murder; *Lide v. State*, 133 Ala. 43, 31 So. 953, holding when insanity is set up as defense to murder, accused must show by preponderance of evidence if knowing from wrong, that by reason of mental disease he had lost power to choose between right and wrong and to avoid doing act; *Danforth v. State*, 75 Ga. 114, 58 A. R. 480, holding that insanity as defense to murder must be proved by preponderance of evidence; *State v. Lyons*, 113 La. 959, 37 So. 890, holding that person charged with murder relying on insanity as defense must prove it by preponderance of whole evidence of case; *State v. Scott*, 49 La. Ann. 253, 36 L.R.A. 721, 21 So. 271, to point that insanity is defense which must be established to satisfaction of jury by preponderance of evidence; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241, holding that presumption of sanity, in murder trial, prevails until overcome by preponderance of evidence showing accused's insanity to satisfaction of jury; *Kelch v. State*, 55 Ohio St. 146, 60 A. S. R. 680, 39 L.R.A. 737, 45 N. E. 6, holding that accused, in trial for murder, is bound to establish insanity by preponderance of evidence; *Lovegrove v. State*, 31 Tex. Crim. Rep. 491, 21 S. W. 191, holding that person charged with theft of horse must establish insanity by preponderance of testimony.

Cited in reference notes in 83 A. D. 239, on burden of proof of sanity when insanity is pleaded as defense to crime; 36 A. R. 768, 795, on burden to show sanity in criminal cases.

Cited in notes in 97 A. D. 176, 177, on burden of proof when insanity is set up as defense to crime; 76 A. S. R. 83, 96, on burden of proof as to insanity set up as an excuse for crime; 39 L.R.A. 739, 740, on proof of insanity in criminal cases by preponderance of the evidence; 39 L.R.A. 741, on what constitutes sufficient preponderance of the evidence as to insanity in criminal cases.

Capacity of unsound mind to form criminal intent.

Disapproved in *Porter v. State*, 140 Ala. 87, 37 So. 81, holding charge that an unsound mind cannot form criminal intent, misleading if not wholly incorrect.

Statutory grades of homicide.

Cited in *Smith v. State*, 68 Ala. 424, on grades of criminal homicide as classified by statutes.

Duty of jury to determine what are symptoms of insanity.

Cited in *Porter v. State*, 135 Ala. 51, 33 So. 694, holding that in homicide case, where insanity is an issue, charge invades province of jury which instructs that extravagant acts, nervousness, sleeplessness, and restlessness are symptoms of insanity.

Cited in note in 39 L.R.A. 739, on proof of insanity in criminal cases to satisfaction of jury.

General objection to evidence partly admissible.

Cited in *Marks v. State*, 87 Ala. 99, 6 So. 377, holding that general objection to admission of evidence, part of which is admissible, may be overruled entirely.

Sufficiency of exception.

Cited in *Robertson v. Black*, 74 Ala. 322, holding that judgment on final settlement of administrator's accounts will be affirmed if exception is taken to ruling of court, sustaining or overruling objection to introduction of evidence in mass.

35 AM. REP. 40, AN TOMARCHI v. RUSSELL, 63 ALA. 356.**Contribution between adjacent proprietors as to cost of party wall.**

Cited in *Preiss v. Parker*, 67 Ala. 500, holding adjacent lot owner under no obligation to contribute to cost of erection of party wall; *Griffin v. Sansom*, 31 Tex. Civ. App. 560, 72 S. W. 864, holding fact that adjoining owner makes use of party wall rebuilt and standing partly on his land will not render him liable for one half cost of rebuilding wall; *Hawkes v. Hoffman*, 56 Wash. 120, 24 L.R.A. (N.S.) 1038, 105 Pac. 156, holding that use of party wall, constructed on line by adjoining owner raises no implied obligation to pay one-half of its cost.

Cited in notes in 92 A. D. 289, 300, on liability of adjoining owner to contribute to expense of party wall in absence of contract; 89 A. S. R. 939, on contribution for use of party wall.

Distinguished in *Merchants Bank v. Foster*, 124 Ala. 696, 27 So. 515, holding contribution to repair partition wall only recoverable on contract.

Extinguishment of rights in party wall.

Cited in *McKenna v. Eaton*, 182 Mass. 346, 94 A. S. R. 661, 65 N. E. 382, holding that right of support and shelter on dividing line of owner in severalty of half of double house is ended, when board of health by lawful order compels destruction of other half of building.

Cited in reference note in 18 A. S. R. 833, on mutual rights where party wall destroyed by fire.

Cited in notes in 92 A. D. 298, on rights of owners upon destruction of party wall; 66 A. S. R. 585; 89 A. S. R. 937,—on destruction of party wall; 19 L.R.A. (N.S.) 884, on effect of destruction of building to terminate adjoining owner's easement of support.

Construction of party wall agreement.

Cited in *Old Fellows Asso. v. Hegele*, 24 Or. 16, 32 Pac. 679, holding that provision in party wall agreement that rights of parties shall continue "so long as wall shall stand" means so long as wall shall continue fit and suitable for its purpose.

Implied easement of perpetual support.

Cited in *Shirley v. Crabb*, 138 Ind. 200, 46 A. S. R. 376, 37 N. E. 130, to point that in absence of express agreement there can be, by implication, no mutual easement of perpetual support applicable to future structures.

Cited in note in 66 L.R.A. 705, on enforcement by or against grantees or successors in title of noncontractual obligation to contribute to cost of party wall erected merely with consent of adjoining owner.

Custom as element of contract.

Cited in *Buyck v. Schwing*, 100 Ala. 355, 14 So. 48, holding that custom as

element of contract must be so general and so known as to justify presumption parties knew of it and contracted in reference to it.

Cited in note in 2 L.R.A. 709, on necessity of pleading local custom and usages.

35 AM. REP. 45, WHITE v. LIFE ASSO. OF AMERICA, 63 ALA. 419.
Rights of surety.

Cited in *McKissack v. McClendon*, 133 Ala. 558, 32 So. 486 (dissenting opinion), to point that surety in suit by creditor may make any defense which principal could make.

When surety is discharged.

Cited in *First Nat. Bank v. Cheney*, 114 Ala. 536, 21 So. 1002, to point that if new firm had collected funds belonging to old and deposited them with creditor and creditor knew that fact it would have been under obligation to surety to apply funds so deposited to payment of its claim against old firm; *First Nat. Bank v. Fidelity & D. Co.* 145 Ala. 335, 117 A. S. R. 45, 5 L.R.A.(N.S.) 418, 40 So. 415, 8 A. & E. Ann. Cas. 241, holding surety discharged by improper payments by owner to contractor; *Spurgeon v. Smitha*, 114 Ind. 453, 17 N. E. 105, holding sureties discharged by refusal of creditor to accept payment of debt when tendered; *Life Asso. of America v. Neville*, 72 Ala. 517, holding that general offer to pay by principal debtor, not having formalities of legal tender and not definitely refused by creditor has no legal effect on surety's liability unless it operates to his injury.

35 AM. REP. 54, ACKLEN v. HICKMAN, 63 ALA. 494.

Right of witness to refresh memory by memorandum.

Cited in *Munden v. Bailey*, 70 Ala. 63, on use of books or memoranda by witness to aid or refresh his memory; *Jaques v. Horton*, 76 Ala. 238, holding that witness may refresh memory by memorandum if he knows it to be correct and can, after referring to it, testify from independent recollection; *Stondenmire v. Harper*, 81 Ala. 242, 1 So. 857, holding that witness may refresh memory by reference to copy if he can state that original entry was, when made, true statement of facts and that memorandum used is correct copy of original entries; *Bellingslea v. State*, 85 Ala. 323, 15 So. 137, holding that witness being questioned as to time of commission of offenses charged against defendant may refresh memory by memorandum of his testimony on former examination which was written down and subscribed by him at time; *Hawes v. States*, 88 Ala. 37, 7 So. 302, holding that newspaper reporter may refer to printed report of his interview for purpose of testifying to conversation had with defendant at time of arrest where notes made at time were destroyed; *Powell v. Henry*, 96 Ala. 412, 11 So. 311, holding that witness may refresh his memory as to amount of account by referring to paper which had been drawn off from book of items; *Thompson v. State*, 99 Ala. 173, 13 So. 753, holding that witness may refresh his memory by memorandum made at or about time to which it relates when he knows it to be correct and can thereafter testify from independent recollection; *Anderson v. English*, 121 Ala. 272, 25 So. 748, holding memorandum of delivery of lumber made by witness from original entries which was true copy of original admissible to refresh memory in action on account; *Hirschfelder v. Levy*, 69 Ala. 351, holding that witness cannot refresh his memory by reference to items of account as to enable him to swear to knowledge of contents of memorandum

rendered to debtor by creditor; *Miller v. Boykin*, 70 Ala. 469, holding that witness cannot refresh memory by memorandum when he did not make it himself and had no personal knowledge of truth of facts therein recited; *Wellman v. Jones*, 124 Ala. 580, 27 So. 416, holding memorandum not identified as made by witness or at his dictation not admissible to refresh witness' memory as to contents of lost contract.

Cited in reference notes in 40 A. R. 697, on right of witness in capital case to refresh memory by memoranda; 1 A. S. R. 451, on witness's use of memorandum to refresh memory; 48 A. S. R. 191, 296; 52 A. S. R. 159,—on refreshing of witness' memory.

Cited in note in 98 A. D. 620, 622, on use of memoranda by witness who has independent recollection.

Right to cross examine witness as to memorandum used to refresh memory.

Cited in *Little v. Lichkoff*, 98 Ala. 321, 12 So. 429, holding that witness having refreshed his memory by examination of entries in ledger and testified to their correctness, adverse party had right to cross-examine him upon those entries without making them evidence in cause; *Green v. Texas*, 53 Tex. Crim. Rep. 490, 22 L.R.A.(N.S.) 706, 110 S. W. 920, holding that writing or memorandum must be delivered to opposite party for his inspection, that he may cross-examine witness in regard to it.

Admissibility of memorandum.

Cited in *Danforth v. Tennessee & C. River R. Co.* 99 Ala. 331, 13 So. 51, holding written estimates of civil engineers inadmissible upon inquiry of profits plaintiffs would have realized if permitted to perform their contract; *Hall v. State*, 134 Ala. 90, 32 So. 750, holding stenographic report of defendant's testimony upon former trial for rape admissible in trial for seduction where same act upon same girl is involved; *Louisville & N. R. Co. v. Cassibry*, 109 Ala. 697, 19 So. 900, holding memorandum made by witness showing estimate of articles destroyed by fire and their value not admissible where as to some of items there is no proof of its correctness; *Manchester Assur. Co. v. Oregon R. Co.* 46 Or. 162, 114 A. S. R. 863, 69 L.R.A. 475, 79 Pac. 60, holding memoranda secondary evidence and incompetent if witness is able to testify without referring to them or from present recollection after refreshing recollection; *Calloway v. Varner*, 77 Ala. 541, 54 A. R. 78, holding memorandum used for purpose of refreshing memory of witness not admissible in evidence unless called for by opposite party; *Palmer v. Hartford Dredging Co.* 73 Conn. 182, 47 Atl. 125, holding writing itself not admissible in evidence where it refreshes memory of witness; *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281, holding both testimony of witness and memorandum admissible when he testifies that he made it in usual course of business and that at time he made it he knew its contents to be true; *Snodgrass v. Coulson*, 90 Ala. 347, 7 So. 736, holding memorandum admissible though witness cannot recollect facts if he states that he made memorandum and that he then knew facts to be as stated; *Battles v. Tallman*, 96 Ala. 403, 11 So. 247, holding memorandum in connection with testimony admissible if witness have no independent recollection of facts but at time memorandum was made knew truth and accuracy of its contents; *St. Louis S. W. R. Co. v. White Sewing Mach. Co.* 78 Ark. 1, 93 S. W. 58, 8 A. & E. Ann. Cas. 208, holding memorandum in connection with testimony admissible to prove that message was sent where operator has no present recollection that message was sent but swears that at

time memorandum was made by him he knew message was sent; *Casey v. Ballou Bkg. Co.* 98 Iowa, 107, 67 N. W. 98, holding schedule of goods attached to exhibit and sworn to be correct and made by competent person admissible in action for conversion of goods described for purpose of showing their character; *Wright v. Wright*, 58 Kan. 525, 50 Pac. 444, holding both testimony and memorandum admissible if witness have no independent recollection of facts but at time memorandum was made knew truth and accuracy of its contents; *Garden City v. Heller*, 61 Kan. 767, 60 Pac. 1060, holding that if witnesses have no independent recollection of facts but can testify to truth and accuracy of memoranda made by them as to number and kinds of trees planted, both testimony of witnesses and memoranda are admissible; *Green v. State*, 53 Tex. Crim. Rep. 490, 22 L.R.A. (N.S.) 706, 110 S. W. 920, holding that upon trial of violation of local option law where witness has no independent recollection of facts and depends upon his knowledge that memorandum is correct, it must be produced.

— Admissibility of book entries.

Cited in *Minniece v. Jester*, 65 Ala. 222, holding entries in memorandum book purporting to show items of personal expenditure by owner inadmissible on proof of his handwriting only and his own statement as witness; *Hart v. Kendall*, 82 Ala. 144, 3 So. 41, holding entries by book-keeper, by direction of employer, not in presence of person against whom they are offered as evidence and as to which bookkeeper has no personal knowledge or remembrance of facts, inadmissible against that person; *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59, holding entry of cash on books by cashier admissible as evidence of sale and delivery of mule; *J. Snow Hardware Co. v. Loveman*, 131 Ala. 221, 31 So. 19, holding entries of executory contract where bookkeeper had no knowledge of contract or truthfulness of memorandum inadmissible against buyer in action for breach of contract; *Jeffries v. Castleman*, 68 Ala. 432, holding memorandum entered at time of sale by defendant on his books to effect that proceeds of check, when collected, were to be placed to credit of husband, not admissible as evidence for defendant without husband's knowledge of it or assent to it.

Admissibility of secondary evidence generally.

Cited in *Mobile L. Ins. Co. v. Egger*, 67 Ala. 134, holding statements of witness derived not from personal knowledge of matters testified about but from inspection of books of insurance company, not legal evidence; *Brent v. Baldwin*, 160 Ala. 635, 49 So. 343, holding copy which was only summary of original and not exact copy incompetent.

35 AM. REP. 57, BLACKMAN v. LEHMAN, 63 ALA. 547.

Negotiability of bonds and coupons of corporation.

Cited in *Washington County v. Williams*, 49 C. C. A. 621, 111 Fed. 801, holding municipal bonds with no certainty as to fact or time of payment not negotiable instruments within the law merchant; *Cobb v. Bryant*, 86 Ala. 316, 5 So. 586, holding that note payable to existing person or bearer must be construed under section 1761 of code as if payable to him or order; *Kansas City, M. & B. R. Co. v. Cobb*, 100 Ala. 228, 13 So. 938, holding that section 1761 of code has no application to coupons payable to bearer which under general law possess all attributes of negotiable promissory notes and are governed by law merchant; *Mobile County v. Sands*, 127 Ala. 493, 29 So. 26, holding bonds and coupons not commercial paper.

Cited in notes in 98 A. D. 683, 684, on negotiability of municipal bonds; 4 E. R. C. 192, on negotiability of bill of exchange or promissory note.

Distinguished in *Lehman v. Tallassee Mfg. Co.* 64 Ala. 567, holding bonds of private corporation issued under authority of statute, being payable to bearer with coupons for interest attached are negotiable instruments; *Reid v. Bank of Mobile*, 70 Ala. 199, holding railroad bonds payable to bearer and indorsed by state when expressed in negotiable words are clothed with all attributes of negotiable paper.

Essentials of promissory note.

Cited in *Heflin Gold Min. Co. v. Hilton*, 124 Ala. 365, 27 So. 301, holding that it is essential to promissory note that promise to pay be absolute and without restriction to particular funds.

Validity of notes payable to an estate.

Cited in *Stern v. Eichberg*, 83 Ill. App. 442, holding promissory notes payable to estate of deceased person valid not only as promissory notes but also as evidence of indebtedness and admissible in proof under common counts.

Rights of bona fide holder of promissory note.

Cited in *Woodall & Sons v. People's Nat. Bank*, 153 Ala. 576, 45 So. 194; *Brown v. First Nat. Bank*, 103 Ala. 123, 15 So. 435,—holding that bona fide holder of negotiable promissory note for value takes it free from all legal and equitable defenses to which it may have been subject prior to purchase.

Effect of transfer of note indorsed in blank as collateral security.

Cited in *Carter v. Lehman*, 90 Ala. 126, 7 So. 735, holding that delivery and transfer of note as collateral security, indorsed in blank, passed interest and property therein to transferee.

Rights of purchaser of chattels from person not owner.

Cited in *Bennett v. Brooks*, 146 Ala. 490, 41 So. 149, holding that purchaser of chattels from one not owner thereof acquires no better title than his vendor had although he purchases without notice and for valuable consideration.

Cited in note in 42 A. R. 107, on title of bona fide purchaser from vendee holding under conditional sale.

Right of property.

Cited in *Fairbanks v. Eureka Co.* 67 Ala. 109, holding that owner shall not be deprived of his property without his consent except by due process of law.

Right of municipality to execute note.

Cited in *Cleveland School Furniture Co. v. Greenville*, 146 Ala. 559, 41 So. 862, holding note executed by city for payment of furniture purchased to fit up school ultra vires and unenforceable.

What is due process of law.

Cited in *Speer v. Athens*, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802, on what is meant by "due process of law."

Cited in note in 2 L.R.A. 655, on constitutional requirement of due process of law.

35 AM. REP. 67, HANKS v. NAGLEE, 54 CAL. 51.

Validity of contracts against public policy generally.

Cited in note in 90 A. S. R. 640, on injunction to prevent breach of contract in restraint of trade.

Promise of marriage based on consideration of sexual intercourse.

Cited in *Boigneresq v. Boulon*, 54 Cal. 146; *Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320; *Saxon v. Wood*, 4 Ind. App. 242, 30 N. E. 797; *Sramek v. Sklenar*, 73 Kan. 450, 85 Pac. 566,—holding no action maintainable for breach of promise to marry in consideration of sexual intercourse; *Edmonds v. Hughes*, 115 Ky. 561, 74 S. W. 283, holding promise of marriage in consideration of illicit sexual intercourse void; *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749, holding promise of marriage made in consideration of sexual intercourse illegal and void.

Cited in notes in 63 A. D. 536, on validity of promise of marriage on immoral consideration; 44 A. D. 178, on evidence of seduction in action for breach of promise; 40 A. S. R. 173, on consideration against law or public policy as defense to breach of promise suit.

Erroneous instruction as to assessment of damages.

Cited in *Lathrope v. Flood*, 135 Cal. 458, 57 L.R.A. 215, 67 Pac. 683, holding instruction as to assessment of damages by reason of death of child and as to consideration of defendant's connection with the death erroneous in action by husband and wife against physician for malpractice.

35 AM. REP. 69, PEOPLE v. AH NGOW, 54 CAL. 151.**Flight of accused as evidence of guilt.**

Cited in *Smith v. State*, 106 Ga. 673, 71 A. S. R. 286, 32 S. E. 851, holding flight of accused only one of series of circumstances from which guilt may be inferred; *State v. Poe*, 123 Iowa, 118, 101 A. S. R. 307, 98 N. W. 587, holding flight of accused not presumptive evidence of guilt.

Distinguished in *People v. Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951, holding flight of defendant from scene of homicide immediately after shots carrying revolver in plain view, incriminating circumstance.

Presumption of guilt from possession of stolen property.

Cited in *People v. Mitchell*, 55 Cal. 236, holding possession of property by accused recently after it had been stolen not presumption of guilt.

Effect of material conflict of instructions.

Cited in *People v. Messersmith*, 57 Cal. 575, holding charge erroneous where court instructed jury that insanity must be proved beyond reasonable doubt and in connection read to jury decision to effect that it is sufficient if insanity be proved by preponderance of evidence; *Haight v. Vallet*, 89 Cal. 245, 23 A. S. R. 465, 26 Pac. 897, holding where instructions on material point are contradictory judgment will be reversed.

Error in instruction which invades province of jury.

Cited in *People v. Massersmith*, 61 Cal. 246, holding that assumption of fact by court which must be found by jury constitutes error for which conviction is reversible; *People v. Welsh*, 63 Cal. 167, holding conduct of accused after arrest admissible as indicating guilty intent.

Cited in note in 72 A. D. 544, on examples of charges upon weight of evidence.

Cure of erroneous instruction.

Cited in *People v. Bush*, 65 Cal. 129, 3 Pac. 590; *People v. Thomas*, 92 Cal. 506, 28 Pac. 589; *People v. Westlake*, 124 Cal. 452, 57 Pac. 465; *People v. Maughan*, 149 Cal. 253, 86 Pac. 187,—holding that erroneous instruction is not cured by

correct statement of law in another part of charge; *McClaine v. Territory*, 1 Wash. 345, 25 Pac. 453, holding that omission of essential element in defining crime cannot be cured by reason of any other portion of charge correctly stating law.

35 AM. REP. 72, HELBING v. SVEA INS. CO. 54 CAL. 156.

Effect of false statement in insurance contract.

Cited in *Miller v. Fireman's Fund Ins. Co.* 6 Cal. App. 395, 92 Pac. 332, holding statement in proof of loss that certain property was destroyed and that there was no mortgage on insured property avoids policy only in case it is wilfully false; *National Bank v. Union Ins. Co.* 88 Cal. 497, 22 A. S. R. 324, 26 Pac. 509, holding that misstatement in insurance policy as to leasing of property must be intentional to avoid policy.

Cited in reference note in 39 A. R. 584, on effect of mistake on provision in insurance policy making it forfeitable for fraud.

Cited in note in 11 L.R.A.(N.S.) 983, as to when statements may be regarded as representations although expressly denominated in policy as warranties; 44 L.R.A. 858, on conclusiveness of proof of loss as to amount of loss.

Effect of warranty against overvaluation in policy.

Cited in *Wheaton v. North British & M. Ins. Co.* 76 Cal. 415, 9 A. S. R. 216, 18 Pac. 758, holding that policy cannot be held void for breach of condition as to overvaluation unless overvaluation is intentional and fraudulent; *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 41 N. E. 183, holding that overvaluation of property destroyed made without intent to deceive in proof of loss will not defeat recovery on policy containing provision against overvaluation.

Cited in reference note in 44 A. R. 177, on effect of innocent overvaluation to invalidate insurance.

Right to refuse instruction as to presumption of fact.

Cited in *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310, holding instruction declaring to jury mere presumption of fact properly refused.

35 AM. REP. 77, WILLIAMS v. HARTFORD INS. CO. 54 CAL. 442.

What constitutes total loss of structure within meaning of statute.

Cited in *Liverpool & L. & G. Ins. Co. v. Heckman*, 64 Kan. 388, 67 Pac. 879, holding that total loss means only such destruction of property as deprives it of character in which it was insured; *Palatine Ins. Co. v. Weiss*, 109 Ky. 464, 59 S. W. 509; *Thuringia Ins. Co. v. Malott*, 111 Ky. 917, 55 L.R.A. 277, 64 S. W. 991,—holding that there is total loss to building where its identity and specific character as building is destroyed; *Monteleone v. Royal Ins. Co.* 47 La. Ann. 1563, 56 L.R.A. 784, 18 So. 472; holding when building insured is so injured by fire as to be made insecure and menace to life, is condemned and reparation prohibited insured may claim total loss although building when insured was not sound; *Havens v. Germania F. Ins. Co.* 123 Mo. 403, 45 A. S. R. 570, 26 L.R.A. 107, 27 S. W. 718, holding that words "wholly destroyed" as used in revised statute regarding insured building mean that building is totally destroyed as such though there is not absolute extinction of all its parts; *O'Keefe v. Liverpool, L. & G. Ins. Co.* 140 Mo. 558, 39 L.R.A. 819, 41 S. W. 922, holding that total loss of building occurred, where all was destroyed but stone foundation and upper part of one wall; *Corbett v. Spring Garden Ins. Co.* 155 N. Y. 389, 41 L.R.A. 318, 50 N. E. 282 (reversing 85 Hun, 250, 32 N. Y. Supp. 1059), holding not total

destruction of building where roof and interior were destroyed but owner restored building to substantially its former condition at expense of one third its original value; *Pennsylvania F. Ins. Co. v. Drackett*, 63 Ohio St. 41, 81 A. S. R. 608, 57 N. E. 962, holding that there is total loss within meaning of statute where building is so far destroyed by fire as to lose its identity and specific character as building; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 59 A. R. 613, 18 S. W. 337, holding that total loss does not mean an absolute extinction; *St. Clara Female Academy v. Northwestern Nat. Ins. Co.* 98 Wis. 257, 67 A. S. R. 805, 73 N. W. 767, holding that structure is wholly destroyed within meaning of statute when it is destroyed so as to leave nothing but badly damaged foundation walls; *Murphy v. American Cent. Ins. Co.* 25 Tex. Civ. App. 241, 54 S. W. 407, holding that foundations are not to be considered in determining whether there has been total loss of building by fire for contract of insurance is made with reference to part of structure above ground.

Cited in reference notes in 59 A. R. 613, on what constitutes "total loss" of building by fire; 45 A. S. R. 578, on meaning of "total destruction" of insured property.

Cited in notes in 59 A. S. R. 811, as to when property is deemed wholly destroyed or a "total loss" within insurance contract other than marine; 56 L.R.A. 785, 787, 789, on rule of loss of identity and specific character as applied to constructive total loss of insured building.

What is evidence of total loss of insured building.

Cited in *Royal Ins. Co. v. McIntyre*, 90 Tex. 170, 59 A. S. R. 797, 35 L.R.A. 672, 37 S. W. 1068, holding evidence of cost of repairing and restoring building admissible upon issue as to whether loss was total or partial in action on policy of fire insurance.

Nature of insurance upon building.

Cited as leading case in *Northwestern Mut. L. Ins. Co. v. Rochester German Ins. Co.* 85 Minn. 48, 56 L.R.A. 108, 88 N. W. 265, to point that policy covered building and not materials out of which it was constructed.

Cited in *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549, 62 N. E. 911, holding that insurance upon building is insurance upon building as such and not upon materials of which it is composed.

Sufficiency of proofs of loss.

Cited in *Continental Ins. Co. v. Wilson*, 45 Kan. 250, 23 A. S. R. 720, 25 Pac. 629, holding insurance company estopped to complain of sufficiency of proof of loss where it was sent to company twenty days before expiration of period fixed in policy and retained without objection until long after expiration period; *McCullough v. Home Ins. Co.* 155 Cal. 659, 102 Pac. 814, 18 A. & E. Ann. Cas. 862, holding that insurer waived proof of loss where adjuster stated to insured that such proofs were unnecessary.

Cited in note in 42 A. R. 624, on authority of agent as to conditions in insurance policy.

Waiver of proof of death.

Cited in *Daniher v. Grand Lodge A. O. U. W.* 10 Utah, 110, 37 Pac. 245, holding that proof of death was waived where insurers upon application to them refused to give death report, disclaimed liability under beneficiary certificate and refused payment.

Insufficient provision for arbitration in fire insurance policy.

Cited in *Case v. Manufacturers' F. & M. Ins. Co.* 82 Cal. 263, 21 Pac. 841,

holding no right of arbitration exists under fire insurance policy when stipulation for arbitration does not definitely fix number of arbitrators nor provide mode of selection.

Limitation of evidence.

Cited in *San Luis Obispo County v. White*, 91 Cal. 432, 48 Pac. 864, holding objection to admission of copy of election proclamation properly overruled if court is not requested to limit evidence to purpose for which it is admissible; *State v. Greene*, 33 Utah, 497, 94 Pac. 987, holding where evidence in criminal prosecution is competent for certain purposes but is admitted generally, remedy of party objecting to its admission is to ask for instructions limiting it to purpose for which it is admissible.

Necessity of request for caution to jury.

Cited in *People v. McLean*, 84 Cal. 480, 24 Pac. 32, holding that if opposing counsel desires caution to be given to jury he should ask for it.

35 AM. REP. 80, PAYNE v. ELLIOT, 54 CAL. 339.

Right to maintain trover for conversion of shares of stock.

Cited in *London, P. & A. Bank v. Aronstein*, 54 C. C. A. 663, 117 Fed. 601, holding corporation liable to executor for conversion on refusal to transfer stock; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476, holding that action of trover for conversion lies in favor of assignee on refusal of bank to transfer shares of stock upon its books; *Daggett v. Davis*, 53 Mich. 35, 51 A. R. 91, 18 N. W. 548, holding that trover will lie for conversion of certificate of stock; *Keller v. Eureka Brick Mach. Mfg. Co.* 43 Mo. App. 84, 11 L.R.A. 472, holding action by transferee of stock against corporation for damages for conversion of shares of stock maintainable; *Craig v. Mason*, 64 Mo. App. 342, holding trover maintainable for conversion of certificate of stock; *Withers v. Lafayette County Bank*, 67 Mo. App. 115, holding action maintainable for conversion of share of stock, which certificate represents, as well as that of certificate; *Mehaney v. Walsh*, 16 App. Div. 601, 44 N. Y. Supp. 969, holding that trover lies for conversion of corporate stock; *Condouris v. Imperial Turkish Tobacco & Cigarette Co.* 3 Misc. 66, 22 N. Y. Supp. 695, holding certificate of stock or stock itself subject of conversion; *Budd v. Multnomah Street R. Co.* 12 Or. 271, 53 A. R. 355, 7 Pac. 99, holding that trover will lie for conversion of shares of capital stock of corporation.

Cited in note in 52 A. D. 73, on action of trover for shares of stock.

Nature of shares of stock.

Cited in *People v. Williams*, 60 Cal. 1, holding that shares of stock constitute property.

Right of stockholder to compel issuance of certificate of stock.

Cited in *Lacaff v. Dutch Miller Min. & Smelting Co.* 31 Wash. 506, 72 Pac. 112, to point that stockholder may bring suit in equity to compel issuance of certificate of stock on refusal of corporation.

Property subject to conversion.

Cited in notes in 24 A. S. R. 818, on what personalty may be subject of conversion; 2 L.R.A. 449, on conversion of commercial paper.

Distinguished in *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130, holding there can be no conversion of property, title to which consists only in right at some future time to acquire it by purchase.

When execution may issue against person.

Cited in *Portland Cracker Co. v. Murphy*, 130 Cal. 649, 63 Pac. 70, holding that no person can be imprisoned for debt in any civil action on mesne or final process unless in cases of fraud; *Ledford v. Emerson*, 143 N. C. 527, 10 L.R.A.(N.S.) 362, 55 S. E. 969, holding that execution against person should not have been issued upon judgment for debt in absence of any special finding of fraud by jury.

Distinguished in *Banning v. Roy*, 47 Or. 119, 114 A. S. R. 908, 82 Pac. 708, holding that execution against person may issue when defendant has been provisionally arrested or order has been made authorizing his arrest and is still in force and execution against his property has been returned unsatisfied in whole or in part.

What facts must be alleged and proved.

Cited in *People v. McKenna*, 81 Cal. 158, 22 Pac. 488, holding that where no facts constituting fraud are averred, no facts are admitted; *Coogrove v. Fisk*, 90 Cal. 75, 27 Pac. 56, holding complaint alleging cause of action based upon alleged fraud of defendant which fails to aver facts constituting fraud, demurrable as to that cause of action; *Plummer v. Brown*, 70 Cal. 544, 12 Pac. 464, holding that unsuccessful claimant in action to compel conveyance of legal title, must distinctly allege and prove that he occupies such status as gives him right to control legal title.

35 AM. REP. 83, TOOMES'S ESTATE, 54 CAL. 509.**Admissibility of expert testimony.**

Cited in *Sowden v. Idaho Quartz Min. Co.* 55 Cal. 443, holding that practical miner who has used blasting powder for ten years can be asked his opinion, based upon his experience in its use, as to safety of that powder; *Re Dolbeer*, 149 Cal. 227, 86 Pac. 695, holding medical practitioner whose experience covered all classes of diseases, mental and physical, qualified to testify as to soundness of mind of testatrix whom he met in Paris subsequent to execution of will; *Kimie v. San Jose-Los Gatos Interurban R. Co.* 156 Cal. 379, 104 Pac. 986, holding graduate nurse who has been constantly engaged in calling of professional nurse for five years competent to testify as expert.

Cited in notes in 66 A. D. 239, on opinions of persons who are not physicians upon medical questions; 12 L.R.A. 460, on expert and opinion testimony as to handwriting; 39 L.R.A. 317, on qualifications of experts as to sanity or insanity.

Previous and subsequent conduct as evidence of mental condition.

Cited in *Godsil's Estate*, 4 Cof. Prob. Dec. Anno. 514, holding proof of insanity, both prior and subsequent to making of will admissible; *Re Dalrymple*, 67 Cal. 444, 7 Pac. 906, holding evidence as to testator's sanity at other times during course of progressive disease supposed to have affected his mind admissible as to his state of mind at time of execution of will; *People v. Monoogian*, 141 Cal. 592, 75 Pac. 177, holding acts and conduct of accused prior to homicide admissible as bearing upon question of his mental condition at time of homicide; *Perkins v. Sunset Teleph. Co.* 155 Cal. 712, 103 Pac. 190; *People v. Zeigler*, 142 Cal. 337, 75 Pac. 1090,—holding that jury may consider acts, conduct and appearance of accused prior to and after time of act involved in determining whether accused was insane at that time.

Exclusion of proper testimony as ground for reversal.

Cited in *Re Carpenter*, 79 Cal. 382, 21 Pac. 835, holding that exclusion of proper testimony in determining person's sanity, which is material and important and might have changed result is ground for reversal; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871, on admissibility of testimony of partner as to other partner's state of mind on days just preceding day of conversation with plaintiff in action on contract.

Sufficiency of execution of will.

Cited in *Re Langan*, 74 Cal. 353, 16 Pac. 188, holding will sufficiently executed where name of testatrix is signed by witness in her presence and under her direction although person signing her name omits to write his own name near by as a witness to her signature.

Ownership as evidence of title and right of possession.

Cited in *Hayden v. Collins*, 1 Cal. App. 259, 81 Pac. 1120, holding evidence of plaintiff's ownership admissible on issue of title and right of possession in action in ejectment.

35 AM. REP. 89, FRIEND v. DURYEE, 17 FLA. 111.**Power of partner to bind firm.**

Cited in *Schellenbeck v. Studebaker*, 13 Ind. App. 437, 55 A. S. R. 240, 41 N. E. 845, holding that partner in nontrading firm has no implied authority to execute firm note for purchase of horses in absence of necessity, usage or custom; *Snively v. Matheson*, 12 Wash. 88, 50 A. S. R. 877, 40 Pac. 623, holding that partner of nontrading partnership cannot in absence of authority, usage or necessity bind partnership by execution of promissory note and mortgage.

Cited in reference notes in 48 A. R. 361, on note by nontrading partnership; 10 A. S. R. 34, on liability of firm on note signed in firm name by partner for his own benefit.

Cited in notes in 17 L.R.A.(N.S.) 839, on right to show by parol evidence that indorsement unrestricted in form was made for purpose of collection only; 4 E. R. C. 215, on right of partner to bind copartners by postdated check.

35 AM. REP. 93, YOUNG v. THOMAS, 17 FLA. 169.**Constitutionality of license tax on lawyers.**

Cited in *Odlin v. Woodruff*, 31 Fla. 160, 22 L.R.A. 699, 12 So. 227, on constitutionality of license tax on lawyers; *Maxey v. Wright*, 3 Ind. Terr. 243, 54 S. W. 807, on right to impose occupation tax on practitioners of law; *Ex Parte Williams*, 31 Tex. Crim. Rep. 262, 21 L.R.A. 783, 20 S. W. 580, holding lawyers subject to occupation tax.

Cited in reference note in 41 A. R. 443, on right to tax lawyers.

Cited in notes in 18 L.R.A. 409, on license tax on lawyers; 129 Am. St. Rep. 292, on constitutional limitations on power to impose license or occupation taxes.

25 AM. REP. 96, BROWNE v. BROWNE, 17 FLA. 607.**Limitation of time for foreclosure action.**

Cited in *Jordon v. Sayre*, 24 Fla. 1, 3 So. 329; *Hope v. Johnston*, 28 Fla. 55, 9 So. 830, holding that action to foreclose sealed instrument mortgaging real estate falls within the twenty years limitation.

—Effect of bar of debt secured.

Cited in *Lenfesty v. Coe*, 34 Fla. 363, 16 So. 277, holding that suit in equity

to foreclose mortgage will be sustained notwithstanding action at law upon note secured by mortgage is barred by statute of limitations; *Ellis v. Fairbanks*, 38 Fla. 257, 21 So. 107, holding fact that remedy at law is barred by statute of limitations upon promissory notes secured by mortgage under seal, does not affect lien of mortgage.

Cited in notes in 95 A. S. R. 664, on effect of bar of debt on right to enforce mortgage; 21 L.R.A. 550, on effect of statutory bar of principal debt on right to foreclose mortgage or deed of trust securing same.

Distinguished in *Duke v. Story*, 116 Ga. 388, 42 S. E. 722, holding that security deed not referring to debt to secure which it was given cannot be foreclosed as an equitable mortgage and money judgment obtained thereon, if obligation secured by deed is barred by statute of limitations.

Applicability of statute of limitations in equity.

Cited in *Coe v. Finlayson*, 41 Fla. 169, 26 So. 704, holding that statute of limitations applies to equitable as well as legal demands.

Remedies of mortgagee.

Cited in *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.* 14 N. D. 147, 116 A. S. R. 642, 70 L.R.A. 814, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160, holding that holder of note and mortgage has two distinct remedies for collection of his debt which exist and may be pursued independently of each other.

Cited in note in 20 L.R.A. 372, in what states right to strict foreclosure of mortgage is in force.

35 AM. REP. 107, SOUTHERN EXP. CO. v. VAN METER, 17 FLA. 783.

Liability of express company for misdelivery.

Cited in *Pacific Exp. Co. v. Shearer*, 160 Ill. 215, 52 A. S. R. 324, 37 L.R.A. 177, 43 N. E. 816 (affirming 43 Ill. App. 641), holding express company liable for delivery of money package to imposter.

Cited in reference note in 46 A. R. 467, on carrier's liability for delivery to wrong person.

Cited in notes in 9 A. S. R. 514, on nature and extent of carrier's liability for delivery to wrong person; 61 A. S. R. 375, on delivery by express company to consignee; 33 L.R.A. 67, on duty of express companies as to delivery and collection of packages; 37 L.R.A. 180, on delivery by carrier to imposter who has imposed on consignor.

Necessity for exceptions.

Cited in *Potsdamer v. State*, 17 Fla. 895, holding exception in court below to charge necessary in order to assign error thereon in appellate court; *Weaver v. State*, 58 Fla. 135, 50 So. 539; *Stewart v. Milla*, 18 Fla. 657, holding that error cannot be assigned that judge neglected to give instructions to jury as prayed for by counsel unless his neglect was excepted to and so appears of record; *Jones v. Greeley*, 25 Fla. 629, 6 So. 448, holding objection because of judge's failure to sign and seal ruling on charge not available in appellate court where no exception was taken; *White v. State*, 26 Fla. 602, 7 So. 857, holding failure of judge to sign and seal charge and to declare or to pronounce charge given not ground for new trial where no exception was taken at time; *Richardson v. State*, 28 Fla. 349, 9 So. 704, holding that charge to jury cannot be made part of record of cause except by bill of exceptions; *Pittman v. State*, 45 Fla. 91, 34 So. 88, holding that charges not excepted to in court below cannot be assigned

as error; *Keigans v. State*, 52 Fla. 57, 41 So. 886 (dissenting opinion), on necessity of exception to review charge on ground that it is not law.

Time and manner for taking exception.

Cited in *Blige v. State*, 20 Fla. 742, 51 A. R. 628, holding that party cannot subsequently except to oral charge unless he has requested court in writing before evidence is closed to charge jury in writing; *West v. Blackshear & Co.* 20 Fla. 457, holding that exception to charge to jury that it is not in writing cannot be taken for first time in appellate court; *Neal v. Spooner*, 20 Fla. 38, holding that exception to charge cannot be taken for first time in appellate court; *Gibson v. State*, 26 Fla. 109, 7 So. 376, holding that oral charge is as error considered as waived if not excepted to before retirement of jury; *Jacksonville, T. & K. W. R. Co. v. Hunter*, 26 Fla. 308, 8 So. 450, holding that objection to charge of court below taken for first time in appellate court, comes too late; *Hubbard v. State*, 37 Fla. 156, 20 So. 235, holding that error in giving oral charge will not be considered when no exception was taken at time of charge; *Driggers v. State*, 38 Fla. 7, 20 So. 758, holding where oral giving of charge in murder trial is not promptly excepted to at time it is given, error in giving it orally will be considered as waived and will not be ground of reversal on writ of error; *Morrison v. State*, 42 Fla. 149, 28 So. 97, holding objections to form or manner in which charges are given waived if exceptions are not made before rendition of verdict.

Discretion of court as to propounding leading questions.

Cited in *Myers v. State*, 43 Fla. 500, 31 So. 275, holding that trial judge in his discretion may permit leading questions to be propounded to witnesses and exercise of such discretion is not reviewable by supreme court upon writ of error; *Falk v. Kimmerle*, 57 Fla. 70, 49 So. 504, 17 A. & E. Ann. Cas. 839; *Camp v. State*, 58 Fla. 12, 50 So. 537,—holding trial courts vested with wide discretion in permitting leading questions to witnesses.

Waiver of assignments of error.

Cited in *Meinhardt v. Mode*, 22 Fla. 279, holding assignments of error not discussed in brief for appellants are treated as abandoned; *Williams v. State*, 25 Fla. 734, 6 L.R.A. 821, 6 So. 831, on waiver of illegality in execution of writ; *Jordan v. Sayre*, 24 Fla. 1, 3 So. 329, holding that appellate court will regard as abandoned grounds of demurrer not noticed in brief of counsel; *Easterlin v. State*, 43 Fla. 565, 31 So. 350 (dissenting opinion), to point that all assignments of error not argued will be treated as abandoned; *Bird v. State*, 18 Fla. 493; *Florida C. & P. R. Co. v. Ashmore*, 43 Fla. 272, 32 So. 832; *Hoodless v. Jernigan*, 46 Fla. 213, 35 So. 656,—holding that errors not argued will be treated as abandoned and will not be considered.

Effect of revision of statute.

Cited in *Jernigan v. Holden*, 34 Fla. 530, 16 So. 413, holding where there is revision by later statute, later being intended as substitute for former, there need be no express words of repeal.

When appeal lies.

Cited in *Willingham v. State*, 21 Fla. 761, as to when violation of statute is error of law from which appeal may be prayed as of right.

Refused instructions as part of record.

Cited in *Baker v. Chatfield*, 23 Fla. 540, 2 So. 822, holding paper containing instructions which were refused, part of record.

35 AM. REP. 110, WILSON v. SPARKMAN, 17 FLA. 371.**Jurisdictional amount.**

Cited in *Ball v. Biggam*, 43 Kan. 327, 23 Pac. 565, holding that justice of peace has no jurisdiction of action if amount claimed exceeds three hundred dollars.

Cited in reference notes in 78 A. S. R. 92, on jurisdiction as determined by amount; 123 A. S. R. 808, on jurisdictional amount.

— Test of.

Cited in *Livingston v. L'Engle*, 27 Fla. 502, 8 So. 728, holding amount which plaintiff actually put in controversy proper test in determining limit of circuit court's jurisdiction; *Seaboard Air Line R. Co. v. Ray*, 52 Fla. 634, 42 So. 714, holding that amount put in controversy in civil action determines jurisdiction of county court, not amount of recovery; *Arnold v. County Ct.* 38 W. Va. 142, 18 S. E. 476, on point of including interest in ascertaining amount in controversy in reference to jurisdiction of appellate court.

Invalidity of judgment in excess of jurisdictional amount.

Cited in *Louisville & N. R. Co. v. Sutton*, 54 Fla. 247, 44 So. 946, holding judgment entered by county judge for amount in excess of amount over which court has jurisdiction, void.

Cited in notes in 54 A. S. R. 223, on showing of merits as essential to equitable relief against judgments, decrees, or other judicial determinations; 31 L.R.A. 202, 204, on injunction against judgment for want of jurisdiction as to amount.

Invalidity of judgment including attorney's fees.

Cited in *Parker v. Dekle*, 46 Fla. 452, 35 So. 4, holding judgment including attorney's fees where amount of attorney's fees is not provided for or specified in cause of action and without proof as to what would constitute reasonable attorney's fee, void even on collateral attack.

35 AM. REP. 115, WILSON v. McMILLAN, 62 GA. 16.**Emancipation of minor child.**

Cited in *Biggs v. St. Louis*, 1 M. & S. R. Co. 91 Ark. 122, 120 S. W. 970; *McDaniel v. Parish*, 4 App. D. C. 213; *Hargrove v. Turner*, 112 Ga. 134, 81 A. S. R. 24, 37 S. E. 89,—holding that father may emancipate minor child by allowing him to receive proceeds of his labor; *Robinson v. Hathaway*, 150 Ind. 679, 50 N. E. 883, holding that emancipation may be effected by consent of parent or by abandonment or failure to support child; *People v. Dewey*, 23 Misc. 267, 50 N. Y. Supp. 1013, holding father's paternal right to child relinquished by his abandonment and neglect to support it; *Tennessee Mfg. Co. v. James*, 91 Tenn. 164, 30 A. S. R. 865, 15 L.R.A. 211, 18 S. W. 262, holding daughter's emancipation only partial and conditional where she violated condition as to giving notice of her intention to quit under joint contract by father and daughter hiring latter's services to third person.

Cited in reference notes in 49 A. R. 567, on right of parent to emancipate child; 6 A. S. R. 664, on father's right to child's services; 15 A. S. R. 722, on right of parent to child's earnings.

Effect of desertion on father's right to earnings of minor children.

Cited in *Thompson v. Chicago*, M. & St. P. R. Co. 104 Fed. 845, holding that father who has deserted his family and failed to support them has no right to earnings of minor children.

Cited in notes in 38 A. S. R. 47, on power of insolvent father to relinquish right to son's earnings; 113 A. S. R. 119, on emancipation of infant by insolvent parent.

Liability of earnings of emancipated child for father's debts.

Cited in *Re Dunavant*, 96 Fed. 542, holding that creditors of insolvent father cannot claim earnings of emancipated minor son; *Flynn v. Baisley*, 35 Or. 268, 76 A. S. R. 405, 45 L.R.A. 645, 57 Pac. 908, holding that earnings of minor child who has been in good faith emancipated by father cannot be taken by latter's creditors; *Trapnell v. Conklyn*, 37 W. Va. 242, 38 A. S. R. 30, 16 S. E. 570, holding that if minor child, with father's consent give mother benefit of his labor on her separate estate profits from child's labor will not be liable for father's debts.

Relation between debtor and creditor.

Cited in *Williams v. Williams*, 122 Ga. 178, 106 A. S. R. 100, 50 S. E. 52, holding that creditor is not guardian of debtor and cannot interpose defenses for him nor avail himself at law of privileges which are personal to debtor; *Brand v. Bagwell*, 133 Ga. 750, 66 S. E. 935, holding that insolvent husband can give away his services to his wife without defrauding his creditors.

35 AM. REP. 122, COTTON STATES L. INS. CO. v. LESTER, 62 GA. 247.

What amounts to waiver of condition in policy.

Distinguished in *McLendon v. Woodman of the World*, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36, holding that condition that liability of benefit society shall not attach under benefit certificate unless delivered to applicant while living cannot be waived by unauthorized initiation of applicant before proper acceptance of application and constitutional delivery of certificate.

— As to payment of premiums.

Cited in *Alabama Gold L. Ins. Co. v. Garmany*, 74 Ga. 51, holding that stipulation contained in notices but not in life insurance policy, to pay premiums at noon on day they fell due was waived where literal compliance with requirement had not been exacted; *Grant v. Alabama Gold L. Ins. Co.* 76 Ga. 575, holding that policy will not be forfeited if within period so reasonably short as to show intent to continue policy, assured take steps to inquire and pay premium where company fails to give customary notice to pay premium; *Haupt v. Phoenix Mut. L. Ins. Co.* 110 Ga. 146, 35 S. E. 342, holding policy of life insurance stipulating that it shall cease and determine if any premium be not paid when due is not on nonpayment of particular premium at proper time, kept in force because company had habit of receiving overdue premiums; *Neal v. Gray*, 124 Ga. 510, 52 S. E. 622, holding that prompt payment of premium on insurance policy may be waived by course of dealings calculated to cause insured to think that exact time specified would not be insisted upon; *Loughridge v. Iowa Life & Endowment Asso.* 84 Iowa, 141, 50 N. W. 508, holding that custom of mutual benefit association to receive payment of assessments after expiration of time provided in by-laws operated as waiver of forfeiture for nonpayment; *Trotter v. Grand Lodge I. L. H.* 132 Iowa, 513, 7 L.R.A. (N.S.) 569, 109 N. W. 1099, 11 A. & E. Ann. Cas. 533, holding where financial secretary was absent from home at time when assessment became delinquent member of beneficial association is entitled to reasonable time after return of such officer in which to make payment; *Hartford Life & Annuity Ins. Co. v. Eastman*, 54 Neb. 90, 74 Am. Rep. Vol. XVII.—57.

N. W. 394, holding provision in life insurance policy requiring payment of assessments in cash at its office in distant state is waived by habitually accepting good checks in lieu of cash.

Cited in reference notes in 1 A. S. R. 111, on waiver by insurance company of condition as to payment of premium note; 2 A. S. R. 740, on waiver of forfeiture of insurance policy by accepting overdue payment; 40 A. S. R. 106, on waiver of forfeiture for nonpayment of premium by act of agent.

Cited in note in 26 L. ed. U. S. 766, on forfeiture of life insurance policy for nonpayment of premium and waiver thereof.

Distinguished in *Bryan v. National L. Ins. Co.* 21 R. I. 149, holding that promise of collector to call again on not receiving payment for lapsed policy did not amount to waiver of condition as to payment.

35 AM. REP. 126, HAWLEY v. SCREVEN, 62 GA. 347.

Liability for loss of baggage.

Cited in *Wolff v. Central R. Co.* 68 Ga. 653, 45 A. R. 401, holding road which delivered check or road delivering baggage in bad order liable to passenger with through ticket over connecting lines; *Savannah, F. & W. R. Co. v. McIntosh*, 73 Ga. 532, holding last of chain of railroads liable to passenger for loss of baggage covered by through ticket; *International & G. N. R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 541, holding railway company which sold ticket and received trunk liable to passenger for loss of jewelry from trunk, although ticket extended over several lines to place of destination.

Cited in reference notes in 38 A. R. 617, on liability of one of several connecting carriers, accepting fare over entire line, without agreement as to risks, for baggage; 2 A. S. R. 62, on liability of carrier for loss of baggage on connecting line.

Cited in notes in 72 A. D. 234, on effect under English rule of carrier's receiving goods consigned to point beyond terminus; 99 A. S. R. 363, on liability of connecting carriers for baggage; 5 E. R. C. 348, on effect of receipt by carrier of goods destined for point beyond its line.

Disapproved in *Fox v. Wabash R. Co.* 16 Misc. 370, 38 N. Y. Supp. 88, holding company liable upon whose road baggage is injured where passenger's baggage is checked to point over several connecting lines of railroad.

Liability for safe transportation of passenger over connecting line.

Cited in *Central R. Co. v. Combs*, 70 Ga. 533, 48 A. R. 582, holding railroad company which sells through ticket over its own and other connecting lines liable for safe transportation of passenger to point of destination; *Georgia Southern & F. R. Co. v. Pearson*, 120 Ga. 284, 47 S. E. 904, holding railroad company liable to passenger to whom it sells through ticket over its own and connecting lines of road, for his safe transportation to his destination.

Cited in note in 35 A. R. 711, on liability of carriers selling through tickets for injury to passenger on connecting lines.

35 AM. REP. 128, WELDON v. COLQUITT, 62 GA. 449.

Validity of appearance bond.

Cited in *Colquitt v. Bond*, 69 Ga. 351, holding bond to answer indictments "returned" by grand jury, not void because none then found; *Jones v. Gordon*, 82 Ga. 570, 9 S. E. 782, holding where jurisdiction of magistrate is wanting but de-

fendant made no question as to this at time bail-bond was taken but voluntarily gave it and was released, bond is good as against him and his sureties.

— Bond made on Sunday.

Cited in *Adams v. Candler*, 114 Ga. 151, 39 S. E. 893, holding appearance bond executed on Sunday not void; *Hayden v. Mitchell*, 103 Ga. 431, 80 S. E. 287, holding marriage contract not void because made on Sunday.

Defense to recognizance.

Cited in *Hunt v. United States*, 10 C. C. A. 74, 19 U. S. App. 683, 61 Fed. 795, holding that it is no defense to recognizance that it was entered into before clerk where this was done by order of judge made at request of accused and to secure his speedy release.

Effect of surety's knowledge of principal's disability to contract.

Cited in *Campbell v. Mercer*, 108 Ga. 103, 33 S. E. 871, holding that if original contract of principal was invalid from disability to contract and this disability was known to surety, he is still bound; *Miller v. Sterringer*, 66 W. Va. 169, 25 L.R.A.(N.S.) 596, 66 S. E. 228, holding that equity will relieve one from contract made by him in drunkenness, though his reason may not have been wholly overthrown, if fraud exists.

Cited in note in 54 L.R.A. 453, on who may show intoxication of party to contract.

35 AM. REP. 132, COGGIN v. CENTRAL R. CO. 62 GA. 685, Reaffirmed on later appeal in 73 Ga. 689.

Abatement of suits by dissolution of corporation.

Cited in *Chesapeake, O. & S. W. R. Co. v. Griest*, 85 Ky. 619, 4 S. W. 323, holding purchasing corporation liable for tort committed by vendor in operation of its road.

Cited in notes in 59 A. S. R. 554, on liability of bank for debts of preceding corporation or partnership; 23 L.R.A. 231, on liability of consolidated railroad company for debts of predecessor; 44 L.R.A. 739, 752, 754, on liability of lessor of railroad for injuries caused by negligence of lessee; 11 L.R.A.(N.S.) 1126, on liability of corporation into which another is absorbed or merged for unliquidated claims.

Distinguished in *Walters v. Western & A. R. Co.* 69 Fed. 679, holding that dissolution of corporation, pending garnishment proceedings against it, and before adjudication of any liability, abates such proceedings.

Liability of master for negligence of another's servants.

Cited in notes in 37 L.R.A. 75, on position as master of servants sent to work in charge of plant; 17 L.R.A.(N.S.) 340, on servants in general employ of contractor or his employer as servants of the other for some special purpose.

35 AM. REP. 137, GERMAN NAT. BANK v. MEADOWCROFT, 95 ILL. 124.

Trover against warehouseman for conversion of goods deposited.

Cited in *Morrow v. Langan*, 16 Ill. App. 506, on whether warehouseman was purchaser or bailee of grain deposited in warehouse; *Riebling v. Tracy*, 17 Ill. App. 158, holding trover maintainable for conversion of quantity of wrapping paper deposited with corporation although not separated from bulk; *Pontiac Nat. Bank v. Langan*, 28 Ill. App. 401; *Howe v. Munson*, 65 Ill. App. 674,—

holding trover maintainable for conversion of grain stored in public warehouse to be mixed with grain of other persons; *Yockey v. Smith*, 181 Ill. 564, 72 A. S. R. 286, 54 N. E. 1048, holding that title to grain merely stored in private warehouse does not pass to warehouseman; *Moses v. Teetors*, 64 Kan. 149, 57 L.R.A. 267, 67 Pac. 526, holding value of wheat stored in warehouse at owner's risk, and comingled with other wheat not recoverable by bailor where it is lost by fire.

Cited in note in 24 A. S. R. 807, on demand and refusal as evidence of conversion.

Liability to cotenant for conversion.

Cited in *Weeks v. Hackett*, 104 Me. 264, 129 A. S. R. 390, 19 L.R.A. (N.S.) 1201, 71 Atl. 858, 15 A. & E. Ann. Cas. 1156; *Benjamin Schwarz & Sons v. Kennedy*, 142 Fed. 1027,—to point that where one tenant sells entire property in common goods and thereby ignores and denies right of his cotenant therein, act is tantamount to conversion for which trover will lie.

Right of action by indorsee of warehouse receipt.

Cited in *Sargent v. Central Warehouse Co.* 15 Ill. App. 553, holding that indorsement and delivery of warehouse receipt by bailor of flour to purchase transferred title to purchaser and gave him right of action for any breach of duty of which bailee was guilty during bailment.

Survivorship as to personal property jointly owned.

Cited in *Bradford v. Bennett*, 48 Ill. App. 145, on whether common law rule of survivorship in respect to personal property jointly owned prevails in this state; *Hay v. Bennett*, 153 Ill. 271, 38 N. E. 645, on whether common law rule of survivorship in respect to personal property jointly owned prevails in this state.

35 AM. REP. 144, TURNER v. PEORIA & S. R. CO. 95 ILL. 134.

Negotiability of receiver's certificate.

Cited in *Union Trust Co. v. Chicago & L. H. R. Co.* 7 Fed. 513, holding receiver's certificate not negotiable; *McCarthy v. Crawford*, 141 Ill. App. 276, holding receiver's certificate not negotiable; *McCurdy v. Bowles*, 88 Ind. 583, holding certificate of indebtedness issued by receiver of insolvent corporation not negotiable.

Cited in notes in 9 L.R.A. 143, on receiver's certificate of indebtedness in regard to existing mortgages; 128 Am. St. Rep. 113, 116, on receiver's certificates.

In what court receiver's certificate is enforceable.

Cited in *Re C. M. Burkhalter & Co.* 179 Fed. 403; *Passage v. Dansville & Mt. M. R. Co.* 41 App. Div. 182, 58 N. Y. Supp. 770,—holding that receiver's certificates must be enforced in court directing their issue.

Construction of negotiable instruments act.

Cited in *Gilmore v. German Sav. Bank*, 89 Ill. App. 442, to point that section eight of statute upon negotiable instruments applies only to instruments payable to bearer and not to such as are payable to particular person by name "or bearer;" *Chicago Sash, Door & Blind Mfg. Co. v. Haven*, 195 Ill. 474, 63 N. E. 158, holding that section nine of negotiable instruments act does not authorize defense of want of consideration in suit on bond unless bond is negotiable.

Rights of holder of municipal order.

Cited in *Bordeaux v. Coquard*, 47 Ill. App. 254, holding that municipal order not having been indorsed by payee to holder thereof, any defense may be set up against same if trustees who signed it had power to issue it, against holder, even though he purchased for value, as could have been made against payee.

Validity of assignment of county order.

Cited in *People ex rel. Hurd v. Johnson*, 100 Ill. 537, 39 A. R. 63, holding assignments of county order valid to pass legal title of payee so as to enable assignee to sue in his own name; *Keenan v. Blue*, 240 Ill. 177, 88 N. E. 553 (dissenting opinion), on effect where indorsement is to fictitious person "or bearer."

What is a promissory note.

Cited in *Wickersham v. Beers*, 20 Ill. App. 243, holding "we promise to pay you out of first receipts of this stock, which we control as trustees, \$2,148.93, and interest from June 19, 1884. C. H. Beers and Wm. H. Coney, Trustees. Dated, Chicago, November 19, 1889," not regarded as promissory note and therefore will not import consideration.

Limitation of tax bill lien.

Cited in *Smith v. Barrett*, 41 Mo. App. 460, holding tax bill lien extinguished where no suit was brought against owner within two years.

35 AM. REP. 151, HOLLENBECK v. WINNEBAGO COUNTY, 95 ILL. 148.**Liability of municipal corporation for negligence of its servants.**

Cited in *Evans v. Kankakee*, 132 Ill. App. 488, holding municipality not liable for infection suffered through negligence of servants; *Freel v. Crawfordsville*, 142 Ind. 27, 37 L.R.A. 301, 41 N. E. 312, holding school corporation not liable for negligent acts of its officers in absence of express statutory liability.

Cited in reference notes in 41 A. R. 442, on liability of state or municipality for neglect of public duty; 27 A. S. R. 207, on liability for negligence of public officer.

Cited in note in 68 A. D. 295, on liability of counties for acts or negligence of officers.

—For unfit courthouse.

Cited in reference note in 36 A. R. 236, on liability of county for negligence of its employees in erecting court house.

—For defective bridges and highways.

Cited in *Madden v. Lancaster County*, 12 C. C. A. 566, 27 U. S. App. 528, 65 Fed. 188, to point that county is not liable for failure to keep highways and bridges in repair unless such liability is expressly fixed by statute; *Nagle v. Wakey*, 59 Ill. App. 198, holding commissioners of highways not liable for failure to keep bridge in repair; *Smith v. Allen County*, 131 Ind. 116, 30 N. E. 949, holding county not liable for injury to servant while engaged in tearing down one of its bridges; *Cones v. Benton County*, 137 Ind. 404, 37 N. E. 272, holding county not liable for personal injury sustained by reason of defective gravel road; *Nagle v. Wakey*, 161 Ill. 387, 43 N. E. 1079, holding commissioners of highways not liable for failure to keep bridge in repair; *Vail v. Amenia*, 4 N. D. 239, 59 N. W. 1092, holding township not liable for personal injury caused by defective bridge; *Jasper County v. Allman*, 142 Ind. 573, 39 L.R.A. 58, 42 N. E. 206, holding county not liable for implication for injuries by defective bridges

—For unfit asylum.

Cited in *Hughes v. Monroe County*, 79 Hun, 120, 29 N. Y. Supp. 495, holding county not liable for personal injuries sustained, through its negligence, by employee in asylum maintained by it.

—For unfit prison.

Cited in *Greene County v. Boswell*, 4 Ind. App. 133, 30 N. E. 534, holding county not liable for failure of board of county commissioners to keep county jail in healthy condition; *White v. Sullivan County*, 129 Ind. 396, 28 N. E. 846, holding county not liable for illness of prisoner caused by failure of commissioners to keep jail in healthy condition; *Webster v. Hillsdale County*, 99 Mich. 259, 58 N. W. 317, holding county, in absence of statute imposing such liability, not liable for injury to prisoner's health in consequence of unhealthful condition of jail.

Cited in reference notes in 35 A. R. 403, on right of person to recover for injury as affected by his unlawful act not contributing thereto; 36 A. R. 308, on liability of municipality for injuries caused by defects in public places.

Cited in note in 39 L.R.A. 60, on liability of counties for injuries to persons through condition of buildings.

—For unfit well.

Cited in *Danaher v. Brooklyn*, 51 Hun, 563, 4 N. Y. Supp. 312, holding city maintaining well containing impure water caused by properties contained in earth not liable for injury to person by drinking therefrom until notice from board of health.

—For defective tools.

Cited in *Moody v. State Prison*, 128 N. C. 12, 53 L.R.A. 855, 38 S. E. 131, holding action not maintainable against state prison by prison guard for injury by breaking of defective ladder while employed.

What constitutes municipal corporation.

Cited in *West Chicago Park v. Chicago*, 152 Ill. 392, 38 N. E. 697, holding West Chicago Park Commissioners a municipal corporation.

Liability of county for services of supervisor.

Cited in *Madison County v. Bruner*, 13 Ill. App. 599, holding county not liable on quantum meruit for services rendered under requirements of law, by supervisor in ex officio capacity of overseer of poor.

35 AM. REP. 160, SCOFIELD v. TOMPKINS, 95 ILL. 190.

Stipulated amount as a penalty or as liquidated damages.

Cited in *Smith v. Newell*, 37 Fla. 147, 20 So. 249, holding stipulated sum of five hundred dollars to be paid upon party's failure to comply with terms of contract for sale of land, penalty and not liquidated damages; *Bryton v. Marston*, 33 Ill. App. 211, holding that stipulation to pay a larger sum as liquidated damages than contracts calls for in case of breach thereof will be regarded as penalty; *Steer v. Brown*, 106 Ill. App. 361, holding that courts prefer to construe contract as providing for penalty; *Mercer County v. Stupp Bros. Bridge & Iron Co.* 115 Ill. App. 298, holding where amount to be paid contract is called a penalty it must be so treated and recovery limited to actual damages; *Radloff v. Haase*, 196 Ill. 365, 63 N. E. 729 (reversing 96 Ill. App. 74), holding that amount stipulated as liquidated damages for breach of contract will be construed as penalty where damages can be readily ascertained; *Goodyear Shoe Mach. Co. v. Selz*, 157 Ill. 186, 41 N. E. 625 (affirming 51 Ill. App. 390), holding

that discount of fifty per cent to secure prompt payment of sum actually agreed to be paid will be construed as penalty; *Westfall v. Albert*, 212 Ill. 68, 72 N. E. 4, holding that bond fixing amount of damages to secure prompt performance of agreement will be treated as penalty; *Bradstreet v. Baker*, 14 R. I. 546, holding that stipulated price for five thousand tons was penalty not liquidated damages in covenant for party's default in not receiving ice as per contract; *McIntosh v. Johnson*, 8 Utah, 359, 31 Pac. 450, holding that party can recover only damages actually suffered for breach of bond where actual damages can be easily arrived at by evidence; *Iroquois Furnace Co. v. Wilkin Mfg. Co.* 181 Ill. 582, 54 N. E. 987, holding that word "penalty," prima facie excludes notion of stipulated damages; *North & South Rolling Stock v. O'Hara*, 73 Ill. App. 691, holding that no other sum can be recovered under penalty than that which shall compensate plaintiff for his actual loss; *Burk v. Dunn*, 55 Ill. App. 25, holding it to be stipulated damages and not penalty where parties to agreement for sale of land bound themselves in sum of one thousand dollars to be taken as stipulated damages and not penalty; *Farson v. Fogg*, 105 Ill. App. 572, to point that fact that sum to be paid is called liquidated damages by parties does not always control; *McCullough v. Moore*, 111 Ill. App. 545, holding when from nature of condition contained in bond damages for breach of such condition cannot be calculated with any degree of certainty penalty will be held to be liquidated damages; *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. 805, holding provision in lease for payment of thirty dollars per day for time lessee held over enforceable as liquidated damages where property was leased on monthly rental of \$500; *Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937, holding provision in coal mining lease for payment of royalty of \$1200 yearly, payable monthly, whether any coal is mined or not, enforceable as liquidated damages; *Hennessy v. Metzger*, 152 Ill. 505, 43 A. S. R. 267, 38 N. E. 1058, holding that use of term "liquidated damages" by parties to contract is not always conclusive that such damages are intended.

Cited in reference note in 57 A. R. 783, on distinction between penalty and liquidated damages.

Cited in notes in 108 A. S. R. 62, on conveyances of real estate as contracts for liquidated damages; 6 E. R. C. 560, 561, on distinction between a penalty and liquidated damages mentioned as payable in event of nonperformance of contract.

35 AM. REP. 163, *McCORMICK v. BURT*, 95 ILL. 263.

Liability for official act.

Cited in *Summers v. People*, 109 Ill. App. 430, holding public officer when acting in good faith, not liable for erroneous judgment in matter submitted to his determination; *Bailey v. Berkey*, 81 Fed. 737, holding assessor liable for malicious excessive assessment.

— Of school officers generally.

Cited in *Fertich v. Michener*, 111 Ind. 472, 60 A. R. 709, 11 N. E. 605, holding school officer not personally liable for mere mistake of judgment in government of his school.

Cited in reference note in 54 A. R. 347, on personal liability of school directors for dismissing teacher before expiration of term.

Distinguished in *School Bd. Dist. No. 18 v. Thompson*, 24 Okla. 1, 24 L.R.A.

(N.S.) 221, 103 Pac. 578, holding that parent has right to make reasonable selection from prescribed course of study.

—Suspension of pupil.

Cited in *Board of Education v. Purse*, 101 Ga. 422, 65 A. S. R. 312, 41 L.R.A. 593, 28 S. E. 896, holding right to recover for suspension of child from school is limited to cases where public officials acted wantonly or maliciously; *Churchill v. Fewkes*, 13 Ill. App. 520, holding action for damages not maintainable against teachers and directors of school for suspension of pupil under rules in absence of malice or wilfulness.

—Suspension from Soldier's Home.

Cited in *Black v. Linn*, 17 S. D. 335, 96 N. W. 697, holding commissioners of soldiers' home personally liable in damages if they wrongfully and maliciously expel member and deprive him of his rights.

Powers of school officers.

Cited in *Powell v. Board of Education*, 97 Ill. 375, 37 A. R. 123, holding that modern languages may be taught in schools under school law; *Board of Education v. Welch*, 51 Kan. 792, 33 Pac. 654, holding corporate functions of board of education of city of first class granted to assist in carrying out general common school system adopted by state.

Cited in notes in 76 A. D. 166, on authority, duties, and powers of school teachers; 6 L.R.A. 534, on right to teacher in public schools to enforce discipline.

—To suspend pupils.

Cited in *Potts v. Breen*, 167 Ill. 67, 59 A. S. R. 262, 39 L.R.A. 152, 47 N. E. 81, holding that school directors cannot exclude children from school because not vaccinated, except in emergency; *Vermillion v. State*, 78 Neb. 107, 110 N. W. 736, holding that pupil may be suspended or expelled where he is guilty of such conduct as to interfere with discipline and government of school.

Cited in notes in 65 A. S. R. 334, on causes of suspension and expulsion from school; 41 L.R.A. 594, on right to exclude, suspend, or expel pupils for misconduct; 41 L.R.A. 600, 603, on right to exclude, suspend, or expel pupils for failure to participate in certain studies and exercises.

Right of courts to review finding by school board.

Cited in *Wilson v. Board of Education*, 137 Ill. App. 187, holding that courts will not set aside rule of discipline adopted by board of education unless fraud on part of board is shown; *Kinzer v. Independent School Dist.* 129 Iowa, 441, 3 L.R.A.(N.S.) 496, 105 N. W. 686, 6 A. & E. Ann. Cas. 996, holding that courts will not review school board's determination that rule which it had power to make for government of school had been violated; *North v. University of Illinois*, 137 Ill. 296, 27 N. E. 54, holding that mandamus does not lie to control discretionary power vested in trustees of university of Illinois to make reasonable rules and regulations for government of that institution.

Character of Bible.

Cited in *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 117 A. S. R. 599, 69 L.R.A. 592, 87 S. W. 792, 9 A. & E. Ann. Cas. 36, holding King James translation of the Bible not a sectarian book; *People ex rel. Ring v. Board of Education*, 245 Ill. 334,— L.R.A.(N.S.) —, 92 N. E. 251, 19 A. & E. Ann. Cas. 220, holding it unconstitutional for teachers to read daily to pupils

during school hours portions of Bible and to cause them to join in repeating the Lord's Prayer.

35 AM. REP. 166, UNION MUT. INS. CO. v. CAMPBELL, 95 ILL. 267.

Presumption as to delivery of deed.

Cited in *Alexander v. Alexander*, 71 Ala. 295, holding question of delivery of deed when testimony is indeterminate is question of intention with which disputable acts were performed; *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918, holding that law presumes much more in favor of delivery of deeds in case of voluntary settlements than in ordinary cases of bargain and sale; *Chilvers v. Race*, 196 Ill. 71, 63 N. E. 701; *Brady v. Huber*, 197 Ill. 291, 90 A. S. R. 161, 64 N. E. 264,—holding that recording of deed raises rebuttable presumption of delivery; *Slattery v. Keefe*, 201 Ill. 483, 66 N. E. 365, holding execution and recording of deed only prima facie evidence of delivery; *Baker v. Hall*, 214 Ill. 364, 73 N. E. 351, holding that presumptions are in favor of delivery of deed of voluntary settlement; *Creighton v. Roe*, 218 Ill. 619, 109 A. S. R. 310, 75 N. E. 1073, holding that recording voluntary conveyance raises presumption of delivery; *Valter v. Blavka*, 195 Ill. 610, 63 N. E. 499; *Blankenship v. Hall*, 233 Ill. 116, 122 A. S. R. 149, 84 N. E. 192,—holding recording of deed prima facie evidence of delivery; *McGuire v. Clark*, 85 Neb. 102, 23 L.R.A.(N.S.) 873, 122 N. W. 675, holding that mere recording of acknowledged deed, without intention to deliver, does not operate as delivery or transfer of title.

Cited in reference notes in 50 A. R. 510, on recording of deed by grantor as valid delivery; 55 A. R. 392, on recording of deed as presumptive evidence of delivery.

Cited in notes in 53 A. S. R. 548, on recording deed as delivery; 5 L.R.A. 121, on registration as evidence of delivery of deed; 54 L.R.A. 885, on recording of deed or delivery for record; 18 L. ed. U. S. 542, on recording deed as delivery or evidence of delivery; 40 A. R. 217; 8 E. R. C. 597,—on sufficiency of delivery of deed.

—How rebutted.

Cited in *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482, holding that delivery as evidenced by recording deed may be rebutted by showing that conveyance was intended to confer no benefit upon grantee; *Konser v. Konser*, 219 Ill. 466, 76 N. E. 846, holding prima facie evidence of delivery made by proof of recording and grantee's possession may be rebutted by proof that grantor did not intend delivery and have it become effective as conveyance.

Competency of circumstantial evidence as to delivery of deed.

Cited in *Merki v. Merki*, 113 Ill. App. 518, holding circumstantial evidence concerning delivery of deed competent only where question of delivery of deed is doubtful or debatable.

Acceptance as essential to delivery of deed.

Cited in *Mac Veagh v. Chase*, 67 Ill. App. 160; *Santee v. Day*, 111 Ill. App. 495,—holding acceptance by grantee essential to delivery of deed.

Cited in note in 54 L.R.A. 888, on necessity of acceptance of deed.

Presumption as to assent to conveyance.

Cited in *Weber v. Christen*, 121 Ill. 91, 2 A. S. R. 68, 11 N. E. 893, holding that assent to voluntary conveyance will be presumed; *Littler v. Lincoln*, 106 Ill.

353, holding that if burden is imposed by deed acceptance cannot be assumed from its mere execution.

How express trust created.

Cited in *Whetsler v. Sprague*, 224 Ill. 461, 79 N. E. 667, holding that express trust need not be manifested in any particular form of writing; *Wallace v. Pruitt*, 1 Tex. Civ. App. 231, 20 S. W. 728, holding instrument good as declaration of trust by which party holding absolute legal title to land empowers another to sell any portion not exceeding half, to make title in our joint names, and apply proceeds to his own use.

35 AM. REP. 173, NORTON v. GALE, 95 ILL. 533.

What constitutes submission to arbitration.

Cited in *Missouri, K. & T. R. Co. v. Elliott*, 56 Fed. 772, holding agreement that each party shall select arbitrators and these shall select third who shall fix price of crusher plants and whose decision shall be final is submission to arbitration; *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839, holding that provision in contract for purchase of property at valuation to be determined by appraisement of third parties is not agreement for submission to arbitration; *Chicago Auditorium Asso. v. Corporation of Fine Arts Bldg.* 150 Ill. App. 262, holding that appraisal made pursuant to terms of lease will be sustained if no fraud or unfair dealing is shown; *Stose v. Heissler*, 120 Ill. 433, 60 A. R. 563, 11 N. E. 161, holding parties chosen to fix rent which lessee shall thereafter pay for use of property, there being at time no rent due, not strictly speaking, arbitrators; *Pearson v. Sanderson*, 128 Ill. 88, 21 N. E. 200, holding that action of appraisers of improvements under lease was not an arbitration and award; *Pearson v. Sanderson*, 28 Ill. App. 571, holding agreement between landlord and tenant whereby former is to take, at termination of lease improvements erected thereon by latter and pay therefor sum named by appraisers to be mutually agreed upon is not a submission to arbitration; *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465, holding agreement that purchase price of land should be determined by amount of merchantable pine timber standing on land, to be estimated by three appraisers, not an arbitration; *Wurster v. Armsfield*, 67 App. Div. 158, 73 N. Y. Supp. 609, holding agreement in lease for renewal and to pay as rent for such renewal term percentage upon cash value of premises to be determined by appraisers, does not constitute submission to arbitration.

Sufficiency of memorandum within statute of frauds.

Cited in *Hayes v. Jackson*, 159 Mass. 451, 34 N. E. 683, on sufficiency of memorandum to satisfy statute of frauds.

Construction of contract for sale of land.

Cited in *Hayes v. O'Brien*, 149 Ill. 403, 23 L.R.A. 555, 37 N. E. 73, holding where contract appoints mode of determining price of land sold and price is determined according to that mode, the contract becomes perfect and complete in all respects as if it had been originally fixed in writing.

35 AM. REP. 182, CHICAGO v. GAGE, 95 ILL. 593.

Filling in blanks of written instruments.

Cited in *Donnell Mfg. Co. v. Jones*, 49 Ill. App. 327, holding that principal is clothed with authority to fill up blanks where surety on official bond entrusts it to principal signed in blank relying on his good faith.

Cited in reference note in 6 A. S. R. 337, on effect of signing bond as surety in blank.

— Implied authority to fill blanks.

Cited in *Bolter v. Kolzowski*, 112 Ill. App. 13, on implied authority to fill in blanks in original contract after execution and delivery.

— Effect of parol authority to fill blanks.

Cited in *Bulkley v. Devine*, 27 Ill. App. 145, holding insertion in lease by parol authority of number of house intended to be demised, proper; *Lee County v. Wel-sing*, 70 Iowa, 198, 30 N. W. 481, holding that authority to fill blanks in bond may be conferred by parol.

Directory provisions of statute.

Cited in *Davis v. State*, 75 Tex. 420, 12 S. W. 957, holding that failure of county commissioners to recognize each ward as precinct as statute directs did not invalidate election held in precincts as established as such provision is directory, only.

— As to official's time to qualify.

Cited in *Cawley v. People*, 95 Ill. 249, holding provision of law as to time county treasurer is required to file official bond not mandatory but directory; *Johnson v. Logan County*, 111 Ky. 698, 64 S. W. 634, holding statute as to time to execute sheriff's bond directory; *State ex rel. Berge v. Lansing*, 46 Neb. 514, 35 L.R.A. 124, 64 N. W. 1104 (dissenting opinion), on construction of statute as to duty of person elected to office to file official bond; *Duffy v. State*, 60 Neb. 812, 84 N. W. 264, holding statute directory where provisions as to filing of official oath are not expressly made mandatory; *State v. Colvig*, 15 Or. 57, 13 Pac. 639, holding statutes prescribing time within which officer must qualify are directory in their nature; *State ex rel. Lysons v. Ruff*, 4 Wash. 234, 16 L.R.A. 140, 29 Pac. 999, holding provision of code respecting qualification of county auditor, declaratory.

Effect of officer's failure to qualify in time.

Cited in *Launtz v. People*, 113 Ill. 137, 55 A. R. 405, holding failure of city officer to qualify within ten days was but cause of forfeiture of office, which city council might waive; *Massey v. People*, 201 Ill. 409, 66 N. E. 392, holding failure of alderman to qualify within ten days not forfeiture ipso facto; *Knox County v. Johnson*, 124 Ind. 145, 19 A. S. R. 88, 7 L.R.A. 684, 24 N. E. 148, holding that failure of school superintendent to give bond within time prescribed by law will not per se forfeit his title to office; *Albaugh v. State*, 145 Ind. 356, 44 N. E. 355, holding that township trustee on failure to file bond within time required by law does not forfeit office; *Minnick v. State*, 154 Ind. 379, 56 N. E. 851, holding that where school trustee failed to qualify within time fixed by statute and another is appointed to fill office, former forfeits title and his attempt to qualify thereafter does not restore title.

Cited in note in 16 L.R.A. 140, on vacancy in office by failure to file bond within time prescribed.

Liability of sureties on official bond.

Cited in *Baker County v. Huntington*, 46 Or. 275, 79 Pac. 187, holding that defect appearing on face of bond to impute notice must be of such nature as might reasonably lead to notice of real defect complained of.

Cited in reference note in 10 A. S. R. 847, on liability of sureties on successive bonds.

Cited in note in 23 L.R.A. (N.S.) 132, on liability of sureties of public officer for default during prior term.

— **Effect of forgery or alteration.**

Cited in *King County v. Ferry*, 5 Wash. 536, 34 A. S. R. 880, 19 L.R.A. 500, 32 Pac. 538, holding sureties liable on official bond of county treasurer altered before delivery which was regular upon its face; *Stern v. People*, 102 Ill. 540, holding that forgery of name of one of sureties to official bond will not discharge surety who subsequently executes bond in ignorance of such forgery.

Cited in note in 90 A. S. R. 203, on liability of sureties on official bond, blanks in which are subsequently filled in.

— **Effect of delivery in violation of condition.**

Cited in *Taylor County v. King*, 73 Iowa, 153, 5 A. S. R. 666, 34 N. W. 774; *Benton County Sav. Bank v. Boddicker*, 105 Iowa, 548, 67 A. S. R. 310, 45 L.R.A. 321, 75 N. W. 632,—holding that innocent bona fide holder of bond for value may recover thereon where principal delivers it in violation of condition on which it was signed by sureties; *Schiek v. Trustees of Schools*, 16 Ill. App. 49, holding sureties not bound by bond delivered by principal and accepted by obligees unsigned by principal in violation of condition on which it was delivered by sureties; *Cawley v. People*, 95 Ill. 249, holding that where sureties entrust official bond to principal without restriction it will be presumed that they intend to invest him with authority to procure sufficient number of additional sureties to insure its approval without reference to time when it shall be done.

Cited in note in 90 A. S. R. 190, on irregularities in filing and recording official bond relieving sureties from liability.

When estoppel arises.

Cited in *Casler v. Byers*, 129 Ill. 657, 22 N. E. 507, holding where one, induced by mortgagor purchases mortgage debt at amount in excess of what is due, mortgagor will, on bill to foreclose be estopped from claiming that sum so stated was not due at time of purchase.

— **Of sureties on official bond.**

Cited in *Custer County v. Tunley*, 13 S. D. 7, 79 A. S. R. 870, 82 N. W. 84, holding sureties on county treasurer's bond for second term only not liable for moneys received by him during first term which he had not charged himself as having received on entering on his second term; *School Trustees v. Peak*, 43 Ill. App. 50, holding sureties estopped to deny that funds having come into treasurer's hands and unaccounted for, were not in his hands for purpose of escaping liability on official bond; *Fogarty v. Ream*, 100 Ill. 366, holding that surety will not be permitted to escape liability for money charged to guardian by showing that latter had squandered money before appointment; *Holt County v. Scott*, 53 Neb. 176, 73 N. W. 681, holding sureties on bond of officer de facto estopped from denying that he was in possession of office and de jure; *Rollins v. Ebbs*, 138 N. C. 140, 50 S. E. 577, holding sureties on guardian's bond having entrusted it to another for delivery without inserting penalty estopped to deny their obligation on bond when delivered in completed form.

Conclusiveness of official's books of account and report.

Cited in *Second Borrowers & Investors Bldg. Asso. v. Cochrane*, 103 Ill. App. 29, holding entries made by official in books of account kept by him as part of his official duties, competent evidence against him of receipt of funds there stated.

Cited in reference note in 40 A. R. 727, on admissibility of parol evidence to show relation of two writings.

—Against sureties on official bond generally.

Cited in *People v. Warren*, 14 Ill. App. 296, holding state's attorney and his sureties bound to account for amount of judgments satisfied by him without authority where his report showed he had collected it; *Dall v. People*, 48 Ill. App. 418, holding that sureties on official bond cannot be heard to falsify reports made and records kept by county treasurer.

Cited in notes in 3 A. S. R. 749, on receipts of officers as evidence against their sureties; 53 L.R.A. 523, 524, on use as evidence of entries in books of account required by legal or particular duty on issues between other parties.

—Against sureties on treasurer's bond.

Cited in *Supreme Council C. K. A. v. Fidelity & C. Co.* 11 C. C. A. 96, 22 U. S. App. 439, 63 Fed. 48, holding entries, receipts and reports made by treasurer of beneficial association charging himself with certain items, not conclusive against surety as to time when such items were received; *Longan v. Taylor*, 31 Ill. App. 263, holding report of school township treasurer conclusive against him and his sureties as to amount due; *Cicero v. Grisko*, 240 Ill. 220, 88 N. E. 478 (affirming 144 Ill. App. 564); *Cawley v. People*, 95 Ill. 249,—holding treasurer's report admissible against him and sureties in action on official bond; *Longan v. Taylor*, 130 Ill. 412, 22 N. E. 745, holding school treasurer's books, entries and reports conclusive against his sureties; *Doll v. People*, 145 Ill. 253, 34 N. E. 413, holding attempt by sureties on county treasurers' bond to challenge official record and reports of principal, made for first time after suit on bond, comes too late; *Cowden v. Trustees of Schools*, 235 Ill. 604, 126 A. S. R. 244, 23 L.R.A.(N.S.) 131, 85 N. E. 924 (affirming 143 Ill. App. 241), holding that sureties upon bond of township treasurer cannot defend upon ground that treasurer's reports were false; *Independent School Dist. v. Hubbard*, 110 Iowa, 58, 80 A. S. R. 271, 81 N. W. 241, holding books of account kept and reports made by school district treasurer in his official capacity as required by law admissible as evidence of his indebtedness against him and his sureties; *Territory v. Cook*, 2 Ariz. 383, 17 Pac. 10, holding county treasurer's report as to money on hand conclusive against sureties in action on bond.

Cited in reference note in 37 A. R. 232, 233, on books of defaulting treasurer as evidence against sureties and treasurer.

Cited in note in 37 A. R. 235, on conclusiveness of treasurer's books on sureties.

—Against sureties on guardian's bond.

Cited in *Ream v. Lynch*, 7 Ill. App. 161, holding guardian's report as to amount of money on hand conclusive against him and his sureties; *Winslow v. People*, 17 Ill. App. 222, holding that so far as guardian charged himself with interest in his accounts rendered to county court his reports are binding on his sureties.

—Against sureties on executor's bond.

Cited in *People use of Sterling v. Huffman*, 182 Ill. 390, 55 N. E. 981, holding executor's report not conclusive on sureties if not approved by court.

Conclusiveness against surety of judgment against executor.

Cited in *Nevitt v. Woodburn*, 160 Ill. 203, 52 A. S. R. 315 43 N. E. 385, holding that judgment against executor binds his surety.

Right to perfect bond.

Cited in *Second Nat. Bank v. Gilbert*, 70 Ill. App. 251, holding that sheriff entitled to indemnity bond has right to require one that needs no explanations, and on its face subject to no objections.

Permitting correction of bond.

Cited in *Bailey v. Valley Nat. Bank*, 21 Ill. App. 642, holding refusal to strike affidavit and bond for attachment from files on ground that bond had no seal, proper, on allowing seal to be affixed.

Relation back of approval of bond.

Cited in *Boyd v. United States*, 31 Ct. Cl. 158, holding that vice consul's compensation begins with his principal's absence and not with approval of his bond.

Right to follow county money into hands of depositories.

Distinguished in *Moulton v. McLean*, 5 Colo. App. 454, 39 Pac. 78, holding that right to follow county money into hands of depositories by reason of its being public money only arises upon default and insolvency of those making official bond.

Duty of public officers to account for accretions to public funds.

Cited in *Thompson v. Territory*, 10 Okla. 409, 62 Pac. 355, holding that territorial treasurer must account for accretions of funds of territory in his hands; *State v. McFetridge*, 84 Wis. 473, 20 L.R.A. 223, 54 N. W. 1, holding that public officers must account for accretions to public funds in their hands.

Right to appeal from decision of intermediate court.

Cited in *Fraser v. Hollenberg*, 30 Ill. App. 163, on right to appeal to Illinois Supreme Court from reversal by appellate court.

35 AM. REP. 202, BRUKER v. COVINGTON, 69 IND. 33.**Liability for injury from defective streets.**

Cited in reference note in 10 A. S. R. 536, on liability for keeping openings in sidewalks.

Cited in note in 4 L.R.A. 213, on action for damages for injury from street obstruction.

What constitutes contributory negligence generally.

Cited in *Indiana Natural Gas & Oil Co. v. O'Brien*, 160 Ind. 266, 65 N. E. 918, holding that plaintiff in action for personal injuries caused by giving way of defective bridge which she was attempting to cross, is not required to negative in complaint previous knowledge of unsafe condition of bridge; *Langlois v. Dunn Worsted Mills*, 25 R. I. 645, 57 Atl. 910, holding person guilty of contributory negligence where knowing of defect in machine he was injured by putting his hand into geared wheel owing to forgetfulness; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 L.R.A. 783, holding person guilty of contributory negligence where he undertook to follow foot path and knowing location and condition of well, by reason of darkness, missed path and fell into well; *Louisville & N. R. Co. v. Schmidt*, 81 Ind. 264, holding person who notwithstanding horse is frightened at engine leads him toward crossing where becoming unmanageable he rears backwards and is killed, guilty of contributory negligence.

Cited in note in 55 A. D. 673, on knowledge or reason to apprehend danger as essential to contributory negligence which will defeat recovery for injury.

What constitutes contributory negligence on highway.

Cited in *Sandwich v. Dolan*, 133 Ill. 177, 23 A. S. R. 598, 24 N. E. 526, holding

person guilty of contributory negligence where in failing to exercise due care in passing along defective sidewalk he is injured.

— Where defect is known.

Cited in *Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250, holding person who knows of dangerous condition of sidewalk and attempts to pass when unable to see it and avoid it, guilty of contributory negligence; *Bohl v. Dell Rapids*, 15 S. D. 619, 91 N. W. 315, holding person guilty of contributory negligence who familiar with dangerous place in sidewalk at street crossing attempted, on dark night to go down such sidewalk instead of using middle of street, as she might have done whereby she was injured by fall on walk; *Indianapolis v. Cook*, 99 Ind. 10, holding person guilty of contributory negligence where he was in dark was injured by falling over water box in sidewalk of which he had knowledge; *Gosport v. Evans*, 112 Ind. 133, 2 A. S. R. 164, 13 N. E. 256, holding person, injured by known defect in sidewalk because of failure to exercise ordinary care, guilty of contributory negligence; *Sale v. Aurora & L. Turnp. Co.* 147 Ind. 324, 46 N. E. 609, holding person guilty of contributory negligence where he carelessly drove over known embankment at curve of road; *Bloomington v. Rogers*, 9 Ind. App. 230, 36 N. E. 439, holding that one who knows of dangerous obstruction in sidewalk and yet attempts to pass it when on account of darkness he can not see it so as to avoid it, takes risk upon himself; *Bluffton v. McAfee*, 12 Ind. App. 490, 40 N. E. 549, holding fact that person was walking slowly insufficient to relieve her of contributory negligence where she was injured by falling into hole in sidewalk known to her; *Rogers v. Bloomington*, 22 Ind. App. 601, 52 N. E. 242, holding person injured by falling into unguarded ditch, known to her, while passing along sidewalk near ditch after dark, guilty of contributory negligence; *Kokomo v. Boring*, 24 Ind. App. 552, 57 N. E. 202, holding person not guilty of contributory negligence where he was injured by driving sprinkling wagon upon platform scales used by public generally as part of street but which he knew was one inch below level of street proper; *Walker v. Reidsville*, 96 N. C. 382, 2 S. E. 74, holding person guilty of contributory negligence where he was injured by falling into open and unguarded excavation, some distance from sidewalk, which was known to him; *Neal v. Marion*, 126 N. C. 412, 35 S. E. 812, holding pedestrian who has been long resident of town and thoroughly familiar with walk and hole therein guilty of contributory negligence, where she through forgetfulness carelessly walked into it; *Pittman v. El Reno*, 4 Okla. 638, 46 Pac. 495, holding person guilty of contributory negligence where he was injured by dangerous known defect in sidewalk in darkness of night; *Hovert v. Seattle*, 32 Wash. 330, 73 Pac. 383, holding person guilty of contributory negligence where in attempting to re-cross known trench after dark without aid of lights she was injured; *Simonds v. Baraboo*, 93 Wis. 40, 57 A. S. R. 895, 67 N. W. 40, holding person not guilty of contributory negligence as matter of law where he was injured while driving on main thoroughfare by defect which he had seen a week previously but which as he approached at this time was not in view.

Cited in reference notes in 41 A. R. 219, on momentary forgetfulness of defect in sidewalk as contributory negligence; 1 A. S. R. 59, on contributory negligence in voluntarily passing over street known to be unsafe.

Cited in note in 44 A. R. 276, on contributory negligence of one traveling in a highway he knows to be defective.

Distinguished in *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359, holding that

knowledge of defect in street does not necessarily render one guilty of contributory negligence.

— Where defect is not known.

Cited in *Winamac v. Stout*, 165 Ind. 365, 75 N. E. 158, holding person not guilty of contributory negligence as matter of law where he was injured in night time by slipping into hole in defective walk of which he was ignorant; *Bluffton v. McAfee*, 23 Ind. App. 112, 53 N. E. 1058, holding person not guilty of contributory negligence where she was injured while wheeling baby carriage in front of her by stepping into hole in alley crossing, four inches lower than sidewalk and view thereof obstructed; *Collins v. Janesville*, 111 Wis. 348, 87 N. W. 241, holding that if person knows of dangerous defect in sidewalk and is injured thereby it is presumed that he remembered it and was negligent.

Contributory negligence as a bar to recovery.

Cited in *Bedford v. Neal*, 143 Ind. 425, 41 N. E. 1029; *Salem v. Walker*, 16 Ind. App. 687, 46 N. E. 90,—holding that failure of town to keep its streets in reasonably safe condition will not excuse traveler from use of ordinary care.

Cited in notes in 54 A. D. 469, on contributory negligence as affecting right to recover for injury; 21 L.R.A.(N.S.) 652, on contributory negligence as affecting municipal liability for defects and obstructions in streets.

Duty to instruct jury as to what constitutes contributory negligence.

Cited in *Woolery v. Louisville, N. A. & C. R. Co.* 107 Ind. 381, 57 A. R. 114, 8 N. E. 226, holding that it is duty of court to instruct jury as to what facts constitute contributory negligence leaving to jury duty of discovering whether such facts are proved.

35 AM. REP. 205, *CARVER v. STATE*, 69 IND. 61.

Right to sell cigars or tobacco on Sunday.

Disapproved in *Mueller v. State*, 76 Ind. 310, 40 A. R. 245, holding that hotel keeper may not keep open on Sunday, place for purpose of general sales of cigars or tobacco to resident customers or boarders.

Validity of contract made on Sunday.

Cited in *Gilbert v. Vachon*, 69 Ind. 372, holding promissory note executed by surety on Sunday and delivered by principal on week day unenforceable.

Cited in note in 14 L.R.A. 193, on applicability of Sunday law to acts to prevent loss or danger.

35 AM. REP. 210, *STATE v. BROWN*, 69 IND. 95.

What constitutes a riot.

Cited in *Green v. State*, 109 Ga. 536, 35 S. E. 97, holding indictment that certain named persons "did in violent and tumultuous manner prevent sheriff from removing prisoner from common jail" sufficiently charges riot; *State v. Acra*, 2 Ind. App. 384, 28 N. E. 570, holding that indictment alleging that three persons did in riotous, violent and tumultuous manner, unlawfully attempt to commit violent injury on person named by violently and unlawfully threatening to beat, cut and shoot such person, stated facts sufficiently charging riot; *Madisonville v. Bishop*, 113 Ky. 106, 57 L.R.A. 130, 67 S. W. 269, holding assemblage of one thousand people endangering life and obstructing use of main street of city by discharging fireworks a riotous assemblage.

Cited in reference notes in 94 A. D. 137, as to what acts constitute riot; 40 A. R. 629, on what constitutes riot within provision of insurance policy.

35 AM. REP. 212, WRIGHT v. STATE, 69 IND. 163.

Correctness of instruction.

Distinguished in *Timmis v. Wade*, 5 Ind. App. 139, 31 N. E. 827, holding instruction to jury to use their own judgment in determining whether defendant was guilty of fraudulent conduct charged, correct, in action for deceit.

When reasonable doubt of guilt may arise.

Cited in *Knight v. State*, 74 Miss. 140, 20 So. 860, holding that reasonable doubt of guilt may arise from want of evidence as to some fact having natural connection with the case; *State v. Andrews*, 77 N. J. L. 108, 71 Atl. 109, holding that reasonable doubt may arise from lack or want of evidence.

Distinguished in *Batten v. State*, 80 Ind. 394, holding that reasonable doubt may arise as well from lack of evidence as from evidence itself in murder case; *Kennedy v. State*, 107 Ind. 144, 57 A. R. 9, 6 N. E. 305, holding that speculative doubt as to possibility of innocence is not such doubt as requires an acquittal.

35 AM. REP. 214, FLETCHER v. PIERSON, 69 IND. 281.

Necessity of presentation and notice of nonpayment of check.

Cited in *Culver v. Marks*, 122 Ind. 554, 17 A. S. R. 377, 7 L.R.A. 489, 23 N. E. 1086, holding presentation of check and notice of nonpayment to drawer not necessary where drawer has no funds on deposit for payment of check; *Fritz v. Kennedy*, 119 Iowa, 628, 93 N. W. 603, holding failure of holder of bank check for property purchased, to promptly present same for payment, is no defense to action to recover purchase price on dishonor of check in absence of proof of prejudice from delay.

Cited in reference notes in 53 A. R. 252, on equitable assignment by drawing check; 17 A. S. R. 388, on necessity for presentment of check where drawer has no funds in bank.

Cited in notes in 17 A. S. R. 810, on duty of holder of check in order to render drawer or indorser liable; 53 L.R.A. 432, on necessity of loss to discharge of drawer by delay in presenting check.

35 AM. REP. 216, DANENHOFFER v. STATE, 69 IND. 295.

Followed without discussion in *Danenhoffer v. State*, 69 Ind. 418.

Right to punish child.

Cited in *People v. Green*, 155 Mich. 524, 21 L.R.A. (N.S.) 216, 119 N. W. 1087; *State v. Koonse*, 123 Mo. App. 655, 101 S. W. 139,—holding that parent guilty of excessive punishment of child will not be heard to say he thought he was acting for benefit of child.

—Right of teacher.

Cited in *Boyd v. State*, 88 Ala. 169, 16 A. S. R. 31, 7 So. 268, holding that school-master has right to inflict reasonable punishment on pupil; *Vanvactor v. State*, 113 Ind. 276, 3 A. S. R. 645, 15 N. E. 341, holding that reasonableness of punishment inflicted on pupil by teacher must be determined upon facts of particular case; *State v. Vanderbilt*, 116 Ind. 11, 9 A. S. R. 820, 18 N. E. 266, to point that proceeding for assault and battery can

Am. Rep. Vol. XVII.—58.

not be maintained against teacher where punishment of pupil is not administered with unreasonable severity.

Cited in reference note in 3 A. S. R. 650, on powers and liabilities of teachers concerning punishment of pupils.

Cited in notes in 76 A. D. 165, 166, on authority, duties, and powers of school-teachers; 102 A. S. R. 541, on criminal liability of teacher for excessive punishment; 6 L.R.A. 535, on right of teacher to chastise pupil; 65 L.R.A. 892, on liability of school-teacher for reasonable restraint or correction of pupil.

Right of school board to adopt rules and regulations.

Cited in *Fertich v. Michener*, 111 Ind. 472, 60 A. R. 709, 11 N. E. 605, holding that school boards have power to adopt rules and regulations for government of schools under their control.

Cited in notes in 102 A. S. R. 540, on right of teacher to make and enforce rules; 6 L.R.A. 534, on rules and regulations for management and conduct of pupils in public schools.

Right of school board to suspend pupil.

Cited in *Board of Education v. Purse*, 101 Ga. 422, 65 A. S. R. 312, 41 L.R.A. 593, 28 S. E. 896, holding that board of education has right to suspend school children whose parent while undertaking to interfere with teacher's discipline over one of these children enters school room and uses offensive or insulting language to such teacher.

35 AM. REP. 220, *BENSON v. ADAMS*, 69 IND. 353.

Maturity of note.

Cited in *Farmers' Nat. Bank v. Salina Paper Mfg. Co.* 58 Kan. 207, 48 Pac. 863, holding that maker of promissory note has all of day on which it becomes due to pay it; *Toler v. Keiher*, 81 Ind. 383, holding note due on last day of grace; *Joergenson v. Joergenson*, 28 Wash. 477, 92 A. S. R. 888, 68 Pac. 913, holding action not maintainable on negotiable promissory note before expiration of last day of grace.

— **Allowance of grace.**

Cited in *Luce v. Shoff*, 70 Ind. 152, holding that grace is not allowed upon notes which are not negotiable as inland bills of exchange.

Cited in reference note in 92 A. S. R. 892, on days of grace for negotiable instruments.

Computation of time.

Cited in *Towell v. Hollweg*, 81 Ind. 154, holding that time within which statute requires chattel mortgage to be recorded is computed by excluding day on which it was executed and including that on which it was recorded; *Vogel v. State*, 107 Ind. 374, 8 N. E. 164, holding that day of election is to be excluded in computing time where certificate of election entitles township trustee to discharge duties of office at expiration of ten days from day of election; *Bowen v. Julius*, 141 Ind. 310, 40 N. E. 700, holding that day of date is excluded and day of payment included in computing time when note, not governed by law merchant, payable certain number of days after date will become due.

Cited in notes in 78 A. S. R. 374, on exclusion of first day in computation of time; 11 L.R.A. 701, on computation of time in limitation of actions; 49 L.R.A. 208, on rule as to first and last days in computation of time.

Meaning of "day."

Cited in *Miner v. Goodyear India Rubber Glove Mfg. Co.* 62 Conn. 410, 26 Atl. 643; *Sexton v. Goodwine*, 33 Ind. App. 329, 68 N. E. 929,—holding that word "day" in a statute means entire twenty-four hours; *Cheek v. Preston*, 34 Ind. App. 343, 72 N. E. 1048, holding that legal day commences at twelve o'clock at night and continues until same hour the following night in action between landlord and tenant for possession; *Harmon v. Comstock Horse & Cattle Co.* 9 Mont. 243, 23 Pac. 470, holding that day for purpose of serving process includes whole twenty-four hours; *Marquette v. Berks County*, 3 Pa. Super. Ct. 36, holding that law providing for completion of assessment within sixty days means sixty days of twenty-four hours each.

Cited in note in 1 L.R.A.(N.S.) 835, on fractions of day as determining priorities or precedence of rights.

35 AM. REP. 223, STATE EX REL. TIEMAN v. INDIANAPOLIS, 69 IND. 375.**Power of legislature to exempt property from taxation.**

Cited in *Warner v. Curran*, 75 Ind. 309, holding act exempting amount of property from taxation in certain cases unconstitutional and void; *State Tax Comrs. v. Holliday*, 150 Ind. 216, 42 L.R.A. 826, 49 N. E. 14 (dissenting opinion), on power of legislature to exempt property from taxation; *State ex rel. Morgan v. Workmen's Bldg. & L. Fund & Sav. Assn.* 152 Ind. 278, 53 N. E. 168; *State ex rel. Lewis v. Smith*, 158 Ind. 543, 63 L.R.A. 116, 68 N. E. 25,—holding exemption by legislature of property not exempt by constitution, void; *Oak Hill Cemetery Co. v. Wells*, 38 Ind. App. 479, 78 N. E. 350, holding that legislature has no power to exempt property from taxation which is not exempted by constitution.

Cited in notes in 19 L.R.A. 81, on power of state legislature to exempt from taxation; 60 L.R.A. 48, on legislative and governmental powers as to corporate taxation as affected by the contract clause in the Federal Constitution.

Power of courts to void statute violative of uniform taxation.

Cited in *Moog v. Randolph*, 77 Ala. 597, on question when courts can properly interpose to declare statute void because of its taxing particular class of property upon principle violative of uniformity designed by constitution.

Strict construction of exempt statute.

Cited in *Read v. Yeager*, 104 Ind. 195, 3 N. E. 856, holding that clause in city charter of Evansville providing that no property within said city shall be taxed for purpose of making or repairing any road outside city limits, gives exemption only from ordinary road tax.

Improper application of public revenues.

Cited in *Street v. Varney Electrical Supply Co.* 160 Ind. 338, 98 A. S. R. 325, 61 L.R.A. 154, 66 N. E. 895, holding minimum wage law fixing minimum rate of wages to be paid unskilled labor employed upon public work of state, counties, cities, and towns, unconstitutional.

35 AM. REP. 227, MILROY v. QUINN, 69 IND. 406.**What constitutes a guaranty.**

Cited in *Woody v. Haworth*, 24 Ind. App. 634, 57 N. E. 272, holding indorsement of promissory note "For value received, I guarantee payment of within note when due, and waive demand, notice of nonpayment, and protest," constituted ab-

absolute guaranty to pay note; *Herman v. Williams*, 36 Fla. 136, 18 So. 351, holding when promise is to do particular thing which another is bound to perform in event he does not do it, obligation is original undertaking not strict or collateral guaranty; *Kline v. Raymond*, 70 Ind. 271, holding where one writes "I hereby guarantee you," etc., and delivers the paper it is absolute and complete guaranty.

Necessity of notice of acceptance of guaranty.

Cited in *Hasselman v. Jananese Development Co.* 2 Ind. App. 180, 27 N. E. 318, holding promise "Till M's order. I will guaranty payment within 30 days" was proposition to guaranty payment of debt, to be contracted and guarantor was entitled to notice of acceptance; *Wills v. Ross*, 77 Ind. 1, 40 A. R. 279, holding it not necessary that creditor should notify guarantor of acceptance of guaranty where there is existing debt known to guarantor; *John A. Tolman Co. v. Means*, 52 Mo. App. 385, holding that persons residing in different states who sign guaranty provided for in contract of employment of traveling salesman, are entitled to notice of their acceptance as guarantors.

Cited in reference notes in 39 A. R. 221, on right of guarantor to notice of acceptance of guaranty; 42 A. S. R. 442, on notice of default to guarantor.

Cited in notes in 105 A. S. R. 518, on necessity of notice to guarantor of default of principal obligor; 20 L.R.A. 260, on necessity of notice of default to bind guarantor of purchase money; 16 L.R.A.(N.S.) 374, on necessity of notice of acceptance to one executing guaranty of payment for goods and chattels sold.

Effect of performance of consideration for guaranty.

Cited in *Snyder v. Click*, 112 Ind. 293, 13 N. E. 581, holding where guarantee accepts guaranty and acting upon faith of it performs consideration upon which it rests contract is complete and enforceable.

35 AM. REP. 232, SMITH v. YARYAN, 69 IND. 445.

Evidence of want of chastity of female seduced.

Cited in *South Bend v. Hardy*, 98 Ind. 577, 49 A. R. 792, to point that female in action for seduction, may be required to testify on cross examination, to acts showing her previous want of chastity if they would not tend to criminate her, but would only disgrace her.

Cited in reference note in 51 A. R. 234, on admissibility of evidence of lewd acts of prosecuting witness in prosecution for seduction.

Cited in notes in 44 A. D. 177, on evidence as to seduced female's character for chastity; 14 L.R.A.(N.S.) 734, 752, on evidence of specific instances to prove character of prosecutrix in prosecution for bastardy.

Impeachment of witness.

Cited in *Canada v. Curry*, 73 Ind. 246, holding that witness cannot be impeached by proof or suggestion that he has been indicted for any offense.

Cited in note in 11 E. R. C. 157, on method of impeaching witness.

What constitutes seduction.

Cited in *Ireland v. Emmerson*, 93 Ind. 1, 47 A. R. 364, to point that it is seduction where unmarried man importunes unmarried female to sexual intercourse with him and she through confidence and love, yields to his solicitations; *Franklin v. McCorkle*, 16 Lea, 609, 57 A. R. 244, holding that father may recover damages for seduction of minor daughter, without pleading loss of her services.

Sufficiency of complaint in seduction.

Cited in *Wilson v. Shepler*, 86 Ind. 275, on sufficiency of complaint by woman for her own seduction; *Wales v. Miner*, 89 Ind. 118, holding that complaint for criminal conversation need not allege means by which seduction of wife was effected.

Right of female of nonage to maintain action for seduction.

Cited in *McCoy v. Trucks*, 121 Ind. 292, 23 N. E. 93, holding that woman of nonage may maintain action for her own seduction.

Cited in note in 44 A. D. 166, on right of female to sue for her own seduction.

35 AM. RLP. 236, NATIONAL BANK v. SECOND NAT. BANK, 69 IND. 479.**Necessity for drawer's acceptance of check.**

Cited in *Harrison v. Wright*, 100 Ind. 515, 50 A. R. 805, to point that payee of bank check can not maintain action against drawee unless check has been accepted by drawee.

Cited in reference notes in 40 A. R. 142, on holder's right of action against drawee of check; 2 A. S. R. 652, on liability of bank on check drawn by depositor in absence of written acceptance; 40 A. S. R. 665, on nature of general bank deposits; 53 A. D. 662, on effect of figures on margin of note, bill or check.

Cited in notes in 57 A. D. 466, on right of holder of unaccepted check or draft to sue drawee; 96 A. D. 133, on right of holder of check to sue; 45 A. R. 355, on rights as against the bank of a holder of an unaccepted check; 19 A. S. R. 610, as to whether check is an assignment of the fund; 41 L. ed. U. S. 855, 859, on liability for wrongful dishonor of check; 3 E. C. R. 760, on liability of bank to third person as holder of check; 10 E. C. R. 424, on bank check as equitable assignment of deposit.

Sufficiency of special verdict.

Cited in *Belshaw v. Chitwood*, 141 Ind. 377, 40 N. E. 908, holding special verdict in contest of will which covers all issues formed, sufficient.

Cited in note in 24 L.R.A.(N.S.) 10, on what special verdict must contain.

35 AM. REP. 240, STILWELL v. KNAPPER, 69 IND. 558.**Validity of condition in restraint of marriage.**

Cited in *Kennedy v. Alexander*, 21 App. D. C. 424; *Coon v. Bean*, 69 Ind. 474,—holding condition, in devise, in restraint of marriage, void.

Cited in reference note in 49 A. R. 478, on validity of conditions in wills in restraint of marriage.

Cited in notes in 80 A. D. 404, on bequest to legatee while he or she remains unmarried; 6 E. R. C. 367; 25 E. R. C. 637,—on validity of condition in restraint of marriage.

—Remarriage of testator's widow.

Cited in *Crawford v. Thompson*, 91 Ind. 266, 46 A. R. 508, holding condition in devise in general restraint of marriage of testator's widow void; *Van Gorder v. Smith*, 99 Ind. 404; *Levengood v. Hoople*, 124 Ind. 27, 24 N. E. 373,—holding that where particular estate is devised to wife upon condition that she shall not remarry, condition is void.

Cited in note in 84 A. S. R. 151, on conditions against remarriage.

Construction of devise during widowhood.

Cited in *Wood v. Beasley*, 107 Ind. 37, 7 N. E. 331, holding that husband may by limitation restrict estate of surviving wife so that it shall terminate when she marries.

Cited in note in 1 L.R.A. 432, on devise to wife during widowhood.

— Estate created by.

Cited in *Eate v. McLain*, 74 Ind. 493, holding that devise to wife only, so long as she should remain testator's widow vested only estate during her widowhood; *O'Harrow v. Whitney*, 85 Ind. 140, holding that where husband dies, leaving wife and two children surviving, having devised his land to wife during widowhood, and she elects to accept provision made for her by will her estate is limited in duration to period of her widowhood.

— As a condition in restraint of marriage.

Cited in *Hibbits v. Jack*, 97 Ind. 570, 49 A. R. 478; *Summit v. Yount*, 109 Ind. 506, 9 N. E. 582,—holding devise of property to wife "so long as she remains my widow" a limitation of estate merely and not condition in restraint of marriage; *Beatty v. Irwin*, 35 Ind. App. 238, 73 N. E. 926, holding language in devise "only so long as she shall be and remain my unmarried widow" simply condition against remarriage.

Necessity for using word "condition" to create condition.

Cited in *Downing v. Rademacher*, 133 Cal. 220, 85 A. S. R. 160, 65 Pac. 385; *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Claypool v. German F. Ins. Co.* 32 Ind. App. 540, 70 N. E. 281,—holding word condition not necessary to creation of condition, if it plainly appears from words used that intent of parties was to create estate of that description; *Wilson v. Wilson*, 86 Ind. 472, holding word condition not necessary to creation of condition; *Gibson v. Seymour*, 102 Ind. 485, 52 A. R. 688, 2 N. E. 305, holding no precise form of words necessary to create condition.

Cited in note in 29 L.R.A. (N.S.) 1162, on rule in *Shelley's case*.

Effect of provision by will same as that by statute.

Cited in *Davidson v. Koehler*, 76 Ind. 398; *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457; *Robertson v. Robertson*, 120 Ind. 333, 22 N. E. 310; *Davis v. Lennen*, 125 Ind. 185, 24 N. E. 885,—holding that devisee takes by law and not under will where provisions of will are same as those of law; *Rowley v. Sanns*, 141 Ind. 179, 40 N. E. 674, to point that will is inoperative where by its terms precisely same provision is made to devisee as that made by statute; *Bateman v. Bennett*, 31 Ind. App. 277, 67 N. E. 713, to point that will is inoperative where by its terms precisely same provision is made to devisee as that made by statute.

Effect of contemporaneous agreement to support grantor for life.

Cited in *Van Horn v. Mercer*, 29 Ind. App. 277, 64 N. E. 531, holding agreement contemporaneous with deed by grantee to support grantors during life and until said conditions in deed are fully complied with agreement shall be lien on lands to sum of eight hundred dollars did not create condition subsequent but lien for sum named.

Cited in note in 130 A. S. R. 1045, on conveyances in consideration of support.

35 AM. REP. 255, *HART v. WILLIS*, 52 IOWA, 56, 2 N. W. 619.

Place of contract in case of note.

Cited in *Haseltine v. Whitney*, 38 Pittsb. L. J. N. S. 325, holding that place

where parties intend note to become subsisting obligation is place of contract; *Bigelow v. Burnham*, 83 Iowa, 120, 32 A. S. R. 294, 49 N. W. 194, holding that promissory note purporting on its face to have been made in Iowa but in fact made and delivered in New York where payee resided must be presumed payable in Iowa and not usurious because usurious under laws of New York state.

Cited in reference note in 27 A. S. R. 782, on place of contract of negotiable instrument.

Cited in notes in 99 A. D. 672, on where negotiable instruments are deemed to have been made; 31 A. R. 78, on conflict of laws as affecting validity of promissory notes; 55 A. S. R. 48, on place of contract of guaranty; 62 L.R.A. 44, on conflict of laws as to usury.

35 AM. REP. 257, GOLDEN v. NEWBRAND, 52 IOWA, 59, 2 N. W. 537.

Liability of master for negligence of servant—When within scope of employment.

Cited in *Oakland City Agri. & Industrial Soc. v. Bingham*, 4 Ind. App. 545, 31 N. E. 383, holding master liable for acts of servant done in scope of employment though ill-advised, malicious and against his express order; *Ephland v. Missouri P. R. Co.* 71 Mo. App. 597 (dissenting opinion), on liability of railroad company for act of brakeman in wilfully injuring passenger in stopping train; *Compher v. Missouri & K. Teleph. Co.* 127 Mo. App. 553, 106 S. W. 536, holding master liable for violence of superintendent in revolving telephone girl around on chair and throwing her against obstruction where she was violating instruction; *Davis v. Houghtellin*, 33 Neb. 582, 14 L.R.A. 737, 50 N. W. 765, holding master liable to third persons for damages resulting from negligence of servants only when later in acting within scope of his employment; *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1, 104 N. W. 49, holding railroad company liable for injuries to boy by conductor while acting within general scope of employment about master's business, though negligent and malicious; *Johnston v. Chicago, St. P. M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424, holding that assault and imprisonment inflicted by employee for sole purpose of obtaining information sought through investigation as to injuries to master's property were acts within scope of employee's duty.

Cited in reference notes in 25 A. S. R. 651, on criminal liability of master for servant's acts; 27 A. S. R. 226, on master's liability for servant's torts; 38 A. S. R. 370, on master's liability to third persons for acts of servants; 93 A. S. R. 813; 96 A. S. R. 552,—on master's liability for acts of servants; 108 A. S. R. 409, on liability of employer where watchman shoots trespasser.

Cited in notes in 3 L.R.A.(N.S.) 1039, on liability for injury to poachers by discharge of firearms; 131 A. S. R. 308, on declarations and acts of agents.

— When not within scope of employment.

Cited in *Savannah Electric Co. v. Hodges*, 6 Ga. App. 470, 65 S. E. 322; *Robards v. P. Bannon Sewer Pipe Co.* 130 Ky. 380, 132 A. S. R. 394, 18 L.R.A.(N.S.) 923, 113 S. W. 429; *Holler v. Ross*, 68 N. J. L. 324, 96 A. S. R. 546, 51 L.R.A. 943, 53 Atl. 472,—holding master not responsible if wrong done by servant without his authority, and not for purpose of executing his orders or doing his work; *Georgia R. & Bkg. Co. v. Wood*, 94 Ga. 124, 47 A. S. R. 146, 21 S. E. 288, holding railroad company not liable for injury to boy by brakeman in throwing stones at him after he had desisted from trespass; *Dolan v. Hubinger*, 109 Iowa, 408,

80 N. W. 514, holding master not liable where motorman after boy had desisted from trespass, threw stone, striking and injuring him; *Healy v. Patterson*, 123 Iowa, 73, 98 N. W. 576, holding master not liable for injury resulting from negligence of servant in operating machinery without authority; *Belt R. Co. v. Banicki*, 102 Ill. App. 642, holding railroad company not liable where watchman shoots trespasser without any apparent cause; *Pennsylvania Co. v. Dean*, 92 Ind. 459, to point that master is not liable for injury to trespasser by negligence of servant unless act complained of occurred within scope of servant's employment; *Kincade v. Chicago, M. & St. P. R. Co.* 107 Iowa, 682, 78 N. W. 698, holding railroad company not liable where employee, riding on hand car strikes another who in attempt to avoid blow pushes off third employee who is injured thereby; *Galveston H. & S. R. Co. v. Currie*, 100 Tex. 136, 10 L.R.A.(N.S.) 367, 96 S. W. 1073, holding railroad company not liable where engine despatcher, handling hose conveying blast of compressed air, turned it in sport upon engine wiper inflicting injuries which caused his death.

Cited in notes in 54 A. S. R. 87, on master's liability for servant's wilful, malicious, or criminal acts, torts, or frauds; 88 A. S. R. 796, on liability of principal in tort for assault and battery by agent; 88 A. S. R. 789, on nonliability of principal for acts of agent outside of scope of employment; 88 A. S. R. 792, on necessity that unauthorized act of agent be in execution of employment to hold principal liable; 27 L.R.A. 197, on master's liability to third person for wilful and malicious shooting by employee; 10 L.R.A.(N.S.) 397, on master's liability for injury by servant to third person in use of firearms; 17 E. R. C. 279, on master's liability for servant's disobedient acts.

Distinguished in *Holler v. Ross*, 68 N. J. L. 324, 96 A. S. R. 546, 59 L.R.A. 943, 53 Atl. 472, holding master not liable if wrong done by servant is done without his authority, and not for purpose of executing his orders or doing his work.

Sufficiency of complaint in action for negligent injuries.

Cited in *McPeak v. Missouri P. R. Co.* 128 Mo. 617, 30 S. W. 170 (dissenting opinion), to point that, complaint in action against master for personal injury by negligence of servant, must allege that act was done in line of his employment and in furtherance of master's business.

Admissibility of evidence given on former trial.

Cited in note in 91 A. S. R. 201, on opportunity to cross-examine as requisite to admission of evidence given on former trial.

Dismissal and nonsuit.

Cited in *Broderius v. Anderson*, 54 Wash. 591, 103 Pac. 837, on insufficiency of evidence as matter of law.

35 AM. REP. 258, STATE v. WHITCOMB, 52 IOWA, 85, 2 N. W. 970.

Effect of subsequent marriage on decree of divorce fraudulently procured.

Cited in *Maher v. Title, Guarantee & T. Co.* 95 Ill. App. 365, holding that subsequent marriage should not be allowed to operate as affirmance of decree of divorce fraudulently procured; *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341, holding that notwithstanding plaintiff in divorce proceeding has again married, aggrieved

party may maintain action to set aside and annul decree a vinculo, procured by fraudulent acts.

Effect of subsequent reversal of judgment.

Cited in *Rine v. Wagner*, 135 Iowa, 626, 113 N. W. 471, holding that one cannot be good faith purchaser who relies upon judgment which is subject to appeal and reversal by higher tribunal.

Cited in note in 61 A. D. 467, on effect of setting aside or annulling divorce.

Invalidity of proceedings of court without jurisdiction.

Cited in *State v. Keller*, 8 Idaho, 699, 70 Pac. 1051, holding that orders or process issued by court in matter in which such court had no jurisdiction are void, and are no protection to person who acts under them.

— Decree of divorce.

Cited in *State v. Fleak*, 54 Iowa, 429, 6 N. W. 689, holding decree of divorce absolutely void if court had no jurisdiction; *Neff v. Beauchamp*, 74 Iowa, 92, 36 N. W. 905, holding that decree of divorce was absolutely void from beginning where court rendering decree had no jurisdiction.

Admissibility of evidence as to criminal intent in bigamy.

Cited in *State v. Zichfeld*, 23 Nev. 304, 62 A. S. R. 800, 34 L.R.A. 784, 46 Pac. 802, holding that in prosecution for bigamy, evidence was not admissible to show that defendant, by his second marriage, had no criminal intent, he believing that first marriage had been annulled by agreement.

Cited in note in 8 E. R. C. 46, on necessity of guilty intent to make act crime.

Distinguished in *State v. Audette*, 81 Vt. 400, 130 A. S. R. 1061, 18 L.R.A. (N.S.) 527, 70 Atl. 833, holding one not guilty of adultery where connection relied on was had as result from marriage, while single, to woman whom he honestly believed to be unmarried.

Good faith as defense to criminal prosecution.

Cited in *State v. Probasco*, 62 Iowa, 400, 17 N. W. 607, holding that knowledge of presence of minors therein or of their minority, need not be shown to sustain conviction of saloon keepers for failure to take proper measures to prevent minors remaining in their saloons.

Lex loci contractus.

Cited in reference note in 10 A. S. R. 33, on *lex loci contractus* as governing validity of contract.

Cited in note in 99 A. D. 671, on where contract of insurance is deemed to have been made.

35 AM. REP. 261, FEJAVARY v. BROESCH, 52 IOWA, 88, 2 N. W. 963.

Validity of chattel mortgage on after acquired property.

Cited in *Consolidated Tank Line Co. v. Collier*, 148 Ill. 259, 39 A. S. R. 181, 35 N. E. 756, holding mortgage on property not owned by mortgagor and not then in existence valid if he afterwards acquire it; *Phillips v. Both*, 58 Iowa, 499, 12 N. W. 481, holding that chattel mortgage may be made to cover future acquisitions of property; *Hughes v. Wheeler*, 66 Iowa, 641, 24 N. W. 251, holding that chattel mortgage may be so drawn as to cover after acquired property if it is in existence at time mortgage is executed; *Sandwich Mfg. Co. v. Robinson*, 83 Iowa, 567, 14 L.R.A. 126, 49 N. W. 1031, holding that demands for money not

yet earned may be mortgaged; *Riddle v. Dow*, 98 Iowa, 7, 32 L.R.A. 811, 66 N. W. 1066, holding that one may validly mortgage property to be acquired in future; *T. B. Townsend Brick & Contracting Co. v. Allen*, 9 Kan. App. 230, 59 Pac. 683, holding chattel mortgage lien valid against subsequent purchasers from mortgagor may be created upon clay and bricks to be subsequently made therefrom.

Cited in notes in 76 A. D. 723, on effect of mortgage on after acquired personal property; 76 A. D. 726, on right to mortgage thing in which mortgagor has potential interest; 76 A. D. 731, on equitable doctrines applicable to mortgages of after acquired chattels; 18 L.R.A. 303, on equitable exceptions to rule that no chattel mortgage can be executed which will bind personal property not in existence or not belonging to mortgagor; 5 E. R. C. 138, as to what personal property may be mortgaged.

— Crops.

Cited in *Muir v. Blake*, 57 Iowa, 662, 11 N. W. 621, on validity of chattel mortgage upon crops to be grown; *Foster v. Reid*, 78 Iowa, 205, 16 A. S. R. 437, 42 N. W. 649, holding that where lease gives landlord lien on all crops grown on land to secure unpaid rent, such lien will attach to crops raised by subtenant; *Sioux Valley State Bank v. Honnold*, 85 Iowa, 352, 52 N. W. 244, holding that provision in lease making damages resulting from lessee's failure to perform lease, lien on crops, whether exempt from execution or not is in effect a mortgage.

Cited in note in 23 L.R.A. 470, on sale or mortgage of future crops raised on leased land.

Distinguished in *Pennington v. Jones*, 57 Iowa, 37, 10 N. W. 274, holding that it is essential to validity of mortgage on crops to be planted, as against third persons, that term in which crops are to be grown must, at least be stated.

Effect of unrecorded lien created by lease.

Cited in *Marquam v. Sengfelder*, 24 Or. 2, 32 Pac. 676, holding that unrecorded lien created by lease creates only presumption of fraud which may be rebutted.

Landlord's lien on exempt property.

Cited in notes in 119 A. S. R. 125, on landlord's right to lien on tenant's exempt property by reason of express agreement; 24 L.R.A. 812, on waiver of exemption against claim for rent.

35 AM. REP. 262, WADE v. CLARK, 52 IOWA, 158, 22 N. W. 1039.

Right of court to inquire into nature of debt in bankruptcy.

Cited in *Donald v. Kell*, 111 Ind. 1, 11 N. E. 782; *Madison Twp. v. Dunkle*, 114 Ind. 262, 16 N. E. 593,—holding that courts will look behind note, mortgage or judgment, to ascertain nature of debt and if it is one which discharge in bankruptcy does not bar it will be so adjudged; *Easley v. Bledsoe*, 59 Tex. 488,—holding that when discharge was after rendition of judgment court could inquire into nature of demand to see if it was provable in bankruptcy an released by discharge.

Discharge in bankruptcy as bar to action on former judgment.

Cited in *Wells v. Edmison*, 4 Dak. 46, 22 N. W. 497, holding that discharge in bankruptcy constituted no defense to action on former circuit court judgment entered by default.

Amendment of pleading.

Cited in *Barke v. Early*, 72 Iowa, 273, 33 N. W. 677, holding that amended petition, for action to set aside tax sale, after period of limitation does not pertain to cause of action so far that new cause of action is presented thereby; *Anthony v. Slayden*, 27 Colo. 144, 60 Pac. 826, holding that objections may be made, in advance, to filing of amendment or court allow it to be filed and require opposing party to move to strike or to demur.

35 AM. REP. 263, DENTON v. CHICAGO, R. I. & P. R. CO. 52 IOWA, 161, 2 N. W. 1093.

Pleading in action for negligence.

Cited in *Telle v. Leavenworth Rapid Transit R. Co.* 50 Kan. 455, 31 Pac. 1076, holding where party charges specific act of negligence he is concluded thereby and cannot recover upon matters not alleged.

Burden of proof as to negligence.

Cited in *Carter v. Kansas City, St. J. & C. B. R. Co.* 65 Iowa, 287, 21 N. W. 607, holding that plaintiff averring negligence of one kind in action for damages by fire cannot prove another; *C. C. Taft Co. v. American Exp. Co.* 133 Iowa, 522, 119 A. S. R. 642, 10 L.R.A.(N.S.) 614, 110 N. W. 897, holding that plaintiff must prove negligence in action against carrier for loss of goods caused by failure to properly ice car.

Cited in reference note in 24 A. S. R. 614, on burden of proof in action against warehouseman.

Cited in notes in 97 A. D. 411, on burden of proof where loss of goods intrusted to common carrier is shown; 22 L.R.A.(N.S.) 979, on burden of proof as to negligence of carrier holding as warehouseman.

Burden of proof on appeal.

Cited in *Benjamin v. Shea*, 83 Iowa, 392, 49 N. W. 989, holding that appellant having assumed burden of proof as to title to real estate must be held to carry it on appeal.

Right to correct mistake where party erroneously assumes burden of proof.

Cited in *Burgraf v. Byrnes*, 104 Minn. 343, 116 N. W. 838, holding that where party erroneously assumes burden of proof as to particular fact, mistake will not be corrected in appellate court.

Reversal for error in charge.

Cited in *Maloney v. Chicago & N. W. R. Co.* 95 Iowa, 253, 63 N. W. 690, holding that where erroneous instruction is in harmony with appellant's petition and theory below, and correct one is not asked, there will be no reversal; *Volquarsen v. Iowa Teleph. Co.* 148 Iowa, 77, 28 L.R.A.(N.S.) 554, 126 N. W. 928, holding that plaintiff has no cause of complaint if instructions present theory of case as stated in petition.

35 AM. REP. 266, HANGER v. DES MOINES, 52 IOWA, 193, 2 N. W. 1105.

Powers of municipal corporations.

Cited in *Ex parte Sims*, 40 Fla. 432, 25 So. 280, holding that delegated corporate powers to municipalities must be strictly construed; *Ottumwa v. Chinn*, 75 Iowa, 405, 39 N. W. 671, to point that municipal corporation may abate nuis-

ance by ordinance; *Heins v. Lincoln*, 102 Iowa, 69, 71 N. W. 189, holding city not authorized to issue bonds in payment of its debts.

—Power of town to borrow money.

Cited in *Wells v. Salina*, 119 N. Y. 280, 7 L.R.A. 759, 23 N. E. 870, holding that towns have no general power to borrow money for municipal purposes to pay town charges.

—Power to offer reward for apprehension of criminals.

Cited in *Martin County v. Pipher*, 98 Ind. 124, holding that sheriff cannot as of right, demand payment of county for recapture of prisoners escaped from jail, or expenses incurred therein; *Felker v. Elk County*, 70 Kan. 96, 78 Pac. 167, 3 A. & E. Ann. Cas. 156, holding county commissioners not authorized to offer reward for arrest and conviction of fugitives from justice; *Abel v. Pembroke*, 61 N. H. 357, holding that town in absence of statute authority has no power to offer reward for apprehension of criminal; *Winchester v. Redmond*, 93 Va. 711, 57 A. S. R. 822, 25 S. E. 1001, holding that city has no power to offer rewards for apprehending criminals.

Cited in reference note in 37 A. R. 174, on power of municipal corporation to offer reward.

Distinguished in *People ex rel. Atty. Gen v. Holly*, 119 Mich. 637, 75 A. S. R. 435, 44 L.R.A. 677, 78 N. W. 665, holding that incorporated village has power to offer reward for conviction of persons who have set fire to buildings within its limits.

—Power to employ detectives to suppress disorderly houses.

Cited in *O'Dell v. Scranton*, 126 Mo. App. 19, 103 S. W. 570, holding that city has no power to employ detectives to suppress disorderly houses.

35 AM. REP. 267, SMALLEY v. GREENE, 52 IOWA, 241, 3 N. W. 78.

Right of attorney to delegate his authority to another attorney.

Cited in *Antrobus v. Sherman*, 65 Iowa, 230, 54 A. R. 7, 21 N. W. 579, holding that attorney employed by client to make collection has no power to delegate his authority to another.

Cited in note in 76 A. D. 256, on attorney's power to delegate authority.

Distinguished in *Welsh v. Lemert*, 92 Iowa, 116, 60 N. W. 230, holding that where agreement is made to pay one commission for selling land, and then forms partnership which sells land, partners may sue jointly for commission. Contracts not to be performed within one year.

Cited in *Fernald v. Gilman*, 123 Fed. 797, holding parol agreement by town to pay within ten years money borrowed not void under statute of frauds where lender performed his part of contract at once; *Mackey v. Thisler*, 7 Kan. App. 276, 53 Pac. 767; *Dant v. Head*, 90 Ky. 255, 29 A. S. R. 369, 13 S. W. 1073; *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145; *Kendall v. Garneau*, 55 Neb. 403, 75 N. W. 852,—holding that statute of frauds respecting contracts not to be performed within year does not extend to agreements wholly performed on one side within year; *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339, 56 N. W. 1019; *Reynolds v. First Nat. Bank*, 62 Neb. 747, 87 N. W. 912,—holding that when by specific terms of contract or where it appears that it was not intention of parties that it should be performed within one year from time of its making, contract is void as within provisions of statute of frauds; *Washburn v. Dosch*, 68 Wis. 436, 60 A. R. 873, 32 N. W. 551, holding contract fully exe-

cut by one party at time of making thereof, not within statute of frauds although by its terms it is not to be performed by other party within one year.

Cited in notes in 93 A. D. 90; 1 A. S. R. 469; 29 A. S. R. 373; 6 E. R. C. 305, 307,—on agreements not to be performed within a year within meaning of statute of frauds; 17 E. R. C. 184, on what are contracts to be performed within a year within statute of frauds.

Distinguished in *Bethel v. A. Booth & Co.* 115 Ky. 145, 72 S. W. 803, holding contract to give employment for ten years void under statute of frauds so that action will not lie for its breach, notwithstanding employee has performed part of it.

When contracts are in restraint of trade.

Cited in *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454, holding contracts which only incidentally restrict competition while their main purpose and chief effect is to foster trade do not violate anti-trust act; *Cole v. Edwards*, 93 Iowa, 477, 61 N. W. 940, holding agreement by physician for consideration not to practice medicine within certain locality for period of time, valid; *Swigert v. Tilden*, 121 Iowa, 650, 100 A. S. R. 374, 63 L.R.A. 608, 97 N. W. 82, holding contract not to engage in selling shirts in certain states for period of ten years except as agent of other party not void as being in restraint of trade; *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118, holding contract reasonably limited as to territory in which specific business is not to be carried on, not invalid because restriction as to time is indefinite or general; *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590, holding contract not to practice profession within certain territory enforceable by injunction; *Gordon v. Mansfield*, 84 Mo. App. 367, holding contract of physicians not to practice medicine within county valid and not in restraint of trade.

Cited in reference notes in 50 A. R. 242, on right to restrain violation of agreement by physician not to practise in a certain locality; 1 A. S. R. 822; 4 A. S. R. 343; 32 A. S. R. 301; 33 A. S. R. 221,—on contracts in restraint of trade; 13 A. S. R. 28; 31 A. S. R. 247; 24 A. S. R. 480,—on validity of contracts in restraint of trade; 32 A. S. R. 748; 54 A. S. R. 187,—on reasonableness of restrictions in restraint of trade.

Cited in notes in 61 A. D. 124, on validity of agreement not to engage in practice of law in particular town; 92 A. D. 756, on restraint as to space in contracts in restraint of trade; 59 A. R. 687, on agreements in restraint of trade; 8 L.R.A. 469, on contracts in partial restraint of trade; 8 L.R.A. 470, on restrictions as to locality in contracts in restraint of trade; 11 L.R.A. 503, on validity of contracts in general restraint of trade; 24 L.R.A.(N.S.) 926, on validity of agreement in restraint of trade, ancillary to sale of business or profession, as affected by territorial scope; 6 E. R. C. 451, on validity of contracts made in restraint of trade.

35 AM. REP. 272, MOLINE SCALE CO. v. BEED, 52 IOWA, 307, 3 N. W. 96.

Remedy on repudiation of executory contract.

Cited in *Barker & S. Lumber Co. v. Edward Hines Lumber Co.* 137 Fed. 300, to point that vendor under contract to manufacture article cannot insist on continued performance unless other party retracts repudiation and accepts further performance; *Davis v. Bronson*, 2 N. D. 300, 33 A. S. R. 783, 16 L.R.A. 655, 50 N. W. 836, holding that remedy for rescission of executory con-

tract is for damages for breach of contract; *Oklahoma, Vinegar Co. v. Carter*, 116 Ga. 140, 94 A. S. R. 112, 59 L.R.A. 122, 42 S. E. 378, holding that party on rescission of executory contract is liable for damages sustained by other party by reason of its breach; *Official Catalogue Co. v. American Car & Foundry Co.* 120 Mo. App. 575, 97 S. W. 231, holding that one party to executory contract has power to repudiate it and remedy of other party injured thereby is action for damages for breach of contract; *Herring-Marvin Co. v. Smith*, 43 Or. 315, 72 Pac. 704, holding that either party to executory contract may retire from it, if he chooses, but by so doing he subjects himself to action for damages by other party.

Distinguished in *Davis v. Campbell*, 93 Iowa, 524, 61 N. W. 1053, holding that it is no defense that subscription was rescinded by signer after acceptance but before anything was done or expended under it.

Measure of damages for breach of contract.

Cited in *Hamilton v. Finnegan*, 117 Iowa, 623, 91 N. W. 1039, holding that seller on refusal of buyer to take stock sold can recover only difference between market price at time of delivery and contract price; *McAlister v. Saffley*, 65 Iowa, 719, 23 N. W. 139, holding that seller could recover contract price on completion of contract for granite monument where buyer refuses to accept it; *Litchfield Mfg. Co. v. Gallagher*, 98 Iowa, 390, 67 N. W. 371, holding suit to recover full contract price of furnace to be set up, premature, where defendant did not permit plaintiff to complete contract; *Thompson v. Brown*, 106 Iowa, 367, 76 N. W. 819, holding that measure of damages for defendant's refusal to permit plaintiff to drill well as per contract was compensation for labor done and loss of time and material where contract price was to be computed by depth of well and was therefore uncertain; *McCormick Harvesting Machine Co. v. Market*, 107 Iowa, 340, 78 N. W. 33, holding that seller in action on executory contract for purchase of manufactured chattel, could recover contract price with interest where it had offered to deliver such property within specified time and purchaser had refused to receive it; *American Pub. & Engraving Co. v. Walker*, 87 Mo. App. 503, holding measure of damage for breach of contract to furnish cuts is profit plaintiff should have realized had it been permitted to continue to furnish cuts to end of year.

Cited in reference note in 48 A. R. 141, on damages for breach of contract for manufacture.

Distinguished in *Eastern Granite Co. v. Heim*, 89 Iowa, 698, 57 N. W. 437, holding vendor entitled to recover purchase price in action for breach of contract for sale of monument, less cost of making inscription not mentioned in contract.

Acceptance as essential to complete contract.

Distinguished in *McCormick Harvesting Mach. Co. v. Richardson*, 89 Iowa, 525, 56 N. W. 682, holding acceptance necessary to complete contract.

Sufficiency of acceptance of order for goods to bind purchaser.

Cited in *Fordice v. Gibson*, 129 Ind. 7, 28 N. E. 303, to point that no title passes under contract for sale of article to be manufactured until thing is completed and notice given to vendee; *Minneapolis Threshing Mach. Co. v. Zemanek*, 130 Iowa, 120, 106 N. W. 512, holding that where goods especially ordered are shipped and ready for delivery in accordance with order and within specified time there is sufficient acceptance of order to bind purchaser; *Keller Mechanical Engraving Co. v. Kinney*, Co. 29 R. I. 536, 72 Atl. 865, holding

that executory contract required not only delivery but that machine should be set up in defendant's place of business.

Cited in notes in 33 A. S. R. 793, on right to stop performance of executory contract; 94 A. S. R. 121, on effect of countermand of executory contract of sale; 16 L.R.A. 656, on rights of one who completes contract in disregard of notice to desist.

Insufficiency of appeal certificate.

Cited in *Connor v. Bennke*, 100 Iowa, 748, 69 N. W. 414, holding certificate from trial judge not stating that questions certified are involved in case, insufficient, in action for breach of contract.

35 AM. REP. 275, WRIGHT v. RAWSON, 52 IOWA, 329, 3 N. W. 106.

Liability of master for injury to servant.

Cited in reference notes in 34 A. S. R. 129, on master's liability for injury to servant; 63 A. S. R. 158, on master's duty to furnish safe place to work.

Cited in note in 92 A. D. 219, on duty of employer to furnish safe premises and conditions in and under which to work.

Distinguished in *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1, 94 A. S. R. 259, 61 N. E. 236, holding master liable for injury to employee from explosion of charge of powder placed in mine caused by negligence of boss in allowing wall to become so thin that it could not withstand explosion.

— While acting outside of scope of employment.

Cited in *Ellsworth v. Metheney*, 51 L.R.A. 389, 44 C. C. A. 484, 104 Fed. 119, holding coal miner going through passage during noon hour to visit workman in another part of mine, not engaged in performance of duties of employment so as to bring use of passage within rule requiring employer to provide safe place for work; *Pioneer Min. & Mfg. Co. v. Talley*, 152 Ala. 162, 12 L.R.A.(N.S.) 861, 43 So. 800, holding master not liable for injury to servant at place where he has no right to be; *Kennedy v. Chase*, 119 Cal. 637, 63 A. S. R. 153, 52 Pac. 33, holding master not liable for injury to servant by fall into hatchway on deck of vessel which was outside limits of his employment; *Chattanooga Southern R. Co. v. Myers*, 112 Ga. 237, 37 S. E. 439, holding railroad company not liable where employee was killed by derailment of locomotive upon which he was riding in violation of duty to be elsewhere; *Cleveland, C. C. & St. L. R. Co. v. Martin*, 13 Ind. App. 485, 41 N. E. 1051, holding master not liable where servant without invitation by master goes to pump house in other part of premises from that where he is working to eat his dinner and is there injured by explosion of boiler; *Hutchinson v. Cleveland-Cliffs Iron Co.* 141 Mich. 346, 104 N. W. 698, holding that servant of contractor cannot recover against mill owner for injuries caused by fall down temporarily unguarded elevator shaft in part of mill to which his duties did not call him; *Schmnoke v. Asphalt Ready Roofing Co.* 129 App. Div. 500, 114 N. Y. Supp. 87, holding master not liable for injury to employee by sudden starting of machine where latter was at place to which his work did not call him.

Cited in note in 12 L.R.A.(N.S.) 863, on master's liability for injury to servant when he has left his working place and gone to another portion of plant for his own purposes.

35 AM. REP. 278, HOFFBAUER v. DELHI & N. W. R. CO. 52 IOWA, 342, 3 N. W. 121.

Right to expel person from train on refusal to pay fare.

Cited in *Kansas City, P. & G. R. Co. v. Holden*, 60 Ark. 602, 53 S. W. 45, holding that railway passenger cannot be ejected from train for refusal to pay fare if he tenders fare before effort is made to eject him; *Lake Erie & W. R. Co. v. Mays*, 4 Ind. App. 413, 30 N. E. 1106, holding that person may be expelled from railroad car on refusal to pay additional fare required because of his inability to produce ticket although conductor has accepted regular ticket fare; *Randell v. Chicago, R. I. & P. R. Co.* 102 Mo. App. 342, 76 S. W. 493, holding carrier bound to transport person having no money where other passengers offer to pay his fare; *Gates v. Quincy, O. & K. C. R. Co.* 125 Mo. App. 334, 102 S. W. 50; *Pickens v. Richmond & D. R. Co.* 104 N. C. 312, 10 S. E. 556; *Weber v. Southern R. Co.* 65 S. C. 356, 43 S. E. 888; *Texas & P. R. Co. v. Bond*, 62 Tex. 442, 50 A. R. 532,—holding that after person has refused to pay fare and is being put off train, he acquires no right to passage by then tendering fare demanded.

Cited in reference notes in 54 A. R. 699; 99 A. S. R. 456,—on expulsion of passenger after offer to pay fare following refusal.

Cited in notes in 41 A. D. 477, on ejectment of passengers for not showing or surrendering ticket or paying fare; 5 L.R.A. 820, on expulsion of passenger for refusal to pay fare; 11 L.R.A. 432, on liability of railway company for ejectment of passenger; 16 L.R.A. 53, on right of passenger to pay fare after train stops for purpose of ejecting him; 31 L.R.A.(N.S.) 992, on sufficiency of tender of fare to prevent ejectment.

Distinguished in *Curl v. Chicago, R. I. & P. R. Co.* 63 Iowa, 417, 16 N. W. 69, holding that where passenger does not refuse to pay fare, but lacks portion of money and tells conductor that he can borrow it of fellow passenger and proceeds to make effort, he is entitled to reasonable time to do so.

Reasonableness of carrier's rules as question of law.

Cited in *Little Rock & M. R. Co. v. Barry*, 43 L.R.A. 349, 28 C. C. A. 644. 56 U. S. App. 37, 84 Fed. 944, holding that reasonableness of system of rules adopted by railroad company is question of law; *Kroll v. Close*, 82 Ohio St. 190, 28 L.R.A.(N.S.) 571, 92 N. E. 29, to point that it is within province of court to declare regulation reasonable.

Cited in reference note in 42 A. R. 669, on ejection of passenger for detach-
ing coupon.

Cited in notes in 41 A. D. 472, on reasonableness as test of validity of regulations by railroad companies as to passengers and others not employees: 5 L.R.A. 817, on reasonableness of regulation of railroad to fix its rates of fare by tariff posted at stations; 20 L.R.A. 483, on validity of extra charge for passenger fare when paid upon train.

35 AM. REP. 280, FIRST NAT. BANK v. DUBUQUE S. W. R. CO. 52 IOWA, 378, 3 N. W. 395.

What constitutes equitable assignment of fund.

Cited in *Des Moines County v. Hinkley*, 62 Iowa, 637, 17 N. W. 915, holding that no particular form of words is required to create equitable assignment of fund; *Hove v. Stanhope State Bank*, 138 Iowa, 39, 115 N. W. 476, holding letter to creditor directing him to get fund of debtor in bank, together with

check on bank for amount and indorsement and delivery of deposit slip, assignment in fact of fund.

— Order as.

Cited in *Manning v. Mathews*, 70 Iowa, 503, 30 N. W. 749, holding that notice of unaccepted order would be sufficient to hold fund and would constitute equitable assignment thereof; *Holbrook v. Payne*, 151 Mass. 383, 21 A. S. R. 456, 24 N. E. 210, holding orders drawn upon town by one who had furnished to it labor and materials under contract, aggregating less than amount due on contract, not assignment of any part of debt.

— Check or draft as.

Cited in *Barnsdall v. Waltemeyer*, 73 C. C. A. 515, 142 Fed. 415, holding that accepted bill of exchange becomes assignment to extent of its amount to payee of any debt due from drawee to drawer; *Moore v. Davis*, 57 Mich. 251, 23 N. W. 800, to point that if draft is for whole amount of fund, draft may, in connection with other circumstances, tend to show intent that it should operate as assignment; *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439, holding that when it is established that it was intention and agreement of parties to transaction that check drawn generally should be paid out of particular fund, such check, as between parties, will be treated as though order for payment out of specific, designated fund; *Donohoe-Kelly Bkg. Co. v. Southern P. Co.* 138 Cal. 183, 94 A. S. R. 28, 71 Pac. 93, holding that check upon bank for part of fund does not prior to its presentation operate as assignment of fund pro tanto; *Harrison v. Wright*, 100 Ind. 515, 50 A. R. 805, holding bank check not equitable assignment of fund in hands of drawee.

Cited in reference notes in 38 A. R. 310, on bill of exchange as creating equitable assignment of funds in drawee's hands; 40 A. R. 142, on holder's right of action against drawee of check.

Cited in notes in 45 A. R. 355, on rights as against the bank of a holder of an unaccepted check; 19 A. S. R. 612, as to whether check is an assignment of the fund; 80 A. S. R. 874, on bank's liability to holder of check for refusal to pay; 7 L.R.A. 596, on checks as equitable assignments; 3 E. R. C. 760, on liability of bank to third person as holder of check.

Distinguished in *Covert v. Rhodes*, 48 Ohio St. 66, 27 N. E. 94, holding that check or draft for part of sum due drawer, does not, before acceptance by drawee, constitute equitable assignment of amount for which it is drawn.

Negotiability of bill of exchange.

Distinguished in *Culbertson v. Nelson*, 93 Iowa, 187, 57 A. S. R. 266, 27 L.R.A. 222, 61 N. W. 854, holding bill of exchange drawn for stated sum "with exchange" not negotiable instrument by law merchant, for want of certainty in sum to be paid.

What constitutes a trust.

Cited in *Barnes v. Thuet Bros.* 116 Iowa, 359, 89 N. W. 1085, holding that where stock buyer drew in advance of shipments on commission merchants, equity would impress proceeds of shipment purchased with discount of dishonored draft with trust in favor of party cashing draft; *Re Richardson*, 138 Iowa, 668, 100 N. W. 797, holding that acceptance by cestui que trust without knowledge of transaction will be presumed when trust is beneficial to him.

Am. Rep. Vol. XVII. 59.

Trustee of express trust.

Cited in *Schollmier v. Schoendelen*, 78 Iowa, 426, 16 A. S. R. 455, 43 N. W. 282, holding bank bound to hold deposit for payment to assignees upon death of assignor on production of bank book containing assignment of whole deposit to be paid after death of assignor; *Leach v. Hill*, 106 Iowa, 171, 76 N. W. 667, holding that where cashier, for his bank, cashes check upon undertaking of third persons that check should be honored by drawee, he may bring suit as cashier to recover on check and said incidental agreement, without joining bank as plaintiff.

35 AM. REP. 285, DARLAND v. TAYLOR, 52 IOWA, 503, 3 N. W. 510.**Presumption as to acceptance of gift.**

Cited in *Ammon v. Martin*, 59 Ark. 191, 26 S. W. 826; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119; *Devol v. Dye*, 123 Ind. 321, 7 L.R.A. 439, 24 N. E. 246; *Varley v. Sims*, 100 Minn. 331, 117 A. S. R. 694, 8 L.R.A.(N.S.) 828, 111 N. W. 269, 10 A. & E. Ann. Cas. 473,—holding that where gift is beneficial and imposes no burdens upon donee, acceptance will be presumed as matter of law.

What constitutes a valid gift.

Cited in *Denunzio v. Scholtz*, 117 Ky. 182, 77 S. W. 715, 4 A. & E. Ann. Cas. 529, holding sufficient delivery of subject matter to constitute gift *inter vivos* where donor declared his intention to give person stock, delivered certificate and tore up notes given for stock; *Henschel v. Maurer*, 69 Wis. 576, 2 A. S. R. 757, 34 N. W. 926, holding that mortgagee may by way of gift to mortgagor completely satisfy debt and discharge mortgage.

Cited in notes in 23 A. D. 603, on application of doctrine of *donatio mortis causa* by mere delivery to choses in action generally; 48 A. R. 511, on delivery of gift *mortis causa*; 99 A. S. R. 913, on gift *causa mortis* of debt owing donor by donee; 9 E. R. C. 864, on note as subject of gift *causa mortis*.

35 AM. REP. 288, ALLEMAN v. STEPP, 52 IOWA, 626, 3 N.W. 636.**Nonexpert testimony as to insanity of witness.**

Cited in *Yanke v. State*, 51 Wis. 464, 8 N. W. 276, holding question put to non expert witness for party accused of assault as to whether complainant was "considered partially deranged" improper.

Cited in reference note in 50 A. S. R. 373, on competency of lunatic as witness.

Cited in notes in 82 A. S. R. 25, on evidence admissible as bearing on credibility or bias of witness; 37 L.R.A. 426, on evidence to establish insanity of person offered as witness.

Adoption of lower court's theory on appeal.

Cited in *Culbertson v. Salinger*, 111 Iowa, 447, 82 N. W. 925, holding that where case proceeded on theory that defendant's denial went to amendment made by plaintiff, near close of trial, to effect that agreement was in part written and in part oral, denial will be so treated on appeal.

35 AM. REP. 293, CUSHING v. FIELD, 70 ME. 50.**Negotiability of written instruments.**

Cited in *Sheldon v. McNall*, 89 Ill. App. 138, on negotiability of certain so called notes; *White v. Cushing*, 88 Me. 339, 51 A. S. R. 402, 32 L.R.A. 590, 34

Atl. 164, holding order payable on contingency and restricted as to free circulation for commercial purposes, not negotiable.

Cited in note in 30 L.R.A.(N.S.) 41, on reference to extrinsic agreement as affecting negotiability.

Rights of holder of negotiable paper.

Distinguished in *Burrill v. Parsons*, 71 Me. 282, holding that holder of negotiable paper, taking it in usual course of business for sufficient consideration before its maturity, and ignorant of any facts impeaching its validity can recover against maker.

Material alteration of instruments.

Cited in notes in 86 A. S. R. 103, on materiality of alteration of subject matter, etc., of written instrument; 86 A. S. R. 85, on necessity that alterations of written instruments be material.

35 AM. REP. 297, BLAKE v. MAINE C. R. CO. 70 ME. 60.

Who are fellow servants.

Cited in *Indiana Car Co. v. Parker*, 100 Ind. 181, holding that servants serving common master in same line of employment are fellow servants, although some may be superior to others; *State use of Hamelin v. Malster*, 57 Md. 287, holding superintendent fellow servant of other employees engaged in construction of bridge; *Doughty v. Penobscot Log Driving Co.* 76 Me. 143, holding foreman fellow servant of men engaged to repair dam; *Willis v. Oregon R. & Nav. Co.* 11 Or. 257, 4 Pac. 121, holding that two persons may be regarded fellow servants although one is inferior in grade.

Cited in notes in 36 A. D. 287; 1 A. S. R. 32; 19 A. S. R. 197,—on who are fellow servants; 75 A. S. R. 584, on who is a vice principal; 50 L.R.A. 426, on insufficiency of diversity of duties or departments to exclude defense of common employment; 51 L.R.A. 516, on vice-principalship considered with reference to superior rank of negligent servant; 51 L.R.A. 517, on doctrine that vice-principalship is not deducible merely from power of control over injured servant; 25 L. ed. U. S. 612, on who are coservants within rule that the master is not responsible for injuries to servant occasioned by negligence of co-servant.

— Railroad employees.

Cited in *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, holding laborers employed upon railroad track fellow servants of conductors and trainmen; *Knahtla v. Oregon Short Line & U. N. R. Co.* 21 Or. 136, 27 Pac. 91, holding section hand riding on work train fellow servant of conductor and engineer; *Ewald v. Chicago & N. W. R. Co.* 70 Wis. 420, 5 A. S. R. 178, 36 N. W. 12, holding trainmen and engine wipers fellow servants.

Cited in reference note in 40 A. S. R. 372, on application of fellow servant rule to track repairers and trainmen.

Liability of master for negligence of servants.

Cited in *Hoar v. Maine C. R. Co.* 70 Me. 65, 35 A. R. 299, to point that railroad company does not guaranty against negligence of servants if duly selected; *Hilton v. Fitchburg R. Co.* 73 N. H. 116, 68 L.R.A. 428, 59 Atl. 625, holding that master does not warrant competency of his servants; *Ell v. Northern P. R. Co.* 1 N. D. 336, 26 A. S. R. 621, 12 L.R.A. 97, 48 N. W. 222; *Small v. Allington & C. Mfg. Co.* 94 Me. 551, 48 Atl. 177,—holding that test

which determines master's liability for negligence of one employee whereby injury is caused to another is nature of duty that is being performed by negligent servant at time of injury and not comparative grades of the two servants; *McCarthy v. Claffin*, 99 Me. 290, 59 Atl. 293, holding master undertaking to construct masons' stage bound to furnish competent men to select material; *Stewart v. Louisville & N. R. Co.* 83 Ala. 493, 4 So. 373, holding that recovery against master for injury by negligence of coservant cannot be had unless master is chargeable with employment of incompetent person through whose incompetency injury is inflicted.

Cited in reference notes in 39 A. R. 457, on liability of master to minor servant injured by fellow servant starting machinery unexpectedly; 4 A. S. R. 264, on liability for act of fellow servant.

Cited in notes in 40 A. S. R. 884; 67 A. D. 589,—on liability of master for negligence of fellow servants; 67 A. D. 595, on liability of master for negligence of fellow servants as affected by nature of their duties.

Necessity for alleging master's negligence in selecting fellow servants.

Cited in *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Norfolk & W. R. Co. v. Briggs*, 1 Va. Dec. 757, 14 S. E. 753,—to point that when gist of action is railroad company's negligence in not furnishing competent servants, its negligence in that regard must be distinctly alleged; *Elwell v. Hacker*, 86 Me. 416, 30 Atl. 64, holding that to render admissible evidence showing that injury was received through negligence of master in selecting incompetent servants, declaration must contain such averment.

Cited in notes in 36 A. D. 286, on recovery by servant for personal negligence of master; 25 L.R.A. 710, on liability of master for injuries caused by employing incompetent fellow servant; 41 L.R.A. 93, on master's duty to know character and capacity of servant during time of service; 41 L.R.A. 53, on nonliability for injury to servant predicated from want of constructive knowledge as to servants; 48 L.R.A. 375, 377, on recovery of servant for injury due to incompetence of fellow servant dependent upon proof of master's act or constructive knowledge of unfitness; 1 L.R.A.(N.S.) 289, on master's duty to keep himself informed as to fitness of servants in his employ.

Disapproved in *Unfried v. Baltimore & O. R. Co.* 34 W. Va. 260, 12 S. E. 512, holding that it is not necessary to allege negligence of master in selecting proper servants in action against master for injuries by fellow servant.

Admissibility of servant's reputation in action against master.

Cited in note in 14 L.R.A.(N.S.) 759, on evidence of specific instances to prove character of servant in action against master for injury to fellow servant.

Distinguished in *Dunham v. Rackliff*, 71 Me. 345, holding reputation of driver of horse and carriage inadmissible in action by owner of another horse killed by collision therewith, to recover its value; *St. Louis, I. M. & S. R. Co. v. Stroud*, 67 Ark. 112, 56 S. W. 870, holding evidence of servant's previous acts of misconduct inadmissible in suit against railroad company to recover damages for wrongful expulsion by servant of passenger from depot.

Presumption of continuance of servant's skillfulness.

Cited in *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246, holding that master has right to rely on presumption that servant will continue careful and skillful.

Assumption of risk by servant.

Cited in *Demers v. Deering*, 93 Mo. 272, 44 Atl. 922, holding that negligence of fellow servant is one of risks assumed by servant.

Effect of general demurrer.

Cited in *Damren v. Traak*, 102 Me. 39, 65 Atl. 513, to point that errors which might be deemed fatal on special demurrer will be disregarded when demurrer is general.

35 AM. REP. 299, HOAR v. MAINE C. R. CO. 70 ME. 65.**Who are passengers.**

Cited in *Bryant v. Chicago, St. P. M. & O. R. Co.* 4 C. C. A. 146, 12 U. S. App. 115, 53 Fed. 997, holding that presumption is that one riding in passenger coach is lawfully there by invitation or permission of employees of carrier; *Albion Lumber Co. v. De Nobra*, 19 C. C. A. 168, 44 U. S. App. 347, 72 Fed. 739, holding logging company liable for injury to person by derailment of train not authorized for use of passengers but on which superintendent had invited person to ride in order to get tools to return to work.

Cited in notes in 82 A. D. 294, as to who is a passenger; 61 A. S. R. 75, on commencement of relation of passenger; 61 A. S. R. 85, on person invited to ride as passenger.

— Persons riding on freight train.

Cited in *Chicago, R. I. & P. R. Co. v. Lee*, 34 C. C. A. 365, 92 Fed. 318, holding that presumption is that person riding on freight train is not a passenger; *Purple v. Union P. R. Co.* 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123, holding that presumption is that one riding for his own convenience on freight train is trespasser.

— Persons riding on construction train.

Cited in *Spence v. Chicago, R. I. & P. R. Co.* 117 Iowa, 1, 90 N. W. 346, holding railroad company liable for injury caused by its negligence to person received as passenger on construction train by conductor with apparent authority to accept him as such; *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875, holding no presumption that person found upon work train was there rightfully.

Cited in note in 61 A. S. R. 95, on person riding on construction train or hand car as passenger.

— Persons riding on hand car.

Cited in *Rathbone v. Oregon R. Co.* 40 Or. 225, 66 Pac. 909, holding person riding on hand car by invitation of foreman not entitled to rights of passenger.

Cited in reference notes in 2 A. S. R. 524, on right of action against railway company by one riding on hand car by invitation; 43 A. S. R. 41, on liability of railroads to persons injured while riding on hand car.

Distinguished in *Pool v. Chicago, M. & St. P. R. Co.* 53 Wis. 657, 11 N. W. 15, holding railroad company liable for injury to person by reason of unfitness of hand car on which he, being detective, was invited to ride by agent of company, for purpose of discovering persons who had stolen property from company's cars.

Liability of master for acts of servant.

Cited in *Kiernan v. New Jersey Ice Co.* 74 N. J. L. 175, 63 Atl. 998, holding master not liable where servant in charge of ice wagon gave person, without

authority, permission to take piece of ice from wagon, and while person was in act of taking ice, servant assaulted him.

Cited in notes in 40 A. R. 227, on recovery against master for servant's act by one knowing it to be contrary to authority; 54 A. S. R. 80, on master's liability for acts of servants while deviating from employment; 17 E. R. C. 276, on liability of master for acts of servant in scope of his employment.

35 AM. REP. 303, JOHNSON v. HERSEY, 70 ME. 74, Reaffirmed on later appeal in 73 Me. 291.

Liability of partnership property for individual debts of partner.

Cited in *Harris v. Peabody*, 73 Me. 262; *Caldwell Bldg. & T. Co. v. Porter*, 52 Or. 318, 95 Pac. 1; *Conary v. Sawyer*, 92 Me. 463, 69 A. S. R. 524, 43 Atl. 27,—holding that partnership property cannot be applied as against creditors of firm, to payment of private debts of partner.

Cited in reference note in 39 A. R. 293, on right to recover against partnership on firm note made by one partner for individual debt.

Cited in note in 7 A. S. R. 380, on right to recover back money paid by partner from firm assets.

Payment of officer's individual debt out of corporate funds.

Cited in *Ferry v. Home Sav. Bank*, 114 Mich. 321, 68 A. S. R. 487, 72 N. W. 181, holding bank liable for payment of corporate officer's individual debt out of corporate funds with knowledge of garnishment proceedings against corporation.

35 AM. REP. 308, WRIGHT v. ANDREWS, 70 ME. 86.

Effect of security on right to notice.

Cited in note in 39 A. D. 99, on waiver of demand and notice by taking security.

Parol evidence to vary terms of note.

Cited in note in 11 E. R. C. 231, on admissibility of parol evidence to vary terms of negotiable instruments.

35 AM. REP. 310, THOMS v. DINGLEY, 70 ME. 100.

Measure of damages for breach of warranty.

Cited in *Peak v. Frost*, 162 Mass. 298, 38 N. E. 518, holding that where horse was purchased for specific purpose known to vendor he is liable to vendees for all damages resulting naturally and directly to them from its unfitness for that purpose or as result of vendor's misrepresentations; *Leavitt v. Fiberloid Co.* 196 Mass. 440, 15 L.R.A.(N.S.) 855, 82 N. E. 682, holding that where conflagration was natural and probable consequences of breach of warranty damages were not limited to difference between value of goods delivered and those called for in contract but plaintiff could recover for loss of factory by fire; *Tower v. Pauly*, 67 Mo. App. 632, holding that damages which seem to be more remote than those claimed in plaintiff's petition for breach of warranty have been frequently allowed.

Cited in notes in 40 A. D. 303, on measure of damages for breach of warranty of soundness; 40 A. D. 304, on right of vendee to consequential damages when warranty is breached; 6 E. R. C. 625, on measure of damages recoverable on breach of a contract.

35 AM. REP. 314, DUNHAM v. BOSTON & M. R. CO. 70 ME. 164.**Connecting carriers.**

Cited in note in 72 A. D. 243, on duty and liability of connecting carrier.

35 AM. REP. 318, DAVIS v. DUDLEY, 70 ME. 236.**Affirmance or disaffirmance of infant's contract.**

Cited in *Bird v. Swain*, 79 Me. 529, 11 Atl. 421, holding that where minor sold horse taking note as security for purchase price, endorsement on note after majority discharging property secured because of note being paid cannot be construed as ratification in writing of alleged warranty of soundness of horse.

Cited in reference note in 13 A. S. R. 339, on ratification of contracts by infants after coming of age.

Cited in note in 41 L. ed. U. S. 761, 763, on validity of ratification and disaffirming of infants' contracts.

—Deed.

Cited in *Jordan v. Kinsley*, 85 Me. 137, 26 Atl. 1090, on right of minors to affirm or disaffirm guardian's sale of land after they become of age; *Goodnow v. Empire Lumber Co.* 31 Minn. 468, 47 A. R. 798, 18 N. W. 283, holding that minor who executes conveyance of real estate must disaffirm it within reasonable time after he becomes of age or be barred of his right to do so; *Logan v. Gardner*, 136 Pa. 588, 20 A. S. R. 939, 20 Atl. 625, 26 W. N. C. 497, 47 Phila. Leg. Int. 475, holding that infant may affirm his deed by much less formal acts than would be sufficient to avoid it and clearly by any act which amounts to estoppel.

Cited in notes in 18 A. S. R. 582, on validity of infant's deed of conveyance; 18 A. S. R. 677, on disaffirmance of deeds within reasonable time after reaching majority.

35 AM. REP. 323, SAWYER v. GERRISH, 70 ME. 254.**Lien on future increase of animals.**

Cited in reference note in 40 A. R. 165, on validity of sale of colts to be foaled; 41 A. R. 151, as to when written contract of lien on increase of animals is considered a mortgage.

Cited in note in 81 A. S. R. 43, on sale of property not yet in existence.

35 AM. REP. 325, GOULD v. MURCH, 70 ME. 288.**Who must bear loss on destruction of property sold.**

Cited in *J. S. Potts Drug Co. v. Benedict*, 156 Cal. 322, 25 L.R.A.(N.S.) 609, 104 Pac. 432; *Phinizy v. Guernsey*, 111 Ga. 346, 78 A. S. R. 217, 50 L.R.A. 680, 36 S. E. 796,—holding that where binding contract for sale of improved realty has been made and improvements are destroyed by fire before vendor can convey loss falls on vendor; *Tufts v. Wynne*, 45 Mo. App. 42, holding that loss by fire of personal property conveyed under conditional sale and in custody of buyer, falls on latter; *Harding v. Jewell*, 73 Me. 426; *Wilson v. Clark*, 60 N. H. 352,—holding that where property under contract of sale is destroyed by fire, loss falls upon party who is owner at time; *Powell v. Dayton*, S. & G. R. R. Co. 12 Or. 488, 8 Pac. 544, holding that in contract for conveyance of property there is implied condition that subject matter of contract shall be in existence when time for performance arrives; *Goldman v. Rosenberg*, 23 Abb. N. C. 343, note, on who must bear loss on destruction of property sold.

Cited in notes in 57 L.R.A. 647, 650, on application of doctrine of equitable conversion to nature of interest of vendor or vendee in land contract for purpose of determining who must bear losses and receive accessions; 27 L.R.A. (N.S.) 235, as to who must bear loss from destruction or deterioration of realty before contract of sale completely performed by transfer of title; 6 E. R. C. 613, on impossibility arising subsequently to contract as excuse for nonperformance.

35 AM. REP. 327, WITZLER v. COLLINS, 70 ME. 290.

Conclusiveness of bill of lading.

Cited in reference notes in 35 A. R. 488, on estoppel of carrier to deny agent's bill of lading; 4 A. S. R. 90, on parol evidence to explain or vary contract of carriage; 20 A. S. R. 578, on conclusiveness of bills of lading.

Cited in notes in 38 A. D. 415, on conclusiveness of bill of lading as to condition of goods; 4 E. R. C. 679; 11 E. R. C. 233,—on parol evidence to explain or contradict receipt; 24 E. R. C. 359, on bill of lading as evidencing agreement between parties.

Effect of clause "in apparent good order" in bill of lading.

Cited in *St. Louis, A. & T. R. Co. v. Neel*, 56 Ark. 279, 19 S. W. 963, holding that clause "in apparent good order" refers only to external condition of goods.

Necessity of relying on allegations of complaint.

Cited in *Ausk v. Great Northern R. Co.* 10 N. D. 215, 86 N. W. 719, holding that where complaint charged delivery and acceptance of stock at one place, delivery and acceptance at another place cannot be relied on without amendment of complaint.

35 AM. REP. 335, STATE v. LITTLEFIELD, 70 ME. 452.

Former jeopardy as defense.

Cited in *Hopkins v. United States*, 4 App. D. C. 430, holding former conviction of assault and battery no bar to subsequent indictment for murder, where person assaulted dies within year and a day; *Boswell v. State*, 20 Fla. 869, holding conviction for assault and battery before justice of peace no bar to subsequent indictment and prosecution for assault with deadly weapon with premeditated design to effect death; *Com. v. Ramunno*, 219 Pa. 204, 123 A. S. R. 653, 14 L.R.A. (N.S.) 209, 68 Atl. 184, 12 A. & E. Ann. Cas. 818, holding former conviction of assault and battery with intent to kill no defense to indictment for murder.

Cited in reference notes in 35 A. R. 385, on former conviction of assault as bar to indictment for murder; 11 A. S. R. 84, on conviction of lesser offense as bar to prosecution for greater offense; 15 A. S. R. 308, on former acquittal or conviction; 68 A. S. R. 107, as to when former jeopardy is a bar.

Cited in notes in 5 A. S. R. 901, on merger of conspiracy in felony; 7 A. S. R. 595; 11 A. S. R. 228,—on former acquittal or conviction as defense; 92 A. S. R. 114, on prosecution for less offense as bar to prosecution for greater offense including it; 92 A. S. R. 106, on tests of identity of offenses within rule as to former jeopardy; 92 A. S. R. 139, 140, on assault and homicide within rule as to former jeopardy; 14 L.R.A. (N.S.) 210, on conviction on charge of assault as bar to subsequent prosecution for homicide following death of victim; 21 L. ed. U. S. 875, on what constitutes former jeopardy.

35 AM. REP. 346, HINKLEY & E. IRON CO. v. BLACK, 70 ME. 473.**What are fixtures.**

Cited in *Tudor Iron Works v. Hitt*, 49 Mo. App. 472, holding that ties and rails fastened in road bed for use of cars become annexed to realty and are not personal property unless made so under express or implied agreement; *McCrillis v. Cole*, 25 R. I. 156, 105 A. S. R. 875, 55 Atl. 196, holding that engine placed in mill, by one in possession of land under contract of purchase was fixture.

Cited in notes in 17 A. S. R. 475; 10 L.R.A. 725,—on fixtures as between vendor and vendee.

—Intention as criterion.

Cited in *Morey v. Hoyt*, 62 Conn. 542, 19 L.R.A. 611, 26 Atl. 127; *Readfield Teleph. & Teleg. Co. v. Cyr*, 95 Me. 287, 49 Atl. 1047,—holding that intention of party making annexation must be given special prominence in determining whether chattel has become fixture.

Cited in note in 10 L.R.A. 723, on intention of parties as governing with respect to fixtures.

—Building erected on another's land.

Cited in *Docking v. Frazell*, 38 Kan. 420, 17 Pac. 160, holding that building occupied for hotel and moved by tenant upon vacant city lot held under lease providing for surrender of lot at its expiration in same condition as at date of lease, is personal property; *Kingsley v. McFarland*, 82 Me. 231, 17 A. S. R. 473, 19 Atl. 442, holding that buildings erected upon land by one in possession under contract of purchase, become part of realty and belong to owner of soil in absence of contrary agreement; *Dustin v. Crosby*, 75 Me. 75; *Michigan Mut. L. Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035, holding that house erected by vendee upon land held under contract, becomes part of realty and as such property of vendor subject to vendee's rights therein.

Cited in reference notes in 49 A. R. 710, on ownership of buildings erected by vendee under contract of purchase which is not carried out; 12 A. S. R. 678, on structure erected on land of another as fixture; 13 A. S. R. 572, as to whether building is fixture when its ownership is severed from the land; 69 A. S. R. 343, on house built on land of another as a fixture.

35 AM. REP. 353, SMALLEY v. SMALLEY, 70 ME. 545.**Competency of witness to will.**

Cited in *Re Trinitarian Cong. Church*, 91 Me. 416, 40 Atl. 325, holding heir at law though legatee competent witness to will if his legacy is conceded less than his interest as heir.

Cited in note in 77 A. S. R. 462, on competency of witness to will as affected by interest.

Cited in note in 77 A. S. R. 467, on competency of executors and their wives as witnesses to will.

35 AM. REP. 356, COM. v. ALLEN, 128 MASS. 46.**Admissibility of experimental evidence.**

Cited in *Huggard v. Glucose Sugar Ref. Co.* 132 Iowa, 724, 109 N. W. 475, holding that experimental evidence in nature of test inadmissible where conditions cannot be accurately reproduced.

Cited in note in 49 A. R. 192, on right to put in evidence various practical tests and experiments.

Competency of hand writing for purpose of comparison.

Cited in *McGlasson v. State*, 37 Tex. Crim. Rep. 620, 66 A. S. R. 842, 40 S. W. 503, holding that prosecutor on trial for uttering forged instrument will not be permitted to write his name to be shown to jury for purpose of comparison of hand writing.

Cited in reference note in 35 A. R. 635, on competency of testimony of handwriting expert; 42 A. S. R. 302, on writings made during trial for purposes of comparison.

Cited in notes in 62 L.R.A. 865, on comparison of handwriting with writings made in court; 63 L.R.A. 440, on specimens of handwriting made post litem motam for the occasion as competent standard for comparison of handwriting; 20 L. ed. U. S. 418, on evidence of handwriting or signature.

35 AM. REP. 357, COM. v. WARDELL, 128 MASS. 52.

What constitutes lewdness.

Cited in *Morris v. State*, 109 Ga. 351, 34 S. E. 577, holding that to render act of exposing one's person, notorious and public it must have been committed at place where it might have been seen by more than one person; *Jamison v. State*, 117 Tenn. 58, 94 S. W. 675, holding that lewd female in sense of provision prohibiting conviction for carnal knowledge with such, is one guilty of illicit intercourse at and before time of commission of offense charged; *State v. Juneau*, 88 Wis. 180, 43 A. S. R. 877, 24 L.R.A. 857, 59 N. W. 580, holding act of gross lewdness "open" within meaning of statute, though committed in private place and when no one was present but accused and person upon whom act was committed and although such person was child of tender years.

Cited in reference note in 43 A. S. R. 880, on indecent exposure.

35 AM. REP. 360, NEW HAVEN & N. CO. v. CAMPBELL, 128 MASS. 104.

Right to lien on part of goods for charges on whole — Storage charges of warehouseman.

Cited in *Barker v. Brown*, 138 Mass. 340, holding that warehouseman may retain residue of shipment of goods for amount due for storage on whole; *Schumacher v. Chicago & N. W. R. Co.* 108 Ill. App. 520, holding that party having lawful lien on goods for storage may, although having delivered part of them without insisting upon lien, retain residue for amount due upon whole.

— Carrier's lien for freight.

Cited in *Potts v. New York & N. E. R. Co.* 131 Mass. 455, 41 A. R. 247, holding that carrier of goods consigned to person under contract has lien upon whole for lawful freight and charges on every part.

Cited in notes in 12 A. S. R. 888; 37 A. S. R. 248; 5 E. R. C. 284,—on lien of carrier for freight; 69 A. S. R. 300, on waiver of carrier's lien.

Distinguished in *New York & N. E. R. Co. v. Sanders*, 134 Mass. 53, holding that where purchaser from consignee takes remainder of quantity of coal with knowledge of carrier's lien for freight this does not import promise on his part to pay carrier freight of entire cargo.

Joinder of counts.

Cited in *Teague v. Irwin*, 134 Mass. 303, holding that count in tort for de-

ceit in sale of stock may be joined with count in contract to recover back price paid.

Election between counts.

Cited in *Whiteside v. Brawley*, 152 Mass. 133, 24 N. E. 1088, holding that if declaration is in two counts, one for fraudulent exchange of horses and other for conversion, and there is evidence at trial that plaintiff avoided exchange before bringing action he need not elect between counts.

Competency of bill of exceptions.

Cited in *Hathaway v. Tinkham*, 148 Mass. 85, 19 N. E. 18, holding that if bill of exceptions discloses evidence at trial which was excluded upon one ground only and does not show that it was material, it is not open to excepting party as competent on other grounds.

Cited in note in 12 L.R.A. 554, on right to except to exclusion of question when there is nothing to indicate what the answer would have been.

35 AM. REP. 363, SMALL v. HOWARD, 128 MASS. 131.

Degree of care required of physician.

Cited in *Force v. Gregory*, 63 Conn. 167, 38 A. S. R. 371, 22 L.R.A. 343, 27 Atl. 1116, holding that physicians by holding themselves out as such, in absence of special contract, impliedly contract to possess reasonable and ordinary qualifications of their profession; *McKee v. Allen*, 94 Ill. App. 147, holding that it is duty of physicians to exercise reasonable and ordinary care, skill and diligence in practice of their professions; *Baker v. Hancock*, 29 Ind. App. 456, 63 N. E. 323; *Whitesell v. Hill*, 101 Iowa, 629, 37 L.R.A. 830, 70 N. W. 750; *Burk v. Foster*, 114 Ky. 20, 59 L.R.A. 277, 69 S. W. 1096, 1 A. & E. Ann. Cas. 304,—holding that care and skill required of physician in treating patient is to be measured by such as is exercised generally by physicians of ordinary care and skill in similar communities; *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992, holding physician liable for injury to person by his want of ordinary skill where marriage engagement is broken in consequence of wrong diagnosis; *McCracken v. Smathers*, 122 N. C. 799, 29 S. E. 354, holding that degree of skill which is required of physician is that ordinarily possessed by profession as it exists at time of his practice; *Griswold v. Hutchinson*, 47 Neb. 727, 66 N. W. 819; *Harris v. Woman's Hospital*, 27 Abb. N. C. 37, 14 N. Y. Supp. 881; *Bigney v. Fisher*, 26 R. I. 402, 59 Atl. 72; *Dye v. Corbin*, 59 W. Va. 260, 53 S. E. 147,—holding that physician, in absence of special contract, is only required to exercise such reasonable skill and diligence as are ordinarily exercised by average practitioners in good standing in similar localities.

Cited in notes in 48 A. D. 483, on civil liability of physicians and surgeons for negligence; 59 A. R. 392, on degree of skill required to entitle physician to recover for services rendered; 93 A. S. R. 660, on degree of skill and care required of physicians and surgeons as determined by locality or place of practice; 1 L.R.A. 720, as to skill and experience required of physicians; 2 L.R.A. 588, on care and skill required of physicians and surgeons in treatment of patient; 37 L.R.A. 835, on what are proper care and skill of physician or surgeon.

—Effect of patient's knowledge of want of skill.

Cited in *Lorenz v. Jackson*, 88 Hun, 200, 34 N. Y. Supp. 652, holding that if

physician informs patient of his want of skill or patient is aware of it, latter cannot complain of lack of that which he knew did not exist.

35 AM. REP. 365, GERRISH v. NEW BEDFORD INST. FOR SAVINGS, 128 MASS. 159.

What constitutes valid trust or gift.

Cited in *Berry v. Evendon*, 14 N. D. 1, 103 N. W. 748; *Cooley v. Gilliam*, 60 Kan. 278, 102 Pac. 1091; *Peck v. Scofield*, 186 Mass. 108, 71 N. E. 109,—holding that trust in personal property does not require written declaration to support it; *Re Podhajsky*, 137 Iowa, 742, 115 N. W. 590, holding that acceptance of gift is presumed; *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273, holding that father's payment for stock and taking it in his name as trustee, with expressed intention of holding it in trust for son, was complete declaration of trust in latter's favor; *Mee v. Fay*, 190 Mass. 40, 76 N. E. 229, holding that announcement by letter that person held money for certain minors by reason of trusteeship and oral agreement and trust made, created valid trust; *Hayden v. Hayden*, 142 Mass. 448, 8 N. E. 437, holding gift of money loaned on note not perfected by vote of incorporated trustees to surrender note, where maker is not notified; *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9, holding gift inter vivos perfected by surrendering bonds to third party with written directions to deliver same, at donor's death, to persons named; *Janes v. Falk*, 50 N. J. Eq. 468, 35 A. S. R. 783, 26 Atl. 138, holding trust created by executor, who converted securities, placing insurance policy among estate papers with letter declaring it to be collateral for repayment, and admitting that he held as trustee; *Welch v. Henshaw*, 170 Mass. 409, 64 A. S. R. 309, 49 N. E. 659, holding no trust created by undelivered written instructions as to disposal of property, where claimant was not notified thereof; *Brunn v. Schuett*, 59 Wis. 260, 48 A. R. 499, 18 N. W. 260, as to effect of father taking note and mortgage in name of daughter upon making advancement to children; *Taft v. Stow*, 167 Mass. 363, 45 N. E. 752, assuming trust created provided allegations of declaration were proved.

Cited in reference note in 37 A. R. 371, on gift causa mortis.

Cited in notes in 34 A. S. R. 196, on language necessary to create trust; 34 A. S. R. 224, on notice of trust to donee; 5 L.R.A. 71, on what necessary to complete gift; 10 L.R.A.(N.S.) 617, on necessity of beneficiary's knowledge of trust.

— In bank deposit.

Cited in *Scrivens v. North Easton Sav. Bank*, 166 Mass. 255, 44 N. E. 251, holding gift inter vivos perfected by deposit in trust payable upon depositor's death, where beneficiary assented thereto; *McMahon v. Lawler*, 190 Mass. 343, 77 N. E. 489, holding that admission by depositor shortly before her death that deposit belonged to sister named as beneficiary, constituted perfected trust in beneficiary's favor by way of gift; *Harris Bkg. Co. v. Miller*, 190 Mo. 640, 1 L.R.A.(N.S.) 790, 89 S. W. 629, holding that where depositor took certificate of deposit in his own name, wrote thereon assignment to housekeeper, declared that money belonged to her and directed bank to pay it only to her, he thereby created express trust in her favor; *Schollmier v. Schoendelen*, 78 Iowa, 426, 16 A. S. R. 435, 43 N. W. 282, holding written assignment of deposit payable after death perfected gift where donor delivered book and considered transaction completed; *Alger v. North End Sav. Bank*, 146 Mass. 418, 4 A. S. R. 331, 15 N. E. 916, holding gift perfected where party making deposit "in trust" for another assured latter that it belonged to her, though book retained; *Supple v.*

Suffolk Sav. Bank, 198 Mass. 392, 126 A. S. R. 451, 84 N. E. 432, holding acceptance necessary to constitute gift inter vivos of bank deposit; Marcy v. Amazeen, 61 N. H. 131, 60 A. R. 320, holding deposit in another's name perfected gift inter vivos, where donee accepted upon delivery of book with intent of conveying title; Smith v. Ossipee Valley Ten Cents Sav. Bank, 64 N. H. 228, 10 A. S. R. 400, 9 Atl. 792, holding gift perfected by deposit in another's name, subject to right of depositor and wife to income for life, where donee assented, though book retained; Eastman v. Woronoco Sav. Bank, 136 Mass. 208, holding gift perfected by bank deposit in another's name subject to depositor's order though book retained for donee's safety with latter's knowledge and consent; Miller v. Clark, 40 Fed. 15, holding gift inter vivos perfected by donee's acceptance of deposits made with express declaration of trusteeship by depositor who alone was to draw; Hogan v. Sullivan, 114 Iowa, 456, 87 N. W. 447, holding gift causa mortis perfected by deposit payable to another made with latter's knowledge where depositor subsequently gave such party written directions for disposition of fund; Providence Inst. for Sav. v. Carpenter, 18 R. I. 287, 27 Atl. 337, holding gift not perfected by deposit to names of depositor and another with intent that title should pass only at former's death; Main's Appeal, 73 Conn. 638, 48 Atl. 965, holding gift not perfected by deposit in names of, and payable to depositor and another, when control to pass only at former's death; Milholland v. Whalen, 89 Md. 212, 44 L.R.A. 205, 43 Atl. 43, holding that deposit "in trust" for depositor and another, payable to either, balance to survivor, creates trust though depositor retains book; Booth v. Oakland Bank of Sav. 122 Cal. 19, 54 Pac. 370, holding trust created by deposit payable to depositor's sisters or herself for purpose of enabling them to draw at her death, where sisters notified; Pope v. Burlington Sav. Bank, 56 Vt. 284, 48 A. R. 781, holding no trust created by mere deposit in another's name, payable to depositor, when other party unnotified; Connecticut River Sav. Bank v. Albee, 64 Vt. 571, 33 A. S. R. 944, 25 Atl. 487, holding trust created by deposit to another's credit, naming depositor as trustee, though book retained and beneficiary unnotified; Norway Sav. Bank v. Merriam, 88 Me. 146, 33 Atl. 840, holding no trust created by deposit in joint tenancy with others, where book retained and others unnotified; Towle v. Wood, 60 N. H. 434, 49 A. R. 326, holding no trust created by agreement between two depositors that survivor shall have other's deposit, each retaining absolute title and control of his own during life; Cleveland v. Hampden Sav. Bank, 182 Mass. 110, 65 N. E. 27, holding no trust created by deposit "in trust" for another, when intended merely to evade interest bearing limit; Bath Sav. Inst. v. Hathorn, 88 Me. 122, 51 A. S. R. 382, 32 L.R.A. 377, 33 Atl. 836, holding trust created by deposit "in trust" for one to whom depositor stated he wished it to go at death, though book retained and beneficiary unnotified; Barker v. Frye, 75 Me. 29, holding trust created by deposit in another's name, subject to depositor's order during life, where beneficiary accepted when notified by depositor; Hoboken Bank for Sav. v. Schwoon, 62 N. J. Eq. 503, 50 Atl. 490, holding trust perfected by deposit in joint names of depositor and another, payable to either or survivor, and intrusting book to third party with instructions to deliver after depositor's death; Bartlett v. Remington, 59 N. H. 364, holding trust not created by deposit "in trust" for another, when depositor retained control intending balance at death should go to other party; Sayre v. Weil, 94 Ala. 466, 15 L.R.A. 544, 10 So. 546, holding deposit in depositor's name

as trustee for others creates trust when nothing remains in trustee but mere naked title.

Cited in reference note in 4 A. S. R. 334, on deposit of money in bank in another's name as a gift.

Cited in notes in 31 A. R. 453, on validity of trust created by deposit in a bank of depositor's own money in trust for another who is ignorant thereof until depositor's death; 39 A. R. 310, on effect of deposit of money in bank in name of another as gift or trust; 48 A. R. 787, on gift of savings bank deposit; 34 A. S. R. 213, on effect of grantor's retention of instrument creating voluntary trust; 34 A. S. R. 223, on possession of pass book as creating trust; 5 L.R.A. 72, on mere deposit as consummated gift; 6 L.R.A. 406, on deposit of a fund in trust for another as a gift; 11 L.R.A. 686, on gift of money on deposit; 1 L.R.A. (N.S.) 790, on deposit in bank for other person as gift or transfer of title.

Distinguished in *Sherman v. New Bedford Five Cents Sav. Bank*, 138 Mass. 581, holding no trust created by deposit in another's name where depositor retained book and never notified other party.

Extrinsic evidence as to existence or nonexistence of trust.

Cited in *Kendrick v. Ray*, 173 Mass. 305, 73 A. S. R. 289, 53 N. E. 823, sustaining admissibility of written and oral evidence to show terms and beneficiary of trust in insurance policy payable to insured as trustee; *Thompson v. Caruthers*, 92 Tex. 530, 50 S. W. 331, holding parol evidence admissible to show that promissory note was charged with trust; *Chace v. Chapin*, 130 Mass. 128, sustaining admissibility of parol evidence to establish trust in railroad stock.

— In bank deposit.

Cited in *Parkman v. Suffolk Sav. Bank*, 151 Mass. 218, 24 N. E. 43, holding evidence that depositor had already on deposit full amount allowed before making deposit, ostensibly as trustee for another, admissible as furnishing explanation other than intent to make gift; *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157, 2 N. E. 925, holding any evidence of mutual understanding that gift was intended admissible to show perfected gift by deposit in another's name, though book is retained; *Northrop v. Hale*, 72 Me. 275, holding extraneous evidence of intent in making deposit in another's name admissible to vary effect of entry in deposit book.

Cited in reference note in 36 A. R. 634, on admissibility of parol evidence to show that a deposit made in name of another was intended to be in trust.

Cited in note in 32 L.R.A. 373, on what is sufficient to show trust, in favor of third person, in deposit in bank.

35 AM. REP. 370, GREEN v. BOSTON & L. R. CO. 128 MASS. 221.

Measure of damages for loss of property.

Cited in *The H. F. Dimock*, 23 C. C. A. 123, 33 U. S. App. 647, 77 Fed. 226, holding that damages for loss of pleasure yacht by collision should be such as will put owner pecuniarily in same condition as before injury; *Barker v. Lewis Storage & Transfer Co.* 78 Conn. 198, 61 Atl. 363, 3 A. & E. Ann. Cas. 889, holding that measure of damages for conversion of household goods and effects is their actual value to owner; *Parmalee v. Raymond*, 43 Ill. App. 609, holding owner of wearing apparel in case of loss entitled to recover its value to him not market value; *Beale v. Boston*, 166 Mass. 53, 43 N. E. 1029, holding evidence of value other than market value of land taken by city for public street admissible; *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270, holding measure of dam-

ages in action for loss of buildings and their contents by fire communicated by locomotive, not market value but real value at time of fire; *Louisville & N. R. Co. v. Stewart*, 78 Miss. 600, 29 So. 394, holding measure of damages for loss of portraits actual value to owner.

Cited in note in 5 E. R. C. 526, on measure of damages for breach of carrier's contract.

Distinguished in *Mather v. American Exp. Co.* 138 Mass. 55, 52 A. R. 258, holding that there can be no recovery against carrier on loss of architect's plans, for consequent delay in constructing house where carrier had no notice of nature or intended use of contents of package.

— **Property having no market value.**

Cited in *Southern Exp. Co. v. Owens*, 146 Ala. 412, 119 A. S. R. 41, 8 L.R.A. (N.S.) 369, 41 So. 752, 9 A. & E. Ann. Cas. 1143, holding that measure of damages, where article lost has no market value, is its value to owner; *Weston v. Boston & M. R. Co.* 190 Mass. 298, 112 A. S. R. 330, 4 L.R.A. (N.S.) 569, 76 N. E. 1050, 5 A. & E. Ann. Cas. 825, to point that where property converted has no market value but has special value to owner he can recover that value; *Austin v. Millspaugh*, 90 Miss. 354, 122 A. S. R. 315, 43 So. 305, holding that recovery may be had for monetary value of property to guest lost by negligence of hotel keeper where it has no market value.

Cited in note in 8 L.R.A. (N.S.) 371, on measure of damages for loss or destruction of manuscript, legal papers, and the like.

Admissibility of agent's admissions as against principal.

Cited in *Austin v. Nuchols*, 42 Tex. Civ. App. 5, 94 S. W. 336, holding declarations of corporate agent in reference to authorized act and at time he is conducting business admissible as against principal; *Central R. & Bkg. Co. v. Skellie*, 86 Ga. 686, 12 S. E. 1017, holding agent's admissions, upon demand being made by shipper for reasons of carrier's noncompliance with contract, transaction being still in progress, admissible against carrier; *Boston & M. R. Co. v. Ordway*, 140 Mass. 510, 5 N. E. 627, holding admissions by freight agent, after delivery of goods, tending to show defendant's liability inadmissible in action against railroad company for injury to goods transported; *Thompson v. St. Louis & S. F. R. Co.* 59 Mo. App. 37, holding statements of agent who received trunk to owner concerning its loss competent evidence against company; *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647, 38 A. R. 617, holding acts and declarations of agent to passenger on presentation of check and during evening that baggage had not been found competent evidence for passenger in action against carrier for loss of such baggage; *Havens v. R. I. Suburban R. Co.* 26 R. I. 48, 58 Atl. 247, 3 A. & E. Ann. Cas. 617, holding agent's admissions against principal made morning after accident inadmissible as not being part of *res gestæ* in negligence action.

Cited in note in 131 Am. St. Rep. 316, on declarations and acts of agents.

Grounds for reversal.

Cited in *Bugbee v. Kendricken*, 132 Mass. 349, holding that no exception lies to refusal to instruct as to what might be effect of one fact taken separately, when it is accompanied and connected with other facts tending to establish main issue; *Parker v. Springfield*, 147 Mass. 391, 18 N. E. 70, holding that no exception lies to refusal to give instruction in language requested, if it is fully covered by instructions given; *Com. v. Gavin*, 148 Mass. 449, 18 N. E. 675, holding that on trial for keeping common nuisance defendant had no right to pick out

part of evidence and to require ruling upon its effect when isolated from other evidence which accompanied it.

Cited in note in 10 L.R.A. 741, on instructions as to evidence on question of contributory negligence of one using street or sidewalk.

35 AM. REP. 372, *FAY v. HARLAN*, 128 MASS. 244.

Admissibility of patient's declarations to physician.

Cited in *Consolidated Traction Co. v. Lamberton*, 60 N. J. L. 452, 38 Atl. 683, holding declarations of patient as to his symptoms, made to physician for purpose of treatment admissible in action for personal injuries; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573, holding statements of person injured, expressive of his present condition, made to physician for purpose of treatment admissible in his behalf in action for personal injuries; *State v. Blydenburg*, 135 Iowa, 264, 112 N. W. 634, 14 A. & E. Ann. Cas. 443; *Roosa v. Boston Loan Co.* 132 Mass. 439; *Lichtenwallner v. Laubach*, 105 Pa. 366, 42 Phila. Leg. Int. 101,—holding statements of patient to physician as to his symptoms and complaints for purpose of medical treatment and advice admissible in action for personal injury.

Admissibility of expressions of pain in evidence.

Cited in *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227; *Atchison, T. & S. F. R. Co. v. Johns*, 36 Kan. 769, 59 A. R. 609, 14 Pac. 237,—holding declarations of party with regard to present or existing pain or suffering admissible in action for personal injuries; *Jackson v. Missouri, K. & T. R. Co.* 23 Tex. Civ. App. 319, 55 S. W. 376, holding evidence of groans and exclamations of pain from plaintiff admissible in action for personal injuries though uttered after suit filed; *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298, holding expressions of pain uttered by deceased at time of injury and from that time to her death admissible in action for personal injuries.

Cited in reference notes in 54 A. R. 312, on competency of declarations of person injured; 2 A. S. R. 39, on admissibility of statements of plaintiff as to his injuries in action for damages; 3 A. S. R. 240, on admissibility as part of res gestæ of declarations of person injured.

Cited in notes in 93 A. D. 280, on when declarations of party are admissible in his own favor; 95 A. D. 66, on admissibility of exclamations of pain and declarations respecting injuries; 13 L.R.A. 466, on admissibility of declarations of pain and suffering as evidence; 24 L.R.A.(N.S.) 258, on admissibility of expressions or statements, subsequent to injury, of present pain; 19 L. ed. U. S. 438, on admissibility of declarations of injured party as to injury, expressions of pain, suffering, etc.; 11 E. R. C. 293, on the doctrine of res gestæ.

35 AM. REP. 373, *McNEIL v. KENDALL*, 128 MASS. 245.

What constitutes subletting.

Cited in *Sexton v. Chicago Storage Co.* 129 Ill. 318, 16 A. S. R. 274, 21 N. E. 920, to point that reservation to lessor of right to declare lease void for non-performance and to re-enter for breach or at end of term, coupled with covenant of lessee to surrender at end of term or upon forfeiture of term by breach, constituted letting by lessee a subletting not assignment of term; *Dunlap v. Bulard*, 131 Mass. 161, holding that where lessee of estate for term of years demised it to another for term equal to whole of unexpired term of original lease with covenant of surrender at end of term it was sublease and not assignment of original lease.

Cited in reference note in 83 A. D. 638, on right of owner of parcel to enforce condition under which the whole tract was sold against the owner of another parcel.

Cited in notes in 10 A. S. R. 558, on the assignable quality of leases; 10 A. S. R. 561, on effects of assignment of sublease; 117 A. S. R. 98, on distinction between subletting and assignment; 15 E. R. C. 501, on what creates lease as distinguished from assignment.

35 AM. REP. 376, GEORGE v. GOBEY, 128 MASS. 289.

Liability of master for acts of agent.

Cited in *St. Louis & S. F. R. Co. v. Ryan*, 56 Ark. 245, 19 S. W. 830, holding master liable for penal acts of his agent, done within scope of authority and in executing master's business; *Knight v. Towles*, 6 S. D. 575, 62 N. W. 964, holding principal liable for criminal act of agent only when committed within scope of his employment; *Hammond v. New York, C. & St. L. R. Co.* 5 Ind. App. 526, 31 N. E. 817, holding that where city ordinance is violated by engineer of railroad company penalty may be recovered in action against company; *Wallace v. Merrimack River Nav. & Exp. Co.* 134 Mass. 95, 45 A. R. 301, holding that if act of those in charge of steamboat, in running against party's yacht, while latter was sailing for pleasure on Sunday in violation of statute, was wanton and malicious, he can maintain action against owner of steamboat if they were acting within general scope of their employment and were executing their master's business; *Com. v. Stevens*, 155 Mass. 291, 29 N. E. 508, to point that master cannot be held criminally for what servant does contrary to his orders, and without authority, merely because it is in course of his business and within scope of servant's employment; *Bowler v. O'Connell*, 162 Mass. 319, 44 A. S. R. 359, 27 L.R.A. 173, 38 N. E. 498, holding master not liable for injury to person by act done by servant not as means or for purpose of performing master's work; *Grant v. Singer Mfg. Co.* 190 Mass. 489, 6 L.R.A. (N.S.) 567, 77 N. E. 480, holding corporation liable for force used by agent as means of retaking machine for nonperformance of contract of conditional sale, although told not to use force; *Cain v. Nawn Contracting Co.* 202 Mass. 237, 88 N. E. 842, holding master liable for act of driver of dump cart in not hauling dirt to destination but dumps it in highway; *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, holding that corporation may become bound by acts of its agents within scope of their duty, though act involves criminal responsibility on part of agent.

Cited in notes in 88 A. S. R. 787, on principal's liability in tort for acts of agent within scope of employment; 88 A. S. R. 790, on liability of principal in tort for unauthorized act of agent in disobedience of instructions; 88 A. S. R. 791, on liability of principal in tort for wilful and malicious acts of agent; 41 L.R.A. 651, on criminal and penal liability for act of copartner, servant, or agent.

— Liability of saloon keeper for sale of liquor by agent.

Cited in *Reath v. State*, 16 Ind. App. 146, 44 N. E. 808, holding bondsmen of saloon keeper liable for damages resulting from illegal sales of liquor to minor although made by bartender and not by saloon keeper in person; *Pelley v. Wills*, 141 Ind. 688, 41 N. E. 354, holding liquor dealer responsible for actionable injuries caused by sales of liquors made by agent although without his knowledge or express orders; *Com. v. Briant*, 142 Mass. 463, 56 A. R. 707, holding sale of intoxicating liquors to minor by servant in master's shop, and in regular course

of master's lawful business is not *prima facie* sale by master although sale is illegal; *Austin v. Carswell*, 67 Hun, 579, 22 N. Y. Supp. 478, on liability of hotel proprietor, in civil action for penalties under excise laws for sales of liquor without license by his bartender, without his knowledge and against his instructions, but receipts for which were passed over to him.

Cited in reference note in 50 A. R. 270, on criminal liability of saloon keeper for act of agent in keeping it open illegally.

Cited in note in 48 A. D. 627, on who may be sued under civil-damage liquor laws.

Sufficiency of notice not to sell liquor to husband.

Cited in *Tate v. Donovan*, 143 Mass. 590, 10 N. E. 492, holding notice served by wife upon liquor seller warning him not to sell any more liquor to her husband sufficient to give information that husband was in habit of using intoxicating liquors to excess.

35 AM. REP. 378, DOLLIVER v. ST. JOSEPH F. & M. INS. CO. 128 MASS. 315.

Construction of policy as to title of insured.

Cited in *Martin v. State Ins. Co.* 44 N. J. L. 485, 43 A. R. 397, holding that where naked legal title of property insured was in third party but whole beneficial interest and possession were in assured, latter had entire, unconditional and sole ownership.

—Effect of executory contract of purchase.

Cited in *Loventhal v. Home Ins. Co.* 112 Ala. 108, 57 A. S. R. 17, 33 L.R.A. 258, 20 So. 419, holding that title of insured under executory contract of purchase is unconditional and sole owner in fee simple; *Johannes v. Standard Fire Office*, 70 Wis. 196, 5 A. S. R. 159, 35 N. W. 298, holding that party's interest in land under contract for its purchase was entire, unconditional, and sole ownership, within meaning of condition in policy.

—Effect of mortgage.

Cited in *Judge v. New York Bowery F. Ins. Co.* 132 Mass. 521, holding that policy of insurance containing condition that if interest of assured be other than entire, unconditional and sole ownership of property policy would be void. is not avoided where assured gave mortgage but retained possession; *Collamore v. Collamore*, 158 Mass. 74, 32 N. E. 1034, holding that mortgagor of land in possession, and his heirs, are actually seized of land as against everybody but mortgagee; *Standard Leather Co. v. Mercantile Town Mut. Ins. Co.* 131 Mo. App. 701, 111 S. W. 631, holding that proviso in policy as to sole and unconditional ownership is not violated by existence of outstanding mortgage; *Koahland v. Hartford Ins. Co.* 31 Or. 402, 49 Pac. 866, holding that failure to disclose existence of mortgage, when applicant for insurance is not interrogated upon subject, not such concealment as to avoid policy; *Steinmeyer v. Steinmeyer*, 64 S. C. 413, 92 A. S. R. 809, 59 L.R.A. 319, 42 S. E. 184, holding that existence of encumbrance on insured's property is not breach of condition which requires sole and unconditional ownership; *Vankirk v. Citizens' Ins. Co.* 79 Wis. 627, 48 N. W. 798, holding that one who holds title to land under deed conveying to him fee simple absolute, is unconditional sole owner within meaning of condition in policy of insurance requiring title to be disclosed notwithstanding there may be mortgage thereon; *Medley v. German Alliance Ins. Co.* 55 W. Va. 342, 47 S. E.

101, 2 A. & E. Ann. Cas. 99, holding that mortgagor in possession, being owner of encumbered fee-simple title, has sole, entire and unconditional ownership within meaning of policy; *Mascott v. First Nat. F. Ins. Co.* 69 Vt. 116, 37 Atl. 255, holding that it was question for jury whether failure to disclose existence of mortgage was concealment of material risk under policy of insurance; *Western Assur. Co. v. Temple*, 31 Can. S. C. 373 (affirming 35 N. B. 171), holding mortgagor sole and unconditional owner within terms of insurance policy.

Cited in reference note in 39 A. R. 584, on effect of mortgage on warranty of ownership in application for insurance.

Cited in note in 28 A. D. 156, 157, on mortgage of property insured as alienation defeating claim for insurance.

—Effect of purchase by trustee in foreclosure.

Cited in *Caraher v. Standard F. Ins. Co.* 63 Hun, 82, 17 N. Y. Supp. 858, holding that interest acquired by trustee in buying property of corporation under foreclosure was that of unconditional and sole ownership.

35 AM. REP. 381, MURPHY v. LOWELL, 128 MASS. 396.

Municipal legislative power.

Cited in reference notes in 20 A. S. R. 939, on legislative powers of mayor and aldermen; 37 A. S. R. 692, on municipal power to determine what is proper use of street.

Liability of city for negligence of its contractor.

Cited in reference note in 36 A. R. 166, on liability of city for negligence of its contractor.

Cited in notes in 76 A. S. R. 417, on liability for negligence of independent contractors in performing work for cities; 1 E. R. C. 621, on liability of municipal corporation neglecting to perform duty imposed by charter.

Liability for injury in blasting.

Cited in *Hoffman v. Walsh*, 117 Mo. App. 278, 93 S. W. 853, to point that contractor is only held to exercise of reasonable care in setting off blast; *Thurmond v. Ash Grove White Line Asso.* 125 Mo. App. 73, 102 S. W. 617, holding proof of negligence necessary to recover for injury to premises caused by blasting.

Cited in note in 76 A. S. R. 422, on liability for negligence of independent contractors in blasting.

Distinguished in *Fitzsimmons v. Braun*, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 492, holding public contractor using explosives in excavating tunnel liable for injury to buildings in neighborhood from concussion however great care used in work.

35 AM. REP. 383, CUSHING v. BOSTON, 128 MASS. 330.

Liability of city for injury due to lawful obstruction of street.

Cited in *Dougherty v. Horseheads*, 159 N. Y. 154, 53 N. E. 799, holding city not liable for injury to person caused by his driving into lawful obstruction of street by stone to protect grass plot at private driveway; *Platt v. New York*, 8 Misc. 409, 28 N. Y. Supp. 672, holding city not liable for injury to person by driving into division fence between bridle path and walk in public park; *Jordan v. New York*, 26 Misc. 53, 55 N. Y. Supp. 710, holding city not liable as for negligence where driver was injured by wagon striking hubstone on city sidewalk.

Cited in reference note in 2 A. S. R. 169, on obligation of municipal corporation to keep streets and highways in safe condition.

Cited in notes in 38 A. R. 128, on public's right to have street free from obstructions; 12 L.R.A. 115, on right to authorize obstruction in highway; 33 L.R.A. 164, 165, on extent of municipal power over buildings as nuisances; 39 L.R.A. 669, on municipal powers over things overhanging streets, etc., as nuisances affecting highways and waters; 20 L.R.A. (N.S.) 624, on liability of municipality for defects or obstructions in streets.

Validity of ordinances.

Cited in reference note in 53 A. R. 625, on validity of municipal ordinance as to pawnbrokers.

Cited in note in 7 E. R. C. 282, on reasonableness of ordinance made by municipal corporation.

35 AM. REP. 387, COM. v. HALL, 128 MASS. 410.

Construction of fish and game laws.

Cited in *State v. Buckman*, 88 Me. 385, 51 A. S. R. 406, 34 Atl. 170, holding that statute prohibiting taking or killing of game during certain time does not apply to game without the state; *People v. O'Neil*, 71 Mich. 325, 39 N. W. 1, holding that statute prohibiting killing of certain game does not apply to quail killed in another state and brought into this state after they are killed; *Dickhaut v. State*, 85 Md. 451, 60 A. S. R. 332, 36 L.R.A. 765, 37 Atl. 21, holding that statutory prohibition against having rabbits in one's possession related only to rabbits caught or killed in this state.

Cited in notes in 23 A. S. R. 646, on game killed in another state; 42 A. S. R. 142, on game laws; 8 L.R.A. 449, on decisions on game laws of various states; 13 L.R.A. 804, on game laws as affecting interstate commerce; 3 L.R.A. (N.S.) 165, on prohibition of possession of foreign game.

Distinguished in *State v. Shattuck*, 96 Minn. 45, 104 N. W. 719, 6 A. & E. Ann. Cas. 934, holding that statute prohibiting sale of game applies to all ruffed grouse whether captured within or without this state; *Javins v. United States*, 11 App. D. C. 345, holding that possession by person in district of partridge or quail during close season is violation of statute relating thereto, whether such bird was taken or killed beyond limits of district or not.

—As to killing or selling of deer.

Cited in *State v. Fisher*, 53 Or. 38, 98 Pac. 713; *Allen v. Young*, 76 Me. 80,—holding that keeping or transportation of hide or carcass of deer from place to place in this state is not unlawful at any time, if deer was killed at time when it was lawful to do so; *Smith v. State*, 155 Ind. 611, 51 L.R.A. 404, 58 N. E. 1044 (dissenting opinion), on construction of statute prohibiting hunting or killing of deer during certain period.

Distinguished in *Ex parte Maier*, 103 Cal. 476, 42 A. S. R. 129, 37 Pac. 402, holding that according to penal code it is no misdemeanor to sell, or offer to sell meat of any deer, without reference to whether deer has been killed within or without state.

—As to taking, selling or transportation of fish.

Cited in *People v. Buffalo Fish Co.* 164 N. Y. 93, 79 A. S. R. 622, 52 L.R.A. 803, 58 N. E. 34, 15 N. Y. Crim. Rep. 93, holding that prohibition in game law against possession of certain fish during close season applies only to fish caught within state; *State v. Barnes*, 24 Or. 366, 21 L.R.A. 478, 33 Pac. 666,

holding it no violation of game or fish laws of Oregon to have in one's possession during close season, fish caught out of state; *State v. Beal*, 75 Me. 289 (dissenting opinion), on construction of statute regarding sale of trout; *McDonald v. Southern Exp. Co.* 134 Fed. 282, holding statute prohibiting transportation of shad fish beyond limits of state unconstitutional.

— As to taking of clams.

Cited in *People v. Allen*, 20 Misc. 120, 45 N. Y. Supp. 74, holding that section of fish laws making possession of clams less than one inch in thickness misdemeanor does not apply to shell fish coming from other states.

— As to taking of lobsters.

Cited in *Com. v. Barber*, 143 Mass. 560, 10 N. E. 330, as to whether statute prohibiting possession of lobsters is applicable to those taken within or without commonwealth; *Com. v. Savage*, 155 Mass. 278, 29 N. E. 468, holding that statute prohibiting possession of lobster not of required length applies to lobsters under required length without regard to place where they were obtained; *Com. v. Hodgkins*, 170 Mass. 197, 49 N. E. 97, holding that statute intended for protection of lobsters includes dead lobsters as well as live ones.

— As to possession of gill net.

Cited in *State v. Lewis*, 134 Ind. 250, 20 L.R.A. 62, 33 N. E. 1024, holding statute making it misdemeanor for any person to have in his possession gill net constitutional.

Powers of legislature.

Cited in *Com. v. Anselvich*, 186 Mass. 376, 104 A. S. R. 590, 71 N. E. 790, to point that legislature has power to make certain conditions prima facie evidence of commission of crime.

— To protect game.

Cited in *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600 (affirming 61 Conn. 144, 13 L.R.A. 804, 3 Inters. Com. Rep. 732, 22 Atl. 1012), holding statutory provision prohibiting killing of woodcock, ruffed grouse, or quail for purpose of conveying same beyond limits of state, constitutional; *Stevens v. State*, 89 Md. 669, 43 Atl. 929, holding that state may lawfully prohibit sale or possession of game within closed season, whether same be brought from another state or not.

Cited in note in 78 A. S. R. 248, on power of legislature to declare acts concerning game criminal.

35 AM. REP. 391, COM. v. HARTWELL, 128 MASS. 415.

What constitutes manslaughter.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Ferrell*, 39 Ind. App. 515, 79 N. E. 988 (dissenting opinion), to point that man may commit manslaughter by doing otherwise lawful acts recklessly; *State v. Dorsey*, 118 Ind. 167, 10 A. S. R. 111, 20 N. E. 777, holding railroad engineer who carelessly and negligently runs engine into passenger car standing upon railroad track, causing death of passenger guilty of manslaughter; *Aiken v. Holyoke Street R. Co.* 184 Mass. 269, 68 N. E. 238; *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594,—to point that person is guilty of manslaughter whose act of carelessness results in death of person injured thereby.

Cited in notes in 90 A. S. R. 572, 573, on what constitutes involuntary manslaughter; 61 L.R.A. 282, on negligent homicide in management of railways, locomotives, etc.

Variance between allegations and proof.

Cited in *Com. v. Pierce*, 130 Mass. 31, holding allegation in indictment charging two persons jointly with obtaining loan of money by false pretences not supported by proof of loan to one of persons only; *Com. v. Moore*, 130 Mass. 45, holding indictment alleging intent to steal person's property not supported by proof of intent to steal property of another; *Com. v. McCarthy*, 145 Mass. 575, 14 N. E. 643, holding allegation in indictment that accused "wilfully did throw certain missile, to wit, a stone" at street railway car not sustained by proof that he threw only billet of wood.

Cited in reference note in 83 A. D. 727, on necessity for proof of allegation descriptive of identity of a charge in an account.

Sufficiency of indictment.

Cited in *Com. v. Hayden*, 150 Mass. 332, 23 N. E. 51, holding description of what was burned essential to fix identity of offense of burning dwelling house; *Com. v. Washburn*, 128 Mass. 421, holding that complaint which does not set forth facts necessary to constitute offense except by reference to statute year of which is wrongly given, will not support conviction.

Cited in note in 61 L.R.A. 299, on pleading and practice in case of negligent homicide.

35 AM. REP. 397, CONNELL v. REED, 128 MASS. 477.**What can be acquired as a trademark.**

Cited in *Coffman v. Castner*, 31 C. C. A. 55, 59 U. S. App. 35, 87 Fed. 457, holding that no one can acquire name of "Pochontas" as descriptive of locality or coal mined in great Pocohontas coal field of Virginia and West Virginia; *Dela-ware, L. & W. R. Co. v. Devore*, 58 C. C. A. 543, 122 Fed. 791, holding that geographical terms and words in common use to designate locality, country, or section of country cannot be monopolized as trade-marks; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151, holding that person cannot acquire right to exclusive use of word "Columbia" as trade mark; *Re Hopkins*, 29 App. D. C. 118, holding that words "Oriental Cream" cannot be exclusively used as trademark.

Cited in notes in 47 A. D. 291, on geographical or local names as trademarks; 85 A. S. R. 108, on trademark in geographical names; 1 L.R.A. 45; 34 L. ed. U. S. 1000,—on what may be a trademark; 9 L.R.A. 145, on object of trademarks; 26 L.R.A. (N.S.) 82, on right to protection in use of geographical name; 25 E. R. C. 222, on right of trader to sell goods by descriptive name.

Protection of trademark in equity.

Cited in *Shaver v. Heller & M. Co.* 65 L.R.A. 878, 48 C. C. A. 48, 108 Fed. 821; *Buzby v. Davis*, 80 C. C. A. 163, 150 Fed. 275, 10 A. & E. Ann. Cas. 63,—holding that equity will enjoin use of geographical and descriptive words as trade marks which constitute unfair competition.

—Effect of fraud or deception on part of owner.

Cited in *Uri v. Hirsch*, 123 Fed. 568; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436, 40 Phila. Leg. Int. 455,—holding that equity will not protect trademark containing misrepresentation; *Clinton E. Warden & Co. v. California Fig Syrup Co.* 187 U. S. 516, 47 L. ed. 282, 23 Sup. Ct. Rep. 161, holding that equity will not protect trademark containing false or misleading representation; *Hilson Co. v. Foster*, 80 Fed. 896; *Continental Paper Bag Co. v. Eastern Paper Bag Co.* 80 C. C. A. 407, 150 Fed.

741; *Hoxie v. Chaney*, 143 Mass. 592, 58 A. R. 149, 10 N. E. 713; *Messer v. The Fadettes*, 168 Mass. 140, 60 A. S. R. 371, 37 L.R.A. 721, 46 N. E. 407,—holding that equity will not enforce claim to trade mark which contains misrepresentation to public; *Memphis Keeley Institute v. Leslie E. Keeley Co.* 16 L.R.A.(N.S.) 921, 84 C. C. A. 112, 155 Fed. 963; *Buckland v. Rice*, 40 Ohio St. 526,—holding that equity will not protect trademark which contains material misleading representation; *Burton v. Stratton*, 12 Fed. 696, holding that equity will not protect use of word as trademark which expresses falsehood; *California Fig-Syrup Co. v. Putman*, 60 Fed. 750; *California Fig Syrup Co. v. Stearns*, 33 L.R.A. 56, 20 C. C. A. 22, 43 U. S. App. 234, 73 Fed. 812,—holding that use of words "Syrup of Figs" will not be protected in equity where preparation contains no laxative properties as represented; *Siebert v. Abbott*, 72 Hun, 243, 25 N. Y. Supp. 590, holding that equity should not be vigilant to protect manufacturer of compound advertised and sold as valuable medicine when it is not shown to contain single medicinal ingredient; *Koehler v. Sanders*, 122 N. Y. 65, 9 L.R.A. 576, 25 N. E. 235, holding that equity will not grant relief for protection of exclusive use of misrepresentation by means of term when it may tend to deceive public and so induce custom; *C. F. Simmons Medicine Co. v. Mansfield Drug Co.* 93 Tenn. 84, 23 S. W. 165, holding fraud on part of party seeking equitable relief in protection of trade mark a defense available without pleading.

Cited in reference note in 1 A. S. R. 421, on misrepresentations intended to deceive defeating owner's right to protection of trademark.

Cited in notes in 17 L.R.A. 130, on refusal of courts to protect a trademark which contains a fraud; 19 L.R.A. 55, on validity of deceptive trademark; 45 L. ed. U. S. 376, on deceptive use of geographical name for trademark; 47 L. ed. U. S. 282, on deception as bar to relief for infringement of trademark.

Distinguished in *Nelson v. J. H. Winchell & Co.* 203 Mass. 75, 23 L.R.A. (N.S.) 1150, 89 N. E. 180; *Wormser v. Shayne*, 111 Ill. App. 556,—holding that false representations as to immaterial matters will not defeat right to protect trademark in equity.

—After discontinuance of business by owner.

Cited in *Grow v. Seligman*, 47 Mich. 607, 41 A. R. 737, 11 N. W. 404, on right of injunction to restrain use of name after sale of business; *Grocers' Journal Co. v. Midland Pub. Co.* 127 Mo. App. 356, 105 S. W. 310, holding that where purchaser of newspaper merged it with another newspaper owned by him and discontinued name of purchased paper, he could not restrain by injunction seller from publishing paper under name similar to one discontinued.

Cited in note in 17 A. S. R. 498, on assignment of trademark of which assignor's name is a part.

35 AM. REP. 398, KELLY v. JOHNSON, 128 MASS. 530.

When relation of master and servant exists.

Cited in *Everhart v. Terre Haute & I. R. Co.* 73 Ind. 292, 41 A. R. 567, holding that person casually passing, who at request of employee got upon car and applied brakes to stop it, was mere intermeddler; *Berry v. New York C. & H. R. R. Co.* 202 Mass. 197, 88 N. E. 588, on continuance in service as assent to new conditions.

Cited in notes in 22 L.R.A. 665, on assumption of risk of service by persons

not volunteers; 37 L.R.A. 47, on effect of servant's ignorance of actual conditions in determining as to which of two persons is his master.

Distinguished in *Sloan v. Central Iowa R. Co.* 62 Iowa, 728, 16 N. W. 331, holding that person supplied by conductor to take his place during absence is employee of railroad and entitled to recover for injury caused by negligence of co-employee.

35 AM. REP. 399, DAVIS v. SOMERVILLE, 128 MASS. 594.

Works of necessity or charity.

Cited in *Donovan v. McCarty*, 155 Mass. 543, 30 N. E. 221, holding assignment of personal property in trust executed by woman eighty years old while in hospital suffering from severe injuries a work of necessity; *Dugan v. State*, 125 Ind. 130, 9 L.R.A. 321, 25 N. E. 171, holding carrying of persons to and from pleasure parties on Sunday not a work of necessity or charity; *Bucher v. Fitchburg R. Co.* 131 Mass. 156, 41 A. R. 216, holding that person who took passage on freight train on Sunday for purpose of receiving expected letter from sister was not traveling from necessity or charity; *Com. v. White*, 190 Mass. 578, 5 L.R.A. (N.S.) 320, 77 N. E. 636, holding gathering of cranberries on Lord's day when there is usually large crop but no sudden and unexpected emergency not a work of necessity within meaning of statute.

Violation of law as a defense.

Cited in *McNeill v. Durham & C. R. Co.* 135 N. C. 682, 67 L.R.A. 227, 47 S. E. 765 (dissenting opinion), on right of party riding on extension of illegal pass, to recover damages sustained by negligent breach of such illegal contract of carriage.

Cited in reference note in 4 A. S. R. 361, on violation of law directly contributing to injury as bar to recovery.

— Sunday law.

Cited in *Day v. Highland Street R. Co.* 135 Mass. 113, 46 A. R. 447, holding that conductor, performing duties of his employment on Sunday cannot recover for injury received by being struck by another corporation's car passing on parallel track.

Cited in reference notes in 35 A. R. 402, on owner's liability for vicious act of dog to injury of person traveling on Sunday; 45 A. R. 304, on right to recover for injuries sustained while traveling on Sunday.

Cited in note in 2 L.R.A. 521, on plaintiff's violation of Sunday law as defense to action for injuries received on that day.

35 AM. REP. 402, WHITE v. LANG, 128 MASS. 598.

Violation of law as defense.

Cited in *Newcomb v. Boston Protective Dept.* 146 Mass. 596, 4 A. S. R. 354, 16 N. E. 555, holding that fact that person is injured while violating city ordinance, through another's negligence, will not defeat his right to recover, unless his unlawful act was contributing cause of injury.

Cited in reference notes in 4 A. S. R. 361, on violation of law directly contributing to injury as bar to recovery; 11 A. S. R. 620, on recovery of damages for negligence by one who was violating law when injured.

— Sunday law.

Cited in *Wallace v. Merrimack River Nav. & Exp. Co.* 134 Mass. 96, 45 A. R. 301, holding that where person is sailing for pleasure in yacht on Sunday in vio-

lation of statute he cannot recover for injury to yacht by being negligently run into by steamboat; *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. L. 169, 19 A. S. R. 442, 7 L.R.A. 435, 19 Atl. 178, holding that fact that person was traveling on Sunday in violation of statute was no defense to action against railroad company for personal injuries caused by its negligence; *Newbury v. Luke*, 68 N. J. L. 189, 52 Atl. 625, holding hiring of horse on Sunday no defense to recovery for over driving.

Cited in reference note in 35 A. R. 399, on what justifies traveling on Sunday.

Contributory negligence as defense.

Cited in *Hickley v. Chicago City R. Co.* 148 Ill. App. 197, holding that negligence of passenger does not amount to contributory negligence which will bar recovery if it is not proximate cause of injury; *Tuttle v. Travellers' Ins. Co.* 134 Mass. 175, 45 A. R. 316, holding that person cannot recover under accident insurance policy providing against exposure to unnecessary danger where he was injured by train while running on tracks, in front of it, to board another train; *Boulester v. Parsons*, 161 Mass. 182, 36 N. E. 790, holding leading of horse behind wagon not such contributory negligence as to preclude action against owner of dog which bites horse.

35 AM. REP. 404, McCURE v. HERRING, 70 MO. 18.

Sufficiency of deed by attorney in fact.

Cited in *Chouteau v. Allen*, 70 Mo. 290, holding deed running in name of corporation as grantor and signed by president and secretary, deed of corporation; *Hubbard v. Swofford Bros. Dry Goods Co.* 209 Mo. 495, 123 A. S. R. 488, 108 S. W. 15, holding that deed by agent was according to intention of parties' deed from husband and wife to third party; *Donovan v. Welch*, 11 N. D. 113, 90 N. W. 262, holding that deed which appears upon its face to have been executed in name of principal and for her by attorney in fact, although not in approved form, is her deed.

Cited in reference note in 37 A. R. 634, on liability of agent on bond executed.

Cited in note in 8 E. R. C. 640, on duty of agent to execute instrument in name of principal.

35 AM. REP. 410, ADKINS v. COLUMBIA L. INS. CO. 70 MO. 27.

Forfeiture of policy for self destruction while insane.

Cited in *Suppiger v. Covenant Mut. Ben. Asso.* 20 Ill. App. 595, holding insurer liable on policy of life insurance providing against suicide if at time of suicidal act, insured was so insane as to be unconscious of act or was driven to its commission by some irresistible impulse; *Scarth v. Security Mut. Life Soc.* 75 Iowa, 346, 39 N. W. 658, holding that there could be no recovery on life insurance policy providing against suicide "felonious or otherwise" "sane or insane" where assured committed suicide while temporarily insane from illness and when he was in no manner conscious or responsible; *Moore v. Northwestern Mut. L. Ins. Co.* 192 Mass. 468, 78 N. E. 488, 7 A. & E. Ann. Cas. 656, holding that there could be no recovery on policy of life insurance providing against death of insured by his own hand where he killed himself though act was result of irresistible impulse over which will of deceased had no control and was not act of violation; *Sparks v. Knight Templars & M. Life Indemnity Co.* 61

Mo. App. 109, holding that where policy of life insurance provides that it shall become void in case of suicide whether voluntary or involuntary, sane or insane, and insured intentionally killed himself with razor while insane, beneficiary cannot recover on policy; *Brower v. Supreme Lodge Nat. Reserve Asso.* 74 Mo. App. 490, holding that where insurance certificate provides that suicide of insured whether sane or insane should cancel certificate, instruction limiting insanity to that kind which leaves party capable of choice and voluntary action is erroneous; *Haynie v. Knight Templars & M. Life Indemnity Co.* 139 Mo. 416, 41 S. W. 461, holding that mental capacity of assured is eliminated and all conditions of insanity are included within exemption of insurer from payment if suicide was "voluntary or involuntary, sane or insane;" *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39, holding that condition in life insurance policy providing against death of insured by his own hand was intended to include self destruction, no matter what mental condition of insured was at time of act which caused death; *Latimer v. Sovereign Camp*, W. W. 62 S. C. 145, 40 S. E. 155, to point that policy providing against death of assured by his own hand or act, sane or insane, not avoided if insured at time of dying by his own hand was so insane as not to apprehend physical nature and consequences of act.

Cited in reference notes in 48 A. R. 676, on avoidance of insurance by suicide while insane; 8 A. S. R. 885, on effect of provision in insurance policy against liability for death by own hand.

Cited in notes in 59 A. D. 493, on effect of insanity on condition in life insurance policy against suicide; 59 A. D. 495, on validity of condition in insurance policy against suicide "sane or insane;" 17 L.R.A.(N.S.) 263, on consciousness of moral nature or quality of act as affecting liability of policy containing suicide clause while sane or insane; 17 L.R.A.(N.S.) 266, on effect of words "sane or insane" or other words relating to mental condition in suicide clause in insurance policy; 17 L.R.A. 90; 21 L. ed. U. S. 237,—on effect of provision avoiding policy in case of suicide; 14 E. R. C. 23, on rules of construction of contracts of insurance.

Disapproved in *Billings v. Accident Ins. Co.* 64 Vt. 78, 33 A. S. R. 913, 17 L.R.A. 89, 24 Atl. 656, holding insurer not liable under policy of life insurance providing against death from "suicide, sane or insane" where assured takes his own life, although he acts in obedience to insane impulse which has overcome his will.

— Validity of provision in policy reducing amount in case of suicide.

Cited in *Keller v. Travelers' Ins. Co.* 58 Mo. App. 557, holding provision in life insurance policy reducing amount of insurance in case of suicide contrary to statute on subject and invalid.

35 AM. REP. 416, ALLEN v. COLLINS, 70 MO. 138.

Interruption of statute of limitations by part payment or acknowledgment.

Cited in *Abercrombie v. Butts*, 72 Ga. 74, 53 A. R. 832, holding that mere private memorandum, unsigned, and found after death of maker, insufficient to relieve bar of statutes of limitations; *Stewart v. McFarland*, 84 Iowa, 55, 50 N. W. 221, holding recital in will not such admission of indebtedness as to revive action on note; *Doran v. Doran*, 145 Iowa, 122, 25 L.R.A.(N.S.) 805, 123 N. W. 996, holding that admission in writing, signed by party to be charged,

that debt is unpaid need not be made to creditor to operate as revival; *Williamson v. Williamson*, 50 Mo. App. 194, holding that written acknowledgment in order to take barred demand out of statute of limitations must be made to creditor or his agent and not to stranger.

Cited in reference notes in 40 A. R. 97, on effect of debtor's promise to stranger to pay barred debt; 41 A. R. 461, 464, as to what promise will prevent attaching or raise bar of statute of limitations; 58 A. R. 749, on memorandum among papers of debtor as reviving debt barred by statute of limitations; 53 A. R. 832; 24 A. S. R. 496,—on what acknowledgment by debtor will remove bar of statute of limitations; 34 A. S. R. 720, on effect of acknowledgment of debt to suspend running of limitations; 51 A. S. R. 746, on acknowledgment of debt as new promise affecting statute of limitations.

Cited in notes in 36 A. R. 697, as to what promise is sufficient to revive a debt once barred; 1 L.R.A.(N.S.) 1117, on devise or legacy reciting consideration as acknowledgment affecting bar of limitations; 102 A. S. R. 754; 25 L.R.A.(N.S.) 809,—on person to whom acknowledgment or new promise must be made to toll statute or remove bar of limitations; 16 E. R. C. 175, on sufficiency of acknowledgment to postpone running of statute of limitations.

Distinguished in *McGinty v. Henderson*, 41 La. Ann. 382, 6 So. 658, holding checks signed and issued by debtor and received by creditor as payments on account of debt, competent evidence to prove interruption of prescription after decease of debtor.

35 AM. REP. 420, LOWRY v. RAINWATER, 70 MO. 152.

Constitutionality of statutes.

Cited in *St. Louis v. Hill*, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861, holding boulevard law providing for building restrictions unconstitutional as depriving person of property without due process of law.

Cited in note in 6 L.R.A. 622, on unconstitutionality of class legislation.

Distinguished in *Cofer v. Riseling*, 153 Mo. 633, 55 S. W. 235, holding statute giving creditor right to recover trust funds lost by betting not void as depriving loser of property without due process of law.

—For protection of fish.

Cited in *Daniels v. Homer*, 139 N. C. 219, 3 L.R.A.(N.S.) 997, 51 S. E. 992 (dissenting opinion), on constitutionality of act authorizing oyster commissioner to seize all nets setting or being used in violation of law and to sell same at public auction.

Disapproved in *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, holding statutory provision authorizing destruction of nets set in state waters in violation of statutes enacted for protection of fish, constitutional.

—As to seizure and destruction of property generally.

Cited in *Modern Loan Co. v. Police Ct.* 12 Cal. App. 582, 108 Pac. 56, holding that one in possession under claim of right cannot be deprived of possession without due process of law; *Berry v. De Maris*, 76 N. J. L. 301, 70 Atl. 337; *McConnell v. McKillip*, 71 Neb. 712, 115 A. S. R. 614, 65 L.R.A. 610, 99 N. W. 505, 8 A. & E. Ann. Cas. 898,—holding statute providing for seizure, forfeiture and transfer of title to property without providing for hearing, unconstitutional and void.

Cited in reference note in 40 A. R. 115, on validity of statute providing for destruction of property illegally used.

Cited in note in 48 A. D. 275, on due process of law in summary seizure and sale of vessels and other property used in violating law.

— As to seizure and destruction of gambling devices.

Cited in *Newman v. People*, 23 Colo. 300, 47 Pac. 278, on constitutionality of statute authorizing destruction of gambling devices without notice to owner; *State v. Robbins*, 124 Ind. 308, 8 L.R.A. 438, 24 N. E. 978, holding order by court necessary to justify destruction of person's gaming apparatus, which has been seized by sheriff under statute; *State v. Derry*, 171 Ind. 18, 131 A. S. R. 237, 85 N. E. 765, holding that owner of slot-machines has right to notice and opportunity to defend, before court may order their destruction.

Cited in reference note in 86 A. S. R. 356, on constitutionality of provision for seizing gambling apparatus.

Cited in notes in 19 L.R.A. 197, on right to compensation for property destroyed in abating a gaming nuisance; 39 L.R.A. 523, on municipal power as to nuisances relating to gambling.

Criticized in *J. B. Mullen & Co. v. Moseley*, 13 Idaho, 457, 121 A. S. R. 277, 12 L.R.A.(N.S.) 394, 90 Pac. 986, 13 A. & E. Ann. Cas. 450, holding anti-gambling act, which authorizes summary seizure and destruction of gambling devices, constitutional.

— As to destruction of animals.

Cited in *King v. Hayes*, 80 Me. 206, 13 Atl. 882, holding statutory provisions authorizing officer of society for prevention of cruelty to animals to condemn, cause to be appraised, and destroyed animal, without notice to owner that he might appear and be heard, unconstitutional.

Distinguished in *Loesch v. Koehler*, 144 Ind. 278, 35 L.R.A. 682, 41 N. E. 326, holding statute authorizing any agent of society for prevention of cruelty to animals to kill animal found neglected or abandoned, unconstitutional.

Validity of ordinances.

Cited in *River Rendering Co. v. Behr*, 77 Mo. 91, 46 A. R. 6, holding ordinance void which confers upon one person right to remove and convert to his own use carcasses of all dead animals, not slain for food, found within city limits, to exclusion of right of owners to remove and use them before they become nuisance; *Kansas City v. Cook*, 38 Mo. App. 660, holding ordinance prohibiting sale of skimmed milk valid exercise of police power of city under its charter.

Cited in reference note in 39 A. R. 208, on constitutionality of ordinance authorizing marshal to seize and sell stray hogs without notice to owner.

Cited in notes in 36 L.R.A. 606, on extent of power of municipality to take or destroy property in preventing or abating nuisances; 36 L.R.A. 612, on power of municipality to define, prevent, and abate nuisance as no infringement of constitutional rights; 36 L.R.A. 613, on notice as prerequisite to abatement of nuisance by municipality.

Distinguished in *Kansas v. Huling*, 87 Mo. 203, holding ordinance as to keeping streets of city in repair not unconstitutional because it directs city engineer to make repairs at expense of adjacent property owner without notice to latter; *Eichenlaub v. St. Joseph*, 113 Mo. 395, 18 L.R.A. 590, 21 S. W. 8, holding ordinance directing removal of wooden building constructed within fire limits as defined by said ordinance, valid and enforceable.

35 AM. REP. 425, BUNN v. JETMORE, 70 MO. 228.**Liability of surety where principal fails to execute bond.**

Cited in Board of Education v. Sweeney, 1 S. D. 642, 36 A. S. R. 767, 48 N. W. 302; Schiek v. Trustees of Schools, 16 Ill. App. 49; State ex rel. Otto v. Austin, 35 Minn. 51, 26 N. W. 906; Gay v. Murphy, 134 Mo. 98, 56 A. S. R. 496, 34 S. W. 1091; North St. Louis Bldg. & L. Asso. v. Obert, 169 Mo. 507, 69 S. W. 1044,—holding bond void as to sureties where principal fails to sign; State v. Hill, 47 Neb. 456, 66 N. W. 541, on liability of sureties where principal did not execute bond; Sullivan v. Williams, 43 S. C. 489, 21 S. E. 642 (dissenting opinion), on effect of principal's failure to execute bond.

Cited in reference notes in 36 A. S. R. 774, on liability of surety on official bond; 40 A. S. R. 52, on liability on bonds not executed by some of the parties; 57 A. S. R. 479, on discharge of surety.

Cited in notes in 90 A. S. R. 193, on effect of omission of principal to sign official bond as to relieving sureties from liability; 12 L.R.A.(N.S.) 1106, on nature of surety's engagement where bond is delivered without signature of principal obligor; 12 L.R.A.(N.S.) 1107, on effect of delivery of bond unsigned by principal obligor when he is independently bound; 12 L.R.A.(N.S.) 1113, on effect of delivery of official bond unsigned by principal obligor where he is bound by operation of law; 12 L.R.A.(N.S.) 1119, on effect of delivery of several bonds unsigned by principal obligor; 12 L.R.A.(N.S.) 1121, on effect of delivery in escrow of bond by principal obligor.

Disapproved in Trustees of Schools v. Sheik, 119 Ill. 579, 58 A. R. 830, 8 N. E. 189, holding sureties liable although principal did not execute bond; O'Hanlon v. Scott, 89 Hun, 44, 35 N. Y. Supp. 31, holding sureties liable on bond although one of obligors failed to sign.

35 AM. REP. 427, STATE v. MEEK, 70 MO. 355.**Necessity of negating statutory exception in indictment.**

Cited in State v. Kimmerling, 124 Ind. 382, 24 N. E. 722, holding that indictment for kidnapping which does not negative exceptions contained in statute defining offense is bad; State v. Finn, 38 Mo. App. 504, holding indictment for selling intoxicating liquors without oath and bond, bad, where it does not negative exception of statute creating offense; State v. Falk, 38 Mo. App. 554, holding indictment for selling flesh of diseased animals which does not negative exception contained in statute defining crime bad on demurrer; State v. Crenshaw, 41 Mo. App. 24, holding indictment for malicious injury to dwelling house, contrary to statute, is fatally defective, if it fails to charge that person indicted had no interest in the property; State v. Raymond, 54 Mo. App. 425, holding that indictments for statutory crimes must show that defendant is not within exception contained in clause of statute defining offense; State v. O'Brien, 74 Mo. 549; State v. Ravenscraft, 62 Mo. App. 109; State v. Dean, 85 Mo. App. 473,—to point that when exception contained in defining clause of statute constitutes part of description of offense charged indictment must negative exception; State v. Bockstruck, 136 Mo. 335, 38 S. W. 375, holding that where affirmative offense is created by statute without reference to exception contained therein, exception need not be negated in indictment.

—For procuring abortion.

Cited in State v. Aiken, 109 Iowa, 643, 80 N. W. 1073, to point that indictment for abortion, must negative all exceptions in statute defining offense; State v.

Stokes, 54 Vt. 179, holding that indictment for procuring abortion bad on demurrer where it did not negative clause in statute to wit, unless same is necessary to preserve her life.

Necessity of proving negative averment.

Cited in *State v. Hathaway*, 115 Mo. 36, 21 S. W. 1081, holding that where subject matter of negative averment lies peculiarly within knowledge of other party, averment is taken as true unless disproved by that party; *State v. Schatt*, 128 Mo. App. 622, 107 S. W. 10, to point that when subject matter of negative proposition lies peculiarly within knowledge of defendant and full proof is made on other material allegations, negative proposition will be regarded as established unless disproved by party possessed of such peculiar knowledge.

35 AM. REP. 431, McCORMICK v. KANSAS CITY, ST. J. & C. B. R. CO. 70 MO. 359.

Rights and liabilities as to surface water.

Cited in *California Pastoral & Agri. Co. v. Enterprise Canal & Land Co.* 127 Fed. 741, holding that riparian owner has right to restrain unlawful diversion of water from stream above his land; *Phillips v. Waterhouse*, 69 Iowa, 199, 58 A. R. 220, 28 N. W. 539, to point that person cannot collect surface water and precipitate it upon premises of another; *Boyd v. Conklin*, 54 Mich. 583, 52 A. E. 831, 20 N. W. 595, holding that farm owner may not erect such barriers as will flood his neighbor's land with surface water that would otherwise escape over his own land; *Benson v. Chicago & A. R. Co.* 78 Mo. 504; *Chicago, R. I. & P. R. Co. v. Johnson*, 25 Okla. 760, 27 L.R.A.(N.S.) 879, 107 Pac. 662; *Stewart v. Clinton*, 79 Mo. 603,—to point that dominant proprietor may not collect surface water as in artificial ditches and discharge it upon servient land in increased volume.

Cited in reference note in 37 A. R. 150, on liability for concentrating and casting surface water on another's land.

Cited in notes in 32 A. D. 126, on servitude to receive flow of water; 3 A. S. R. 788, on right to augment servitude of lower land as to drainage by acts of industry; 85 A. S. R. 716, on right to diminish or impede flow of surface water onto one's own land; 85 A. S. R. 731, on right to accelerate or increase flow of surface water over another's land in large quantities; 25 L.R.A. 531, on flood water as surface water; 6 L.R.A. 450, on right to interfere with natural drainage in improving one's own land.

Cited as overruled in *Hoester v. Hemsath*, 16 Mo. App. 485, holding that land owner may rightfully so ditch his own land as to collect, and cause to flow in body into pond on adjoining land surface water which formerly flowed into pond through natural channels; *Martin v. Benoist*, 20 Mo. App. 262, holding that land owner cannot discharge surface water, collected in cellar, into adjoining house of another by means of tunnel.

— Of railroad company.

Cited in *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 237, 36 A. R. 480, holding that railroad company has no right by erecting embankment, to stop natural flow of surface water; *Munkres v. Kansas City, St. J. & C. B. R. Co.* 72 Mo. 514, holding railroad company, in absence of negligence, not liable to adjoining land owner for injury resulting from overflow of surface waters by obstruction caused by roadbed.

Cited in notes in 21 L.R.A. 597, on right of railroad companies to collect or divert surface water in masses; 12 L.R.A.(N.S.) 682, on liability of railroad for conducting surface water through its embankments and onto property of adjoining owner.

Overruled in *Abbott v. Kansas City, St. J. & C. R. Co.* 83 Mo. 271, 53 A. R. 581, holding railroad company lawfully constructing bridge, liable, only in case of negligence to one injured by its interference with running water.

Cited as overruled in *Jones v. St. Louis, I. M. & S. R. Co.* 84 Mo. 161; *Schneider v. Missouri P. R. Co.* 29 Mo. App. 68; *Morrissey v. Chicago, B. & Q. R. Co.* 138 Neb. 406, 56 N. W. 946; *Egener v. New York & R. B. R. Co.* 3 App. Div. 157, 38 N. Y. Supp. 319,—holding railroad company, in absence of negligence, not liable to owner of land for injury resulting from overflow of surface waters by obstruction caused by roadbed; *Edwards v. Charlotte, C. & A. R. Co.* 39 S. C. 472, 39 A. S. R. 746, 22 L.R.A. 246, 18 S. E. 58, holding railroad company not liable where in erecting sandbank to protect itself against surface water it thereby caused water to flow upon and injure land of adjoining owner; *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 246, 27 A. S. R. 246, 13 L.R.A. 394, 13 S. E. 489, holding railroad company liable for injury caused by erection of embankment on margin of river which increases overflow in times of flood upon lands of opposite proprietor.

— Of municipality.

Cited in *Rychlicki v. St. Louis*, 98 Mo. 497, 14 A. S. R. 651, 4 L.R.A. 594, 11 S. W. 1001 (dissenting opinion), on law governing flow and change of surface water as applied to acts of municipal corporations in construction of streets; *Cannon v. St. Joseph*, 67 Mo. App. 367, holding city liable where by improvement it collects body of water in one place and by artificial means throws it upon land-owner.

Cited in note in 35 A. R. 543, on municipal liability for flowing private lands.

Right to use one's own land.

Cited in *Ramsdale v. Foote*, 55 Wis. 557, 13 N. W. 557, to point that person may use his own land as he sees fit provided he does not thereby injure that of his neighbor.

35 AM. REP. 437, STATE v. HORN, 70 MO. 466.

Liability of bondsmen.

Cited in *Re James*, 18 Fed. 853, to point that bondsmen have complete control over accused, can keep him in actual custody and arrest him without warrant.

Cited in reference notes in 37 A. R. 52, on conviction and imprisonment in another state relieving sureties; 44 A. R. 471, on arrest of principal on same charge by Federal authorities as discharge of bail under state authority; 25 A. S. R. 527, on effect of principal's imprisonment in another state on surety's obligation to pay.

Cited in notes in 99 A. D. 220, on subsequent arrest or indictment of principal as exoneration of bail; 23 L.R.A.(N.S.) 140, on liability of bail where principal cannot appear.

35 AM. REP. 438, COOK v. CONTINENTAL INS. CO. 70 MO. 610.

What constitutes occupancy of insured premises.

Cited in *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Niagara F.*

Ins. Co. v. Dida, 19 Ill. App. 70,—on construction of policy as to whether building was unoccupied within its terms; *Hoover v. Mercantile Town Mut. Ins. Co.* 93 Mo. App. 111, 69 S. W. 42, to point that occupation of dwelling house is living in it; *Norman v. Missouri Town Mut. F. L. T. C. & W. Ins. Co.* 74 Mo. App. 456, holding house not vacant within stipulation of policy against vacancy where tenant was moving but not getting through that day left portion of furniture in old house which was burned, though his family occupied new home that night; *Weidert v. State Ins. Co.* 19 Or. 261, 20 A. S. R. 809, 24 Pac. 242, holding that dwelling-house to be occupied within meaning of policy must be used by human beings as their customary place of abode; *Connecticut F. Ins. Co. v. Buchanan*, 4 L.R.A. (N.S.) 758, 73 C. C. A. 111, 141 Fed. 877, holding building unoccupied within terms of policy where its use for school purposes had been suspended and no one was living in it at time; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 19 A. S. R. 77, 9 L.R.A. 81, 24 N. E. 727, holding dwelling unoccupied where tenant has moved out and nothing had been left in it except two planes; *Sexton v. Hawkeye Ins. Co.* 69 Iowa, 99, 28 N. W. 462, holding building described in policy as "dwelling house" unoccupied where tools were stored therein but no one was living in it; *Limburg v. German F. Ins. Co.* 90 Iowa, 709, 48 A. S. R. 468, 23 L.R.A. 99, 57 N. W. 626, holding building unoccupied where it contained some merchandise but no one was living in it; *Stoltenberg v. Continental Ins. Co.* 106 Iowa, 565, 68 A. S. R. 323, 76 N. W. 835, to point that house is unoccupied when no one is living in it; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 51 A. S. R. 457, 30 L.R.A. 633, 33 Atl. 429, holding house unoccupied within terms of policy where members of insured's family occasionally slept there but meals were not cooked or served there; *Craig v. Springfield F. & M. Ins. Co.* 34 Mo. App. 481, holding that there is not such occupancy as is stipulated in policy where parties left part of furniture in house, visited it at intervals but no one lived or slept in it; *Derry v. Prescott Ins. Co.* 35 Hun, 601, holding house unoccupied within meaning of policy where owner had moved all her furniture into it with view of occupying but no person was living there when it took fire; *East Texas F. Ins. Co. v. Smith*, 3 Tex. App. Civ. Cas. (Willson) 344, holding policy stipulating for forfeiture in case of unoccupancy avoided where tenant removes leaving house unoccupied although without knowledge of landlord.

Cited in note in 8 L.R.A. 79, on when dwelling house is occupied within meaning of insurance policy.

Vacancy as ground for avoidance of policy.

Cited in *Royal Ins. Co. v. Lubelsky*, 86 Ala. 530, 5 So. 768, holding that no recovery can be had on policy stipulating against unoccupancy where house was vacant and unoccupied at time of its destruction by fire; *Hackett Bros. v. Philadelphia Underwriters*, 79 Mo. App. 16, holding that if house becomes vacant where policy requires that it shall be and remain occupied there can be no recovery for loss; *Sullivan v. Germania F. Ins. Co.* 89 Mo. App. 106, holding that person could not recover for loss by fire without vacancy permit unless dwelling house continued to be occupied; *Mooney v. Glens Falls Ins. Co.* 4 Pa. Dist. R. 639, holding proof of abandonment of premises by tenant sufficient to relieve insurance company from liability for loss by fire.

Cited in reference notes in 35 A. R. 656, on vacation by tenant without assured's knowledge as breach of vacancy clause; 37 A. R. 488, on "vacant and unoccupied" building avoiding insurance; 54 A. R. 379; 59 A. R. 444,—on what constitutes vacancy in regard to insurance policy; 42 A. S. R. 515, on violation of condition

against unoccupied premises in insurance policy; 51 A. S. R. 337, on effect of temporary vacancy on insurance policy; 34 A. S. R. 598, on condition in policy against premises becoming "vacant and unoccupied;" 40 A. S. R. 724, on effect of condition in insurance policy against vacancy of premises.

Cited in notes in 10 A. S. R. 391, 393; 29 A. S. R. 773,—on signification of term "vacant and unoccupied" in policy; 8 L.R.A. 80, on object of stipulation against vacancy in insurance policy; 2 L.R.A. (N.S.) 519, on vacancy of insured building caused by removal for medical attention.

Distinguished in *Pabst Brewing Co. v. Union Ins. Co.* 63 Mo. App. 663, holding party entitled to recover if there was any occupancy of premises from expiration of thirty days of permitted vacancy until fifteen days of fire in which event policy would not be forfeited.

— **Effect of agent's knowledge of, or assent to, vacancy.**

Cited in *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15, 19 A. S. R. 118, 22 Pac. 1010, holding insurer not liable for loss of house by fire where it became vacant by consent of local agent; *Wheeler v. Phoenix Ins. Co.* 53 Mo. App. 446, holding insurer, insuring only during time building shall not be vacant, not liable for loss during vacancy, notwithstanding agent issuing policy knew house was tenement house.

Admissibility of offer of compromise.

Cited in *Maddox v. German Ins. Co.* 39 Mo. App. 198; *James v. Insurance Co.* 135 Mo. App. 247, 115 S. W. 478; *Cullen v. Insurance Co. of N. A.* 126 Mo. App. 412, 104 S. W. 117,—holding offer of compromise not admissible for purpose of showing waiver of proofs of loss.

35 AM. REP. 444, GROVER & B. SEWING MACH. CO. v. MISSOURI P. R. CO. 70 MO. 672.

Authority of carrier's agent to contract.

Cited in *Baker v. Kansas City, St. J. & C. B. R. Co.* 91 Mo. 152, 3 S. W. 486, holding that where railroad holds one out as its freight agent, with general authority in that line of business, it will be bound by acts of such agent within scope of his general authority; *Silver v. Missouri K. & T. R. Co.* 125 Mo. App. 402, 102 S. W. 621, holding that station agent has no implied authority to hire one to carry mail between station and postoffice so as to bind railroad company; *Houston & T. C. R. Co. v. Hill*, 63 Tex. 381, 51 A. R. 642, holding that general passenger agent may bind railroad company by contract for transportation of excursionists.

Cited in notes in 9 L.R.A. 833, on contract by freight agent for freight transportation; 10 L.R.A. 355, on principal's responsibility for acts of agent.

Distinguished in *St. Louis & S. F. R. Co. v. Ryan*, 56 Ark. 245, 19 S. W. 839, holding railway company liable where ticket agent, contrary to orders, made excessive charge of passenger fare.

— **For transportation beyond terminus.**

Cited in *Farmers' Loan & T. Co. v. Northern P. R. Co.* 57 C. C. A. 533, 120 Fed. 873, holding that it is within power of general freight agent to contract for carrying of goods beyond limit of carrier's line; *White v. Missouri P. R. Co.* 19 Mo. App. 400, holding that station agent could bind railroad company by contract for transportation beyond terminus where company had sanctioned other similar contracts thus made by agent; *Turner v. St. Louis & S. F. R. Co.* 20 Mo.

App. 632, holding that local freight agent of railroad company has no power as such, to make contract for transportation of freight beyond terminus of road; *Crouch v. Louisville & N. R. Co.* 42 Mo. App. 248, holding that mere agent to solicit business cannot bind railway company by contract for carriage of freight beyond terminus without authority express or implied; *Page v. Chicago, St. P. M. & O. R. Co.* 7 S. D. 297, 64 N. W. 137; *McLagan v. Chicago & N. W. R. Co.* 116 Iowa, 183, 89 N. W. 233; *Hoffman v. Cumberland Valley R. Co.* 85 Md. 391, 37 Atl. 214; *Orr v. Chicago & O. R. Co.* 21 Mo. App. 333; *Patterson v. Kansas City, Ft. S. & M. R. Co.* 47 Mo. App. 570; *Minter v. Southern Kansas R. Co.* 56 Mo. App. 282; *Faulkner v. Chicago, R. I. & P. R. Co.* 99 Mo. App. 421, 73 S. W. 927,—holding that station agent cannot bind railroad by contract for transportation beyond terminus without authority express or implied.

Liability of carrier for transportation beyond its own line.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Bryant*, 36 Ind. App. 340, 75 N. E. 829, holding carrier only bound, in absence of special contract, to carry over its own route and safely deliver to next connecting carrier.

Cited in reference note in 2 A. S. R. 325, on liability of connecting carriers.

Cited in notes in 72 A. D. 236, on liability of carrier under American rule for goods consigned to point beyond its line; 42 A. R. 666, on connecting carrier's liability beyond its line; 31 L.R.A.(N.S.) 7, 31, 33, 34, on liability of connecting carrier for loss beyond own line; 21 L. ed. U. S. 298, on liability of common carrier for goods to be transported beyond termination of his line.

—Effect of contract for transportation.

Cited in *Little Rock, M. R. & T. R. Co. v. Glidewell*, 39 Ark. 487, to point that railroad company may by contract, express or implied, bind itself to transport persons or property beyond line of its own road; *Loomis v. Wabash, St. L. & P. R. Co.* 17 Mo. App. 340, holding that common carrier may, by contract, extend its undertaking to deliver beyond terminus of its line of transportation; *Marshall Medicine Co. v. Chicago & A. R. Co.* 126 Mo. App. 455, 104 S. W. 478, to point that common carrier may be bound by contract, express or implied, but not otherwise, to transport persons or property beyond line of its road.

35 AM. REP. 450, HIGLEY v. GILMER, 3 MONT. 90, Later appeal in 3 Mont. 433.

Followed without discussion in *Rondebush v. Ray*, 3 Mont. 188; *Mayme v. Creighton*, 3 Mont. 108.

Duty of carrier to passengers or trespassers.

Cited in *Kennon v. Gilmer*, 5 Mont. 257, 51 A. R. 45, 5 Pac. 847, holding carrier of passengers bound to exercise utmost care and skill which prudent men are accustomed to use under similar circumstances; *McNeill v. Durham & C. R. Co.* 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765 (dissenting opinion), to point that person on train without authority of any contract was entitled to ordinary care.

Cited in reference note in 35 A. S. R. 660, on carrier's duty to trespassers on train.

Who are passengers.

Cited in *Indianapolis Traction & Terminal Co. v. Lawson*, 5 L.R.A.(N.S.) 721, 74 C. C. A. 630, 143 Fed. 834, 6 A. & E. Ann. Cas. 666, holding passenger one who undertakes, with carrier's consent, to travel in carriage of latter, other-

wise than in its service; *Zuendt v. Missouri P. R. Co.* 124 Mo. 223, 25 S. W. 229; *Gates v. Quincy, O. & K. C. R. Co.* 125 Mo. App. 334, 102 S. W. 50,—holding that if it was party's intention when he got upon train not to pay full fare for his transportation, he did not become a passenger; *Citizens Street R. Co. v. Jolly*, 161 Ind. 80, 67 N. E. 935, holding that issue as to whether person is passenger on street car, when evidence is conflicting, is for determination of jury.

Cited in notes in 82 A. D. 294, as to who is a passenger; 61 A. S. R. 103, on who are passengers on connecting lines; 61 A. S. R. 76, on creation of relation of passenger by contract only; 61 A. S. R. 86, on person paying fare as passenger; 2 L.R.A. 167, as to whether trespassers are passengers; 15 L.R.A. (N.S.) 961, on effect of express refusal to accept one as a passenger upon his status as such.

Burden of proof as to contributory negligence.

Cited in *Wall v. Helena Street R. Co.* 12 Mont. 44, 29 Pac. 721 (dissenting opinion), to point that contributory negligence is matter of defense and plaintiff need not allege or prove its absence; *Mulville v. Pacific Mut. L. Ins. Co.* 19 Mont. 95, 47 Pac. 650, holding contributory negligence matter of defense; *Hunter v. Montana C. R. Co.* 22 Mont. 525, 57 Pac. 140, holding that one who relies on contributory negligence as defense in action for personal injury must allege and prove it; *Nelson v. Helena*, 16 Mont. 21, 39 Pac. 905; *Prosser v. Montana C. R. Co.* 17 Mont. 372, 30 L.R.A. 814, 43 Pac. 81; *Cummings v. Helena & L. Smelting & Reduction Co.* 26 Mont. 434, 68 Pac. 852; *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Nord v. Boston & M. Consol. Copper & S. Min. Co.* 30 Mont. 48, 75 Pac. 681,—to point that in actions for personal injuries absence of contributory negligence is not required to be proved by plaintiff but its presence is matter of defense; *State ex rel. Montana C. R. Co. v. District Ct.* 32 Mont. 37, 79 Pac. 546, holding that contributory negligence in action for personal injuries is special defense which must be pleaded.

Admissibility of evidence of antecedent acts.

Cited in *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42, holding that in action for personal injuries by falling down elevator shaft it may be shown that door was open at times antecedent to accident in corroboration of claim that door was open because of defective condition of lock.

35 AM. REP. 458, BANK OF DEER LODGE v. HOPE MIN. CO. 3 MONT. 146.

Liability of principal for acts of agent.

Cited in *First Nat. Bank v. Hall*, 8 Mont. 341, 20 Pac. 638, holding that bank had no right to rely upon agent's being authorized to draw draft, from fact of his having only once before exercised similar authority; *Kircher v. Conrad*, 9 Mont. 191, 18 A. S. R. 731, 7 L.R.A. 471, 23 Pac. 74, holding principal responsible for acts of agent when done within scope of his authority; *Trent v. Sherlock*, 24 Mont. 255, 61 Pac. 650, holding bill of sale of portion of mining property by superintendent, without authority, not prima facie binding on corporation; *Moore v. Skyles*, 33 Mont. 135, 114 A. S. R. 801, 3 L.R.A. (N.S.) 136, 82 Pac. 799, holding that all persons dealing with agent are bound to ascertain scope of agent's authority, and if they do not, they deal with him at their peril; *Bank of Commerce v. Baird Min. Co.* 13 N. M. 424, 85 Pac. 970, holding that managing agent of mining corporation has no implied power to pledge credit of principal by drawing and cashing bills of exchange.

Cited in reference notes in 72 A. D. 760, on who are general agents and extent of authority to bind principal; 63 A. S. R. 636, on power of agent to execute note in principal's name.

Equitable estoppel.

Cited in *Dye v. Crary*, 13 N. M. 439, 9 L.R.A.(N.S.) 1136, 85 Pac. 1038, on essential elements of equitable estoppel.

35 AM. REP. 462, JEFFERSON COUNTY v. LINEBERGER, 3 MONT. 231.

Liability of officer for loss of public funds.

Cited in *Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832, 17 A. & E. Ann. Cas. 926, holding custodian of public money responsible as an insurer; *Maloy v. Bernalillo County*, 10 N. M. 638, 52 L.R.A. 126, 62 Pac. 1106; *Fairchild v. Hedges*, 14 Wash. 117, 31 L.R.A. 851, 44 Pac. 125,—holding county treasurer strictly accountable for all public funds coming into his hands; *Bush v. Johnson County*, 48 Neb. 1, 58 A. S. R. 673, 32 L.R.A. 223, 66 N. W. 1023, holding county treasurer and sureties liable for failure on his part to pay over public money notwithstanding it is lost without his fault or negligence.

Cited in notes in 67 A. D. 367, on ground of liability of public officials for funds placed in their hands; 67 A. D. 368, on extent of liability of officers having custody of public moneys; 55 L.R.A. 393, on penalty as limit of liability on statutory bonds of treasurers, collectors, and paymasters.

— By theft.

Cited in *United States v. Bryan*, 82 Fed. 290, holding postmaster and sureties on official bond liable for public funds embezzled by clerk appointed under civil service laws; *Board of Education v. Jewell*, 44 Minn. 427, 20 A. S. R. 536, 46 N. W. 914, holding school-district treasurer and sureties on official bond liable for public funds lost by burglary although without fault of former.

Cited in reference note in 3 A. S. R. 881, on liability of public treasurer or collector on official bond for money stolen without his fault.

Cited in notes in 56 A. R. 66, on liability of public officer for loss of public funds by larceny; 22 L.R.A. 451, on liability on official bond for loss by theft or bank failure.

— By failure of bank.

Cited in *Gartley v. People*, 24 Colo. 155, 49 Pac. 272, holding county treasurer and sureties on official bond liable for loss of public funds deposited in bank which subsequently failed; *Tillinghast v. Merrill*, 77 Hun. 481, 28 N. Y. Supp. 1089, holding deposit of school moneys by town supervisor with bankers who subsequently fail no defense to action for nonpayment; *State use of Overton County v. Copeland*, 96 Tenn. 296, 54 A. S. R. 840, 31 L.R.A. 844, 34 S. W. 427, holding county trustee liable for public funds placed by him in bank and lost.

Cited in reference note in 35 A. R. 477, on liability of public treasurer for loss of money by failure of depository.

Overruled in *Livingston v. Woods*, 20 Mont. 91, 49 Pac. 437, holding city treasurer not liable for loss of public funds on deposit, by failure of bank if he used reasonable care in selecting bank and was without fault in keeping deposit.

Liability of surety on official bond.

Cited in *Maddox v. Rader*, 9 Mont. 126, 22 Pac. 386, holding that on refusal to pay official bond sureties are liable for legal interest from date of demand,

though principal with such interest added exceeds penalty of bond; *Dackich v. Bariob*, 37 Mont. 490, 97 Pac. 931, holding undertaking, when reasonably construed, binding on sureties to pay any judgment recovered by plaintiff, in case attachment defendant failed to pay.

Cited in notes in 90 A. S. R. 198, on effect of naming wrong obligee on liability of sureties on official bond; 91 A. S. R. 526, on liability of sureties on official bonds for loss by negligence only; 21 L.R.A. (N.S.) 771, on enforceability of bond of public official, intended, but not binding, as a statutory bond.

Sufficiency of complaint to sustain judgment for interest.

Cited in *Burns v. Paulsen*, 16 Mont. 333, 40 Pac. 789, holding averments in complaint to effect that defendants have refused to pay any part of sums demanded to unreasonable and vexatious delay of plaintiff, sufficient to sustain judgment for interest.

— What law controls as to interest.

Cited in *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. 837, holding interest on purchase money for property delivered in state where contract of sale was made recoverable in accordance with statute of that state, when it is pleaded and proved, although action is brought in another state.

35 AM. REP. 466, FRAZIER v. SYAS, 10 NEB. 115, 4 N. W. 934.

Right of abandoned wife to homestead exemption.

Cited in *Watterson v. E. L. Bonner Co.* 19 Mont. 554, 61 A. S. R. 527, 48 Pac. 1108, holding that abandoned wife may claim homestead exemption; *Farmers' & M. Bank v. Hoffman*, 5 Neb. (Unof.) 9, 96 N. W. 1044, holding that husband's desertion did not transfer to wife title of his exempt property; *Hamilton v. Fleming*, 26 Neb. 240, 41 N. W. 1002, holding wife of absconding husband entitled to exemption as head of family; *Paul Schminke Co. v. Holden*, 86 Neb. 303, 125 N. W. 511; *State ex rel. Scoville v. Wilson*, 31 Neb. 462, 48 N. W. 147,—holding wife of absconded husband, as head of family, entitled to goods of value of five hundred dollars as exemption; *Ecker v. Lindskog*, 12 S. D. 428, 48 L.R.A. 155, 81 N. W. 905, holding wife as head of family entitled to homestead exemption when husband is insane and detained in asylum.

Cited in reference note in 1 A. S. R. 618, on deserted wife carrying on farm as head of family within exemption of statute.

Cited in note in 4 L.R.A. (N.S.) 373, on wife with dependents as "family" under homestead and exemption laws.

Right to convey homestead or land purchased with its proceeds.

Cited in *Jayne v. Hymer*, 66 Neb. 785, 92 N. W. 1019, holding creditor's bill not maintainable to set aside conveyance of property exempt as homestead; *Scheel v. Lackner*, 4 Neb. (Unof.) 221, 93 N. W. 741, holding that debtor had right to convey to wife land purchased by proceeds of homestead.

Cited in notes in 75 A. D. 646, on replevin by debtor whose exemption rights have been disregarded; 75 A. D. 648, on against whom action lies for disregarding exemption rights of debtor.

**35 AM. REP. 468, LAUSMAN v. DRAHOS, 10 NEB. 172, 4 N. W. 956,
Later appeal in 12 Neb. 102.**

Right of tenant to purchase landlord's title at forced sale.

Cited in *Pickett v. Ferguson*, 45 Ark. 177, 55 A. R. 545, holding that tenant

may purchase landlord's title at voluntary or forced sale and so terminate lease.

Cited in notes in 89 A. S. R. 82, on acquisition of landlord's title by tenant; 120 A. S. R. 59, on acquisition of landlord's title as defense in action for unlawful detainer; 53 L.R.A. 936, on right of tenant to acquire title not inconsistent with landlord's title at commencement of tenancy; 53 L.R.A. 938, on right of tenant to acquire title derived from judicial sale during tenancy; 21 L. ed. U. S. 789, on right of tenant to dispute landlord's title; 15 E. R. C. 305, on right of tenant to purchase landlord's property sold on execution.

Adverse possession by tenant.

Cited in *Card v. Deans*, 84 Neb. 4, 120 N. W. 440; *Schiels v. Horbach*, 49 Neb. 262, 68 N. W. 524,—holding that tenant cannot claim his possession is adverse until he has surrendered possession of leased premises; *Ross v. McManigal*, 61 Neb. 90, 84 N. W. 610, holding that if tenant fails to surrender possession of demised premises at expiration of lease it will be presumed that he continues to hold in character of tenant.

35 AM. REP. 471, McMILLAN v. MALLOY, 10 NEB. 228, 4 N. W. 1004.

Followed without special discussion in *Sawyer v. Brown*, 17 Neb. 171, 22 N. W. 355.

Right to recover for part performance of contract.

Cited in *West v. Van Pelt*, 34 Neb. 63, 51 N. W. 313, holding adverse party retaining benefits liable, in action on contract for services performed, for value of such services in excess of damages sustained by failure to fully perform contract.

Cited in reference notes in 37 A. R. 503, on recovery pro tanto for part delivery on contract; 1 A. S. R. 468, on recovery for services rendered where special contract is not completed.

Cited in note in 24 L.R.A. 234, on effect of employee's abandonment of contract of services without cause.

Practice on cross examination.

Distinguished in *Stanton Co. v. Canfield*, 10 Neb. 387, 6 N. W. 465, holding that on cross examination all questions properly within scope of direct examination which do not tend to criminate witness, and which tend to elucidate, vary, contradict, or affirm his direct testimony, are pertinent and proper.

Necessity for exception to rejection of testimony.

Cited in *Sieber v. Weiden*, 17 Neb. 582, 24 N. W. 215, holding that when testimony is offered and excluded, bill of exceptions must set forth testimony thus offered and rejected.

Necessity for stating grounds of objection.

Cited in *Kilkie & A. Co. v. Dawson Town & Gas Co.* 46 Neb. 333, 64 N. W. 978, holding objection to interrogatory not wrongfully sustained where no statement or offer of proof was made.

35 AM. REP. 477, WARD v. SCHOOL DIST. 10 NEB. 293, 4 N. W. 1001.

Liability of officer for loss of public funds.

Cited in *Bush v. Johnson County*, 48 Neb. 1, 58 A. S. R. 673, 32 L.R.A. 223, 66 N. W. 1023, holding county treasurer and sureties on bond liable for failure

to pay over public money, notwithstanding it may have been lost without his fault; *Tillinghast v. Merrill*, 151 N. Y. 135, 56 A. S. R. 612, 34 L.R.A. 678, 45 N. E. 375, holding supervisor liable for public funds lost without fault or negligence on his part; *Fairchild v. Hedges*, 14 Wash. 117, 31 L.R.A. 851, 44 Pac. 125, holding county treasurer strictly accountable for all public funds coming into his hands.

Cited in reference note in 3 A. S. R. 881, on liability of public treasurer or collector on official bond for money stolen without his fault.

Cited in notes in 67 A. D. 368, on extent of liability of officers having custody of public moneys; 91 A. S. R. 562, on liability of sureties on bonds of treasurers for loss of bank deposits.

—By theft.

Cited in *United States v. Bryan*, 82 Fed. 290, holding postmaster liable for public funds embezzled by clerk appointed under civil service laws; *Board of Education v. Jewell*, 44 Minn. 427, 20 A. S. R. 586, 46 N. W. 914, holding school-district treasurer and sureties on bond liable for public funds lost by burglary although without former's fault.

Cited in reference note in 35 A. R. 462, on county treasurer's liability for money stolen by others.

Cited in notes in 56 A. R. 66, on liability of public officer for loss of public funds by larceny; 22 L.R.A. 451, on liability on official bond for loss by theft or bank failure.

—By failure of bank.

Cited in *Alston v. State*, 92 Ala. 124, 13 L.R.A. 659, 9 So. 732, holding probate judge liable for public funds deposited by him in bank and lost; *Lamb v. Dart*, 108 Ga. 602, 34 S. E. 160, holding county treasurer liable for loss of funds deposited on account of subsequent failure of bank; *Jacobson v. Cary*, 51 Neb. 762, 71 N. W. 723, holding county treasurer liable for loss of funds deposited in insolvent banks.

Cited in reference note in 40 A. R. 675, on liability of county treasurer for loss of money by failure of depositary.

Overruled in *People ex rel. Nash v. Faulkner*, 107 N. Y. 477, 14 N. E. 415, holding surrogate and sureties on bond not liable for private individuals' money deposited and lost on account of failure of bank in absence of former's negligence.

Authority of school district to release treasurer from liability.

Cited in *Board of Education v. Jewell*, 44 Minn. 427, 20 A. S. R. 586, 46 N. W. 914, holding vote of school district, and board of education, without consideration, to discharge legal obligation of treasurer, ineffectual.

35 AM. REP. 479, SKINNER v. REYNICK, 10 NEB. 323, 6 N. W. 369.

Right to encumber Federal homestead.

Cited in *Duell v. Potter*, 51 Neb. 241, 70 N. W. 932, to point that Federal homestead may be mortgaged to secure debt contracted by patentee prior to issuing of patent.

Cited in reference note in 11 A. S. R. 45, on right to alienate or encumber homestead.

Cited in notes in 52 A. S. R. 253, on mortgage by homesteader on public land; 6 L.R.A.(N.S.) 935, on validity of mortgage upon public lands executed by claimant under the homestead acts prior to patent or final proof.

Estoppel to deny validity of lien.

Cited in *Smith v. Shaffer*, 29 Neb. 656, 49 N. W. 936, holding grantees of real estate having assumed all liens liable for notes held by grantor's wife and could not dispute validity of her lien; *Koch v. Losch*, 31 Neb. 625, 48 N. W. 471, holding purchasers at judicial sale, of land subject to mortgage estopped to dispute validity of encumbrance; *Eddy v. Omaha*, 72 Neb. 550, 101 N. W. 25, holding that in foreclosure sale where tax lien is deducted from appraised value of debtor's interest, and purchaser takes advantage of deduction, he cannot deny its validity in suit to enjoin collection of taxes; *City Safe Deposit & Agency Co. v. Omaha*, 79 Neb. 446, 21 L.R.A.(N.S.) 72, 112 N. W. 598, holding city acquiring title by eminent domain estopped to deny validity of liens deducted from appraisal.

Title of purchaser at sale subject to junior lien.

Cited in *Hart v. Beardsley*, 67 Neb. 145, 93 N. W. 423, on title acquired by purchaser at foreclosure sale of land subject to junior lien.

35 AM. REP. 480, FORBES v. OMAHA NAT. BANK, 10 NEB. 338, 6 N. W. 393.**Sufficiency of notice of dishonor.**

Cited in *Phelps v. Stocking*, 21 Neb. 443, 32 N. W. 217, to point that endorser of paper payable at place situated within his own postoffice delivery does not by implication agree to receive notice of dishonor through postoffice; *Brown v. Bank of Abington*, 85 Va. 95, 7 S. E. 357, holding notice not sufficient to charge endorser of promissory note who resided just outside corporate limits where notice directed to him was dropped into postoffice without proof of bank's usage, known to indorser when he indorsed, so to send notices to persons living outside but near town.

Cited in reference note in 1 A. S. R. 602, on sufficiency of notice of protest by mail.

Cited in note in 38 A. D. 612, on what is deemed same place of residence for purpose of notice of dishonor of bill or note.

35 AM. REP. 487, DELANY v. ERRICKSON, 10 NEB. 492, 6 N. W. 600. Reversed on rehearing on other grounds in 11 Neb. 533, 10 N. W. 451.**Admissibility of letter press copies.**

Cited in *Ward v. Beals*, 14 Neb. 114, 15 N. W. 353, holding letter press copies of letters secondary evidence inadmissible against objection without first showing loss of originals; *State v. Halstead*, 73 Iowa, 376, 35 N. W. 457, holding letter press copies of letters not admissible unless originals are accounted for, and it is shown that they cannot be produced at trial.

Cited in note in 11 E. R. C. 458, on admissibility of secondary evidence of contents of private document.

Admissibility of record of deed in evidence.

Cited in *Staunfield v. Jeutter*, 4 Neb. (Unof.) 847, 96 N. W. 642, holding record of deed admissible without inquiry as to original whenever evidence as whole fairly indicates that original is not in possession of party offering such proof; *Buck v. Gage*, 27 Neb. 306, 43 N. W. 110, holding that in ejectment where party seeks to prove title in stranger as defense and it appears that original deed does not belong to him, copy of record will be competent evi-

dence in first instance, without proof of loss of original; *Rupert v. Penner*, 35 Neb. 587, 17 L.R.A. 824, 53 N. W. 598, holding record of deeds admissible in evidence without laying foundation therefor, where there is no presumption that originals were ever in party's possession.

Remedy for trespass of animals.

Cited in *Keith v. Tilford*, 12 Neb. 271, 11 N. W. 315, holding that remedy for trespass by live stock upon cultivated lands, as provided by act of March 8, 1871, is cumulative and not exclusive remedy.

Liability for damages by trespassing animals.

Cited in *Lorance v. Hillyer*, 57 Neb. 266, 77 N. W. 755, to point that owner is liable for damages resulting from trespassing of animals on cultivated land; *Heist v. Jacoby*, 71 Neb. 395, 98 N. W. 1058, holding owner not liable for injuries to passer's equipage and person produced by fright of hogs wandering on highway; *Hecht v. Harrison*, 5 Wyo. 279, 40 Pac. 306, to point that where live stock are driven upon uninclosed lands of another, without his permission, owner is responsible for damages they may cause while there.

Cited in notes in 81 A. S. R. 448, on liability of owners of cattle ranging over uninclosed land; 22 L.R.A. 55, on liability of owner for injury by trespassing stock.

Explained and restricted in *Laplin v. Svoboda*, 37 Neb. 368, 55 N. W. 1049, holding person having custody of cattle for purpose of depasturing same, although without compensation from owner, liable for damages done by them upon cultivated lands of another.

Power of courts to declare common law inapplicable.

Cited in *Meng v. Coffee*, 67 Neb. 500, 108 A. S. R. 697, 60 L.R.A. 910, 93 N. W. 713, on power of courts to declare common law inapplicable.

35 AM. REP. 488, SIOUX CITY & P. R. CO. v. FIRST NAT. BANK, 10 NEB. 556, 7 N. W. 311.

Estoppel of carrier by bill of lading.

Cited in *The Isola Di Procida*, 124 Fed. 942, to point that carrier is estopped to deny liability upon false bill of lading given by master or agent; *Fletcher v. Great Western Elevator Co.* 12 S. D. 643, 82 N. W. 184; *American Nat. Bank v. Georgia R. Co.* 96 Ga. 665, 51 A. S. R. 155, 23 S. E. 898,—holding railway company estopped to deny representations in bill of lading as against innocent third person when issued by agent with such authority; *Missouri, K. & T. R. Co. v. Hutchings*, 78 Kan. 758, 99 Pac. 230; *Smith v. Missouri P. R. Co.* 74 Mo. App. 48,—holding carrier, issuing bill of lading, estopped to deny non-receipt of goods; *Union P. R. Co. v. Johnson*, 45 Neb. 57, 50 A. S. R. 540, 63 N. W. 144, holding railway company, having issued bills of lading, estopped as against assignee and holder thereof for value, to deny ever having possession of goods; *Bank of Batavia v. New York, L. E. & W. R. Co.* 33 Hun, 589, holding railroad company liable to one advancing money on faith of bill of lading, issued by its agent when no property was ever delivered to it.

Cited in reference notes in 53 A. R. 453, on carrier's liability where bill of lading given for goods never received; 20 A. S. R. 578, on conclusiveness of bills of lading; 42 A. S. R. 84, on liability of carrier to bona fide purchaser of bill of lading.

Cited in notes in 38 A. D. 411, on conclusiveness of bill of lading as to shipment of goods; 105 A. S. R. 349, on right of carrier to deny actual receipt of

goods as against assignee of bill of lading notwithstanding recital to the contrary; 27 L.R.A. 173, on master's liability for false bills of lading prepared by servant acting within scope of employment; 4 E. R. C. 679, on conclusiveness of bill of lading as to receipt of goods.

Disapproved in *Wisconsin C. R. Co. v. L. T. Soule Elevator Co.* 44 Minn. 224, 9 L.R.A. 263, 46 N. W. 342, holding carrier not estopped to deny non-receipt of goods where bills of lading were issued by station agent; *Roy & Roy v. Northern P. R. Co.* 42 Wash. 572, 6 L.R.A.(N.S.) 302, 85 Pac. 53, 7 A. & E. Ann. Cas. 728, holding that agent of railway company has no authority to issue bill of lading for goods to be transported unless goods have been actually received, even as to innocent transferee of bill of lading.

35 AM. REP. 493, TOWNSEND v. STAR WAGON CO. 10 NEB. 615, 7 N. W. 274.

Materiality of alteration of note.

Cited in *Charlton v. Reed*, 61 Iowa, 166, 47 A. R. 808, 16 N. W. 64, holding alteration of promissory note which changes place of payment material one sufficient to discharge maker as between original parties.

Cited in reference notes in 42 A. R. 135, on insertion of place of payment as alteration of negotiable instrument; 4 A. S. R. 25, on what constitutes and effect of material alteration of written instrument.

Cited in notes in 86 A. S. R. 87, on what alterations of written instruments are material; 35 L.R.A. 466, on alteration in place of payment in note as affecting bona fide holders.

Sufficiency of demand.

Cited in *Nicholson v. Barnes*, 11 Neb. 452, 38 A. R. 373, 9 N. W. 652, holding demand at place where promissory note is dated but not at endorser's residence stated in note, insufficient to charge endorser.

35 AM. REP. 496, GREEN v. DISBROW, 79 N. Y. 1.

Operation of statute of limitations on accounts.

Cited in *Gunn v. Gunn*, 74 Ga. 555, 58 A. R. 447; *Williams v. Davis*, 7 N. Y. Civ. Proc. Rep. 282; *Leahy v. Campbell*, 70 App. Div. 127, 75 N. Y. Supp. 72; *Compton v. Bowns*, 3 Misc. 140, 22 N. Y. Supp. 920,—holding that statute of limitations does not begin to run until after date of last item proved in mutual, open and current account; *Reid v. Wilson Bros.* 109 Ga. 424, 34 S. E. 608; *Fennell v. Black*, 24 Misc. 728, 53 N. Y. Supp. 797; *Becker v. Jones*, 37 Hun. 35; *Willson v. Willson*, 2 Dem. 462,—to point that account must be running or mutual to prevent operation of statute of limitations; *Compton v. Bowne*, 5 Misc. 213, 25 N. Y. Supp. 100, 23 N. Y. Civ. Proc. Rep. 225, 25 N. Y. Supp. 465, holding payment of balance of closed account in final settlement of transaction between parties, is not item in account from which statute of limitations begins to run; *Sandel v. Sommers*, 131 App. Div. 537, 115 N. Y. Supp. 357, holding that statute of limitations begins to run on whole balance from date thereof, even though defendant sold other goods to plaintiff thereafter which were entered in same books, and credited on balance due.

Cited in note in 89 A. D. 75, 78, on application of statute of limitations to merchants' accounts; 89 A. D. 81, 83, 84, on application of statute of *James* to mutual accounts.

What is mutual, open and current account.

Cited in *Re Girvin*, 160 Fed. 197, holding that account of loans between lender and borrowing firm, kept on firm's books or on slips of paper did not constitute "mutual, open and current account;" *Millet v. Bradbury*, 109 Cal. 170, 41 Pac. 865, holding that it is essential to mutual account that items upon two sides of account shall have resulted from mutual dealings and constitute reciprocal demands between parties; *Parker v. Schwartz*, 136 Mass. 30, holding account for goods sold and delivered upon which buyer makes payments of money, which are applied in reduction of account is not mutual and open account current; *Adams v. Olin*, 140 N. Y. 150, 35 N. E. 448, holding account simply containing items of moneys received and paid is not mutual, open and current account; *MacDonald v. Jaffa*, 53 App. Div. 484, 65 N. Y. Supp. 1059, holding that charges for services rendered, consisting of petty items of plumbing work done on various days do not per se constitute mutual, open and current account; *Purvis v. Kroner*, 18 Or. 414, 23 Pac. 260, holding that mutual accounts are those having original charges by persons against each other.

35 AM. REP. 505, BRUCE v. FULTON NAT. BANK, 79 N. Y. 154.**Implied covenant.**

Cited in *Amalgamated Gum Co. v. Casein Co.* 146 Fed. 900, holding that where contract did not contain covenant or obligation binding party to accept products in amounts specified, no covenant could be implied; *New York Pelton Floor Co. v. Tucker*, 43 Misc. 429, 89 N. Y. Supp. 410, to point that covenant cannot be implied in absence of language tending to conclusion that covenant sought to be set up was intended; *Zorowski v. Astor*, 156 N. Y. 393, 50 N. E. 983, holding that when it is apparent that parties to written agreement had subject in question in mind, and either has withheld express promise in regard to it, covenant will not be implied; *Rhineland v. Farmers' Loan & T. Co.* 172 N. Y. 519, 65 N. E. 499 (dissenting opinion), on what is necessary in order to imply covenant in contract under seal; *Brush v. Beecher*, 110 Mich. 597, 64 A. S. R. 373, 68 N. W. 420, holding that lease will not be construed as creating perpetuity by renewal at option of one of parties, unless such appears from clear and unequivocal language to have been the intent; *Swank v. St. Paul City R. Co.* 61 Minn. 423, 63 N. W. 1088, to point that from covenant of lessor to renew lease there was implied a correlative covenant on part of lessee to take renewal.

35 AM. REP. 511, STEPHENS v. BOARD OF EDUCATION, 79 N. Y. 183.**Right of true owner to recover money from third person.**

Cited in *Thaxter v. Thain*, 100 App. Div. 488, 91 N. Y. Supp. 729, to point that chattels converted or unapplied may be recovered if they can be traced and identified either as to article or its proceeds; *Peter Adams Co. v. National Shoe & Leather Bank*, 23 Abb. N. C. 172, 9 N. Y. Supp. 75, holding that where one deposits in bank money obtained by fraud, third party who receives and collects check against fund, after notice of true owner's claim, is liable to latter for money so received; *Holmes v. Davenport*, 27 Abb. N. C. 341, 18 N. Y. Supp. 56; *Denton v. Merrill*, 43 Hun, 224,—to point that funds and property impressed with trust may be pursued until they reach holder in good faith.

Cited in reference note in 78 A. D. 238, on right of principal to deposit made by agent in own name.

Cited in notes in 52 A. D. 759, on recovery on count for money had and received of money obtained by fraud or other tort or by duress or by mistake; 2 L.R.A. 481, on effect of party acquiring trust property with notice of the trust; 52 L.R.A. 797, on liability of bank or other depository, or of drawee, for taking check or draft by agent, fiduciary, etc., where fiduciary or representative character appears on its face; 70 L.R.A. 960, on right to follow proceeds of draft into payee's bank account because of fraud or failure of consideration; 25 L.R.A. (N.S.) 632, 635, on title of one taking money from thief or embezzler.

Distinguished in *Welch v. Polley*, 177 N. Y. 117, 69 N. E. 279 (reversing 86 App. Div. 260; 83 N. Y. Supp. 819), holding that beneficiary may follow trust funds into hands of trustee in bankruptcy of trustee; *Evans v. Garlock*, 37 Hun, 588, holding that money paid under mistake of fact may be recovered back; *Hathaway v. Delaware County*, 185 N. Y. 368, 113 A. S. R. 909, 78 N. E. 153, holding that money paid to county upon forged note purporting to be that of county, under belief that it was loan may be recovered back as money paid under mistake of fact.

— From bona fide holder, generally.

Cited in *Banque Franco-Egyptienne v. Brown*, 34 Fed. 162, holding that possession of money vests title in holder as to all persons who receive it from him innocently upon valid consideration; *Holly v. Domestic & F. Missionary Soc.* 34 C. C. A. 649, 92 Fed. 745, holding that owner cannot recover misappropriated trust funds in hands of innocent holder for value; *Miller v. Stephenson*, 27 Ind. App. 271, 59 N. E. 398, holding that one who in usual course of business receives money in payment of valuable consideration is presumed to receive it without knowledge of source of title of him from whom it is received; *Williams v. Manufacturers' Nat. Bank*, 68 Md. 236, 11 Atl. 835, holding that in case of payment of money proper, taker without notice gets it discharged of trust; *Walker v. Conant*, 69 Mich. 321, 13 A. S. R. 391, 37 N. W. 292, holding that money received in good faith, and in ordinary course of business, and for valuable consideration, cannot be recovered back because it was fraudulently obtained of some other person by payor; *Kimmel v. Bean*, 68 Kan. 598, 104 A. S. R. 415, 64 L.R.A. 785, 75 Pac. 1118; *Sanborn v. First Nat. Bank*, 115 Mo. App. 50, 90 S. W. 1033,—to point that possession of money vests title in holder as to third persons dealing with him, and receiving it in due course of business and in good faith upon valid consideration; *Nassau Bank v. National Bank*, 159 N. Y. 456, 54 N. E. 66 (affirming 32 App. Div. 268, 52 N. Y. Supp. 1118), holding that bank receiving check in restitution for undetected fraud had right to retain amount thereof as against bank which had paid it from fraudulent deposit; *Sutherland v. St. Lawrence County*, 101 App. Div. 299, 91 N. Y. Supp. 962, holding that moneys having been paid over in due course of business could not be followed and retaken by owner even if stolen or misappropriated; *American Preserves Co. v. Columbia Invest. Co.* 7 Misc. 509, 28 N. Y. Supp. 782, holding that it is only to extent of interest remaining in party committing fraud that money can be followed as against innocent party having lawful title founded upon consideration; *Wheeler v. King*, 35 Hun, 101, holding that attorney receiving money under suspicious circumstances from thief for purpose of defending him who after rendering part of services is notified by true owner that it was stolen from him will be compelled to account to

owner for balance; *Brown v. Houck*, 41 Hun, 16, holding that borrower of trust fund without knowledge of trust and breach will be protected if he subsequently and before knowledge repays same by sale of property for full value; *Walker v. First Nat. Bank*, 43 Or. 102, 72 Pac. 635, holding that money when obtained by fraud cannot be followed by true owner into hands of one who has received it bona fide and for valuable consideration in due course of business; *Gray v. Tompkins County*, 36 Hun, 265, holding county not liable to true owner for trust funds wrongfully converted by county treasurer and deposited in bank to credit of county.

— **From one receiving in payment of legacy.**

Cited in *Holly v. Missionary Soc.* 180 U. S. 284, 45 L. ed. 531, 21 Sup. Ct. Rep. 395, holding that missionary society as legatee cannot be called upon to refund money received in payment of legacy in good faith and without notice that money so paid had been misappropriated by executor.

— **From one receiving in payment of antecedent debt.**

Cited in *Dike v. Drexel*, 11 App. Div. 77, 42 N. Y. Supp. 979, holding that no right of recovery by true owner exists in case of money paid in discharge of existing indebtedness; *Smith v. Des. Moines Nat. Bank*, 107 Iowa, 620, 78 N. W. 238, holding that cestui que trust cannot recover trust moneys which were deposited in bank by trustee in his own name and which without notice of trust bank applied to matured individual note of trustee, surrendering note to latter; *First Nat. Bank v. City Nat. Bank*, 102 Mo. App. 357, 76 S. W. 489, holding that if trustee, in violation of duty, pays antecedent debt with trust fund without creditor's notice thereof, who receives it as general payment, money is freed from trust and cannot be followed by beneficiary; *Gale v. Chase Nat. Bank*, 43 C. C. A. 496, 104 Fed. 214, holding that creditor who receives payment of debt in money in due course of business, and in good faith, cannot be required to repay money to one from whom debtor illegally obtained it; *Case v. Hammond Packing Co.* 105 Mo. App. 168, 79 S. W. 732, to point that person receiving money in good faith and without notice in discharge of debt cannot be compelled to restore it to true owner; *Powell Hardware Co. v. Mayer*, 110 Mo. App. 14, 83 N. E. 1008, to point that party receiving money in discharge of debt, in ignorance of its misappropriation, cannot be made to refund it; *Wheatland v. Pryor*, 133 N. Y. 97, 30 N. E. 652, holding that person receiving in good faith and without notice, in discharge of individual debt of partner, money appropriated from firm cannot be made to account for it to firm; *Newell v. Wyatt*, 139 N. Y. 452, 36 A. S. R. 712, 34 N. E. 1045, holding that payment of money to creditor who receives it in good faith in discharge of existing debt, without knowledge that debtor paying has no rightful ownership of fund, cannot be recovered by true owner; *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316, holding state not liable to refund money received in good faith in discharge of existing debt, not knowing that it was paid wrongfully and without authority of county treasurer; *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184, 41 N. E. 403 (affirming 82 Hun, 515, 31 N. Y. Supp. 530), holding that stolen money received by bank in good faith and in discharge of valid obligation cannot be recovered back by true owner; *Meyers v. New York County Nat. Bank*, 36 App. Div. 482, 55 N. Y. Supp. 504, holding that where bank appropriates money in debtor's account in payment of loan, money in such account belonging to lunatic's estate cannot be recovered back; *Charlotte Iron Works v. American Exch. Nat. Bank*, 34 Hun, 26; *Oldfield v. Vassar College*, 68

App. Div. 272, 73 N. Y. Supp. 1112,—holding that money having been received in good faith and in discharge of valid obligation cannot be recovered back by true owner; *Bienestok v. Ammidown*, 11 Misc. 76, 31 Abb. N. C. 400, 29 N. Y. Supp. 593, to point that possession of money vests title in holder as to third persons dealing with him and receiving it in due course of business and in good faith even in payment of precedent account; *Ward v. Higgins*, 9 N. Y. S. R. 641, holding person receiving money in good faith and in regular course of business in payment of existing debt not responsible for fact that application of funds to that purpose was fraud upon firm creditors; *Anderson v. Market Nat. Bank*, 16 N. Y. S. R. 98, 1 N. Y. Supp. 136, holding appropriation by party of any part of proceeds of checks diverted to discharge existing indebtedness not legal; *Fidelity Trust Co. v. Baker*, 60 N. J. Eq. 170, 47 Atl. 6, holding that money, although procured by fraud or felony, cannot be followed into hands of person who has received it innocently in satisfaction of existing debt; *State v. Omaha Nat. Bank*, 66 Neb. 857, 93 N. W. 319, holding that bona fide holder of money transferable by mere delivery and not over due, who has taken it in usual course of business, and for valuable consideration acquires perfect title; *Bank of Syracuse v. Wisconsin M. & F. Ins. Co.* 36 N. Y. S. R. 584, 12 N. Y. Supp. 952, to point antecedent debt not such consideration as will cut off equities of third parties in respect to negotiable securities obtained by fraud; *Southwick v. First Nat. Bank*, 84 N. Y. 420, 61 How. Pr. 164 (reversing 20 Hun, 349), holding that party receiving bill of exchange in good faith and for value cannot be called to account for money paid because of fraud, in transaction between drawer and drawee, to injury of drawee of which party had no knowledge.

Cited in reference note in 36 A. S. R. 715, on payment with funds not belonging to payor.

Distinguished in *Hutchinson v. Manhattan Co.* 9 Misc. 343, 20 N. Y. Supp. 1103, holding that where party endorsed draft to firm of brokers for collection, who deposited same with bank which received it only for collection, latter had no right to credit proceeds of draft when collected upon indebtedness to it of brokers.

35 AM. REP. 515, SCATTERGOOD v. WOOD, 79 N. Y. 263.

Opinions as evidence.

Cited in *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. C. 179 (dissenting opinion), on admissibility of opinion evidence; *Hollender v. New York C. & H. R. R. Co.* 14 Daly, 219, holding that where defendant was allowed to ask opinion of witness on certain point, plaintiff could ask another witness his opinion on same point; *Schwander v. Birge*, 46 Hun, 66, holding opinion of expert, as to whether employer has provided suitable means of escape for employees inadmissible; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, holding that builders may express opinion as to whether floor of structure, as it was constructed, was of sufficient strength to withstand crowd using it for purpose intended; *Hayes v. Southern P. Co.* 17 Utah, 99, 53 Pac. 1001, holding opinion of expert witness as to whether buildings were properly constructed admissible where their construction is outside knowledge and experience of ordinary jurors; *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363, holding that physician could give opinion as to whether pregnancy would probably result from first intercourse in case where female had been ravished and act accomplished against her will; *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732, holding opinion of witness as

to negligence by obstruction of way to premises, incompetent, as being encroachment upon function of jury.

Cited in note in 41 L. ed. U. S. 751, on opinion as evidence.

Measure of damages for breach of contract.

Distinguished in *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760, holding that party could recover only nominal damages for breach of contract to deliver stock which had no actual or market value.

Right to rebut incompetent testimony erroneously admitted.

Cited in *Roark v. Greeno*, 61 Kan. 299, 59 Pac. 655, holding that incompetent testimony erroneously admitted may be rebutted.

Right of party to meet adversary by similar evidence.

Cited in *People ex rel. Hamilton v. Jefferson County*, 35 App. Div. 239, 54 N. Y. Supp. 782, holding that relator, by tendering evidence outside of contract as to value of his services raised issue which defendant was entitled to meet by similar evidence; *Buedingen Mfg. Co. v. Royal Trust Co.* 90 App. Div. 267, 85 N. Y. Supp. 621, holding where defendant placed in evidence certain letters plaintiff was entitled to place rest of correspondence in evidence.

35 AM. REP. 517, BENNETT v. GARLOCK, 79 N. Y. 302.

Acts of trustee as binding on remaindermen.

Cited in *Mott v. Eno*, 181 N. Y. 346, 74 N. E. 229 (reversing 97 App. Div. 580, 90 N. Y. Supp. 608), holding acts of trustee binding upon those who had interests in estate in remainder.

—Bar of limitations against trustee as bar against remaindermen.

Cited in *Rhodes v. Caswell*, 41 App. Div. 229, 58 N. Y. Supp. 470, to point that statute of limitations having run against trustee, barred title of remaindermen who were to share proceeds of sale; *Putnam v. Lincoln Safe Deposit Co.* 49 Misc. 578, 100 N. Y. Supp. 101, holding suit for conversion against trustee barred in six years and such bar operates against remaindermen as represented by trustee.

Cited in note in 19 L.R.A. 852, on adverse possession against remaindermen and owners of future estates.

When remainder will be considered as vested.

Cited in *Lantz v. Massie*, 99 Va. 709, 40 S. E. 50, holding that remainder will be considered as vested, although instrument by which it is created gives to trustee power whose exercise may destroy interest, and although contingency that is to cause divesture is within control of particular tenant.

What is essential to execution of trust over real estate.

Cited in *Bailey v. Bailey*, 28 Hun. 603, holding that execution of trust over real estate requires that trustee shall be vested with title to estate.

Estoppel to question validity of trust deed.

Cited in *Schreyer v. Schreyer*, 43 Misc. 520, 89 N. Y. Supp. 508, holding that party cannot question validity of trust deed where he introduced it in evidence as part of his case and made it one of foundations of his title.

Cited in note in 25 L.R.A.(N.S.) 894, on character of remainder created by grant or devise for life, with remainder to children who may survive.

Creation of active trust.

Cited in *Holmes v. Walter*, 118 Wis. 409, 62 L.R.A. 986, 95 N. W. 380, holding active trust created when title to property is conveyed to one for benefit of an-

other, with active duties to be performed by grantee with reference to subject of conveyance.

When holders of contingent remainder not necessary parties to action.

Cited in *Temple v. Scott*, 143 Ill. 290, 32 N. E. 366, holding that on creditor's bill to set aside deed of land to trustee in trust, trustee represents holders of contingent remainder; *Colins v. Crawford*, 214 Mo. 167, 127 A. S. R. 661, 112 S. W. 538, holding contingent remaindermen in active trust estate not necessary parties to partition suit brought against life tenant and trustee; *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805, 26 Abb. N. C. 441, to point that all interests in land in question being represented by grantor and trustee their joinder as parties in foreclosure action was sufficient.

35 AM. REP. 524, PIERSON v. PEOPLE, 79 N. Y. 424.

Waiver of rights and irregularities.

Cited in *People v. Cignarale*, 110 N. Y. 23, 17 N. E. 135, 6 N. Y. Crim. Rep. 82, on waiver in criminal cases; *People v. Wheeler*, 79 App. Div. 396, 79 N. Y. Supp. 454; *Brown v. Otis*, 98 App. Div. 554, 90 N. Y. Supp. 250,—holding that person under indictment may waive constitutional provision designed for his benefit; *People ex rel. Lyons v. Hanchett*, 2 Ill. C. C. 204, holding that substantial constitution of legal tribunal and fundamental mode of its proceeding are not within power of the parties; *People v. Winness*, 3 N. Y. Crim. Rep. 89, holding that omission of complainant to sign deposition before committing magistrate is irregularity held to be waived by defendant's failure to interpose objection at first available opportunity; *People v. O'Connell*, 60 Hun, 109, 14 N. Y. Supp. 485, holding objection that there is no such offense as attempt to commit an assault in the first degree waived by pleading guilty to such an attempt; *People v. Carter*, 88 Hun, 304, 34 N. Y. Supp. 764, holding that omission on part of magistrate which is mere irregularity not affecting his jurisdiction may be waived by prisoner; *Jones v. Foster*, 43 App. Div. 33, 59 N. Y. Supp. 738, holding defect in warrant waived by voluntary appearance and plea of defendant in proceeding.

Cited in notes in 35 A. D. 620, on power to waive constitutional or statutory provision for one's benefit; 37 A. D. 250, on waiver of constitutional protection; 40 A. D. 388, on right of party to waive statutory or constitutional provision in his favor.

—In respect to jury.

Cited in *People v. Fishman*, 64 Misc. 256, 119 N. Y. Supp. 89, holding discharge of jury not an acquittal where both parties consent because of conversation, between foreman and complaining witness; *People v. Olmsted*, 74 Hun. 323, 26 N. Y. Supp. 818, 9 N. Y. Crim. Rep. 54, holding that defendant having waived irregularities in obtaining jury cannot avail himself of them on appeal; *People v. Thayer*, 132 App. Div. 593, 116 N. Y. Supp. 821, holding failure to object to qualifications of juror waiver of all objections, although disqualification not known to defeated party at time of trial; *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428, holding that in felony case waiver of jury will not bind defendant; *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493, 3 N. Y. Crim. Rep. 551, holding that prisoner may waive his right to challenge; *Wade v. Com.* 106 Ky. 321, 50 S. W. 271, holding that accused may waive right to have jury kept together; *Flynn v. State*, 97 Wis. 44, 72 N. W. 373, holding that one may waive objections

to collected jury, or juror, and so be validly tried by imperfect panel put upon him.

Cited in notes in 43 L.R.A. 49, on number and agreement of jurors necessary to constitute valid verdict in felony and high grade offenses; 41 L. ed. U. S. 105, on challenges to jurors and to the array.

Distinguished in *Biddle v. State*, 67 Md. 304, 10 Atl. 794, holding that where accused has exercised right of peremptory challenge as to member of panel, and juror, thus challenged has retired from box, court will not allow challenge to be recalled or withdrawn.

—As to preliminary examination.

Cited in *People v. Lauder*, 82 Mich. 109, 46 N. W. 956, holding that party may, waive right to preliminary examination upon criminal charge.

—As to arraignment and plea.

Cited in *Gaines v. United States*, 1 Ind. Terr. 296, 37 S. W. 98, holding that announcing ready for trial and going to trial without objection waives arraignment and plea; *People v. McHale*, 39 N. Y. S. R. 758, 15 N. Y. Supp. 496; *People v. Osterhout*, 34 Hun, 260, 3 N. Y. Crim. Rep. 443,—holding that prisoner could waive arraignment.

—As to defense of insanity.

Cited in *Ostrander v. People*, 28 Hun, 38, holding that party waived defense upon ground of insanity where he offered no proof tending to establish insanity at time of commission of crime or at any time subsequent thereto.

—As to privileged communications to physician.

Cited in *Dreier v. Continental L. Ins. Co.* 24 Fed. 870, to point that only one who makes confidential communication can waive statutory protection against physician testifying as to communications from patient; *Penn. Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 A. R. 769, holding that beneficiary on life insurance policy may waive statutory protection against physician testifying as to communications from patient; *Blair v. Chicago & A. R. Co.* 89 Mo. 383, 1 S. W. 350, holding that statutory protection against physician testifying as to communications from patient may be waived by latter; *State v. Depoister*, 21 Nev. 107, 25 Pac. 1000 (dissenting opinion), on admissibility of attending physician's testimony in case of rape where patient's parents had given their consent.

Admissibility of statements by patient to physician.

Cited in *Hauk v. State*, 148 Ind. 238, 46 N. E. 127; *Re Cravath*, 58 Misc. 154, 110 N. Y. Supp. 454,—holding that object of statute prohibiting disclosure of professional information acquired by physician in attending patient, is to protect latter, not to shield one charged with his murder; *People v. Benham*, 30 Misc. 466, 63 N. Y. Supp. 923, 14 N. Y. Crim. Rep. 434, holding statements of deceased to her physician not privileged where they tend to disprove murder; *Citizens' Street R. Co. v. Shepherd*, 30 Ind. App. 193, 65 N. E. 765 (dissenting opinion), to point that professional communications are not privileged, when they are for unlawful purpose, having for their object commission of crime.

Cited in note in 17 A. S. R. 571, on privilege as affecting testimony of physician in criminal cases.

—As to matters not relating to his duty as physician.

Cited in *People v. Glover*, 71 Mich. 303, 38 N. W. 874, holding testimony of physicians as to physical condition of person charged with rape not privileged where examination was not made to enable them to prescribe for him; *Brown* Am. Rep. Vol. XVII.—62.

v. Rome, W. & O. R. Co. 45 Hun, 439, holding information although acquired by physician while attending patient not privileged unless necessary to enable him to act as such; Green v. Terminal R. Asso. 211 Mo. 18, 109 S. W. 715, holding admission of plaintiff in action for personal injuries, to physicians attending him admissible if it related to matters information of which was not necessary to enable them to treat him; People v. Harrie, 136 N. Y. 423, 33 N. E. 65, 10 N. Y. Crim. Rep. 260, holding that physician who had delivered decedent of dead child, may testify to conversation with person accused of murder, in which latter admitted that he had performed two operations upon decedent to produce abortion.

— While attending in professional capacity.

Cited in Westover v. Aetna L. Ins. Co. 99 N. Y. 56, 52 A. R. 1, 1 N. E. 104, holding information acquired by physician while attending patient in professional capacity privileged; People v. Brower, 7 N. Y. Crim. Rep. 292; Westover v. Aetna L. Ins. Co. 2 How. Pr. N. S. 184,—holding physician prohibited from disclosing information acquired in attending patient in professional capacity, which was necessary to enable him to act as such; Connecticut Mut. L. Ins. Co. v. Union Trust Co. 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119, holding information acquired by physicians while attending assured in professional capacity inadmissible; Freel v. Market Street Cable R. Co. 97 Cal. 40, 31 Pac. 730, holding information acquired by physician while attending patient for purpose of prescribing for her inadmissible in action for personal injuries; State v. Grimmell, 116 Iowa, 596, 88 N. W. 342, holding that physician called to attend patient shortly before her death may testify that she was suffering from wounds which he believed resulted from criminal operation; People v. Brecht, 120 App. Div. 769, 105 N. Y. Supp. 436, holding that physician may state what he learned as to physical condition of patient by examination where one is convicted of manslaughter as result of performing abortion; Corey v. Bolton, 31 Misc. 138, 63 N. Y. Supp. 915 (dissenting opinion), on right of physician attending infant to disclose professional information in action for loss of services through assault.

Cited in note in 52 A. R. 5, on prohibition of insurance company to introduce evidence of deceased's statement to physician in last sickness as to previous ailments.

Distinguished in Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 A. R. 617, holding in action upon insurance policy that physician cannot testify to cause of death learned by him while attending patient in professional capacity; People v. Murphy, 101 N. Y. 126, 54 A. R. 661, 4 N. E. 326, 4 N. Y. Crim. Rep. 95, 3 How. Pr. N. S. 469 (reversing 3 N. Y. Crim. Rep. 338); Renihan v. Denin, 103 N. Y. 573, 57 A. R. 770, 9 N. E. 320,—holding information acquired by physician while attending patient which was necessary to enable him to act as such, privileged.

Admissibility of conversation between attorney and client.

Cited in Pearsall v. Elmer, 5 Redf. 181, holding conversation between attorney and decedent relating to preparation of codicil not executed, subsequently to execution of codicil propounded, inadmissible; People v. Petersen, 60 App. Div. 118, 69 N. Y. Supp. 941, 15 N. Y. Crim. Rep. 421, holding that attorney who represented accused in action to recover damages for breach of promise of marriage may properly be required to produce and identify original summons and complaint in that action.

Admissibility of evidence as to knowledge of or motive for crime.

Cited in *People v. Dailey*, 73 Hun, 16, 25 N. Y. Supp. 1050, holding testimony of daughter that she was pregnant by defendant admissible as to motive for arresting mother without cause; *People v. Fitzgerald*, 20 App. Div. 139, 46 N. Y. Supp. 1020, 12 N. Y. Crim. Rep. 524, holding letter of bishop charging priest with "public drunkenness" admissible as tending to show motive for arson; *State v. O'Donnell*, 36 Or. 222, 61 Pac. 892, holding that commission of dissimilar crime, to enable accused to conceal offense admissible against him upon indictment charging auxiliary crime when intent to perpetrate or conceal such offense furnished motive for committing crime for which he is put upon trial; *Pontius v. People*, 82 N. Y. 339, holding evidence of forged notes competent to show commission of assault with intent to kill; *People v. Molineux*, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286, 16 N. Y. Crim. Rep. 120, to point that commission of another crime is admissible as tending to prove accused guilty of one for which he is on trial; *People v. Place*, 157 N. Y. 584, 52 N. E. 576, 13 N. Y. Crim. Rep. 474, holding conduct of person charged with crime admissible as indicative of guilty mind and in determining guilt or innocence of person charged; *People v. Lyon*, 33 Hun, 623, holding that acts and statements made by clerk to one accused of wrongful conversion of public funds, competent as bearing upon question of accused's knowledge and of motive and intent; *People v. Ebanks*, 117 Cal. 652, 40 L.R.A. 269, 49 Pac. 1049, holding that where evidence tends to establish offense charged, fact that it tends also to show attempt of accused to commit another offense does not render it inadmissible; *State v. Phelps*, 5 S. D. 480, 59 N. W. 471, holding evidence directly tending to establish guilt of person upon indictment for felony not incompetent for reason that it tends to prove commission of other offenses, when such evidence goes to question of motive; *People v. Orr*, 92 Hun, 199, 36 N. Y. Supp. 398, 11 N. Y. Crim. Rep. 188, holding that people may show that one accused of seduction under promise of marriage endeavored to induce physician to perform abortion upon complainant; *Maxfield v. Hoecker*, 17 N. Y. S. R. 344, 2 N. Y. Supp. 77, holding subsequent admission of party tending to show motive for previous act in compounding felony admissible for that purpose.

— Illicit relations with wife of murdered man.

Cited in *People v. Brown*, 130 Cal. 591, 62 Pac. 1072; *State v. Reed*, 53 Kan. 767, 42 A. S. R. 322, 37 Pac. 174; *State v. Page*, 212 Mo. 224, 110 S. W. 1057; *People v. Montgomery*, 176 N. Y. 219, 68 N. E. 258, 77 N. Y. Crim. Rep. 503; *State v. Chase*, 68 Vt. 405, 35 Atl. 336,—holding that adulterous relations with wife may be shown as motive for murder of husband; *State v. Goddard*, 162 Mo. 198, 62 S. W. 697, holding that evidence of intimacy with wife may be shown as motive for murder of husband; *People v. Gress*, 107 Cal. 461, 40 Pac. 752, holding testimony of wife and of accused's efforts to induce her to leave husband inadmissible where killing of husband was admitted and only issue was as to necessary self-defense.

Distinguished in *People v. Wright*, 144 Cal. 161, 77 Pac. 877, holding illicit relations with wife not admissible where killing of husband was admitted and only issue was as to necessary self-defense.

— Illicit relations by one charged with murder of wife.

Cited in *Reinhart v. People*, 82 N. Y. 607, holding evidence of husband's prior and subsequent relations with another woman admissible as motive for murder of wife.

— Similar acts or crimes.

Cited in *Davis v. State*, 58 Neb. 465, 78 N. W. 930, holding in trial on charge of uttering forged instruments evidence of similar acts on same day admissible to show guilty knowledge or intent of accused; *Knights v. State*, 58 Neb. 225, 76 A. S. R. 78, 78 N. W. 508, holding evidence of other fires set out by person accused of arson, on same night, in adjacent buildings admissible to establish criminal design; *People v. Bassford*, 3 N. Y. Crim. Rep. 219, holding that to show common interest and purpose of accused and other persons indicted with him, it is competent to prove participation of accused upon other occasions with these persons in business in which crime was committed; *People v. Sharp*, 107 N. Y. 427, 1 A. S. R. 851, 14 N. E. 319, 5 N. Y. Crim. Rep. 569 (reversing 45 Hun, 400, 5 N. Y. Crim. Rep. 388), holding evidence on part of prosecution of act of bribery about year prior to bribery charged by defendant to clerk of assembly, inadmissible.

Cited in notes in 62 L.R.A. 205, on evidence of other crimes to show motive on trial for murder; 8 E. R. C. 87, on proof of acts committed subsequent to offense to show intent or motive.

Effect of motive in criminal case.

Cited in *People v. Cordelia Botkin*, 9 Cal. App. 244, 98 Pac. 861; *Rhodes v. Sperry & H. Co.* 193 N. Y. 232, 20 L.R.A.(N.S.) 1084, 86 N. E. 39; *People v. Stokes*, 2 N. Y. Crim. Rep. 382,—holding that where case depends on circumstantial evidence which points to particular criminal, motive on part of that person to commit crime much fortifies probabilities created by other evidence.

Effect of testimony false in part.

Cited in *Welke v. Welke*, 44 N. Y. S. R. 21, 17 N. Y. Supp. 298, holding that whole testimony of witnesses in action for divorce on ground of adultery could be rejected as unworthy of credit where referee was convinced that their testimony in one respect was false.

Construction of statute, generally.

Cited in *Collier Estate v. Western Paving & Supply Co.* 180 Mo. 362, 79 S. W. 947, to point that in case of uncertainty reasonable and beneficial meaning should be ascribed to a law where its literal sense will fairly permit it; *People v. Abeel*, 182 N. Y. 415, 1 L.R.A.(N.S.) 730, 75 N. E. 307, 3 A. & E. Ann. Cas. 287, 19 N. Y. Crim. Rep. 524 (dissenting opinion), to point that in construction of statute there must be considered mischief intended to be remedied and object to be attained by its enactment; *People v. Fanshaw*, 65 Hun, 77, 19 N. Y. Supp. 865, 8 N. Y. Crim. Rep. 336, on construction of statute as to what constitutes crime of arson; *People v. Fox*, 4 App. Div. 38, 38 N. Y. Supp. 635, 11 N. Y. Crim. Rep. 220, holding that words in statute "made in violation of provisions of this article" mean "made in manner condemned by this article."

35 AM. REP. 531, PRATT v. SHORT, 79 N. Y. 437.

Powers of corporations.

Cited in *Industrial & General Trust v. Tod*, 56 App. Div. 39, 69 N. Y. Supp. 362, holding that act of surety company in assuming risk exceeding ten per cent of its capital and surplus, is ultra vires; *Gause v. Commonwealth Trust Co.* 196 N. Y. 134, 24 L.R.A.(N.S.) 967, 89 N. E. 476, holding that trust corporation has no power to enter into promotion business; *Nassau Bank v. Jones*, 95 N. Y. 113, 47 A. R. 14, holding that banking corporation chartered under laws of this state has no power to subscribe for stock of railroad corporation.

Distinguished in *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 53 Hun, 52, 5 N. Y. Supp. 937, holding that as contract for sale of stock had been completed, and title thereof had passed to corporation, it had right to sell it and to take as part of purchase price such securities as it saw fit, provided it acted in good faith; *Binghampton Trust Co. v. Auten*, 68 Ark. 294, 57 S. W. 936, holding that power to purchase or discount notes is conferred on trust companies by New York banking law.

— **Defense of ultra vires.**

Cited in *Day v. Spiral Springs Buggy Co.* 57 Mich. 146, 58 A. R. 352, 23 N. W. 628, holding that where corporation went beyond its powers in making contracts for speculation, party was not estopped from repudiating contract as ultra vires; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390, to point that courts have sought to regulate and restrict defense of ultra vires so as to make it consistent with obligations of justice.

Cited in reference notes in 41 A. R. 285, on right of corporation discounting paper without statutory authority to recover thereon; 35 A. S. R. 685, on ultra vires contracts of corporation.

Cited in note in 70 A. S. R. 175, on recovery for benefits received under ultra vires contract.

Violation of statute as affecting validity of contract.

Cited in *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 49 A. S. R. 582, 9 L.R.A. 689, 3 Inters. Com. Rep. 319, 20 Atl. 383, holding that where contract, illegal only because prohibited by statute, has been executed by one of parties, other will not be allowed to retain its benefits and at same time set up its illegality; *Washburn Mill. Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544, holding that when purpose of enactment is absolute prohibition of certain act then performance thereof is invalid whether prohibited act be malum in se or simply malum prohibitum; *Re Waterloo Organ Co.* 67 C. C. A. 255, 134 Fed. 341; *Washington L. Ins. Co. v. Clason*, 162 N. Y. 305, 56 N. E. 755,—holding that courts will not aid either party to contracts immoral in their nature or prohibited by statute; *Winegard v. Fanning*, 76 Hun, 170, 27 N. Y. Supp. 566, holding owner of bond and mortgage not estopped from recovering proceeds of foreclosure from mortgagee because he forecloses in name of his assignor in violation of law; *Horton v. Erie R. Co.* 65 App. Div. 587, 72 N. Y. Supp. 1018, holding mileage book-contract in contravention of statute unenforceable; *Laun v. Pacific Mut. L. Ins. Co.* 131 Wis. 555, 9 L.R.A.(N.S.) 1204, 111 N. W. 660, holding that allowance of rebate of premium in violation of statute does not render policy of insurance itself invalid; *Dunn v. O'Connor*, 25 App. Div. 73, 49 N. Y. Supp. 270, holding mortgage given by bank president to bank not invalidated because it contains clause having reference to future loans and renewals to be made to mortgagor.

Cited in reference note in 67 A. D. 154, on rights of parties to illegal contracts.

Cited in notes in 113 A. S. R. 736, on public policy in case of parties in *pari delicto*; 117 A. S. R. 509, on enforceability of contracts violating law regarding inspection, labeling, or statement of quality; 12 L.R.A.(N.S.) 578, 579, on validity of contracts in violation of law; 12 L.R.A.(N.S.) 584, on validity of contracts impliedly prohibited by statute; 12 L.R.A.(N.S.) 594, 595, on ethical quality of contract in business which it is a misdemeanor to transact; 1 E. R. C. 438, on recovery under executed contract voidable under statute of frauds, as account stated.

Distinguished in *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299, holding that sale by unlawful measure being in violation of law, no recovery can be had for price against purchaser; *Washington L. Ins. Co. v. Clason*, 16 App. Div. 434, 45 N. Y. Supp. 27, holding that statute limiting bonds and mortgages taken by insurance company, to real property worth fifty per cent more than amount loaned thereon, does not render void mortgage taken upon property already mortgaged for more than half its value.

— Loan of money on invalid security.

Cited in *Davis Sewing Mach. Co. v. Best*, 30 Hun, 638, holding that loan is separate from security taken and may be legal and collectible from borrower, although security received be illegal and void; *Rome Sav. Bank v. Kramer*, 32 Hun, 270, holding that although notes given for loan of money were ultra vires and void, bank had good cause of action against makers for money loaned; *First Nat. Bank v. Cornell*, 8 App. Div. 427, 40 N. Y. Supp. 850, holding that note given in direct violation of inhibition of statute as security for loan does not work forfeiture of money loaned; *Pratt v. Eaton*, 79 N. Y. 449, holding that where note had been made by way of discount of promissory note company could recover money loaned although security taken was void; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190, holding that where corporation discounted note secured by pledge of railroad bonds thus rendering note void, loan and its security were valid and enforceable; *Rome Sav. Bank v. Krug*, 102 N. Y. 331, 6 N. E. 682, holding that money loaned is not forfeited because notes given as security were void.

— Loan providing for usurious interest.

Cited in *McBroom v. Scottish Mortg. & Land Invest. Co.* 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852, holding that New Mexico statutes make void contract of loan providing for usurious interest only as to interest in excess of what statute allows; *Turner v. Merchants' Bank*, 126 Ala. 397, 28 So. 469, holding that in case of usury lender cannot enforce contract, but borrower can have relief against it.

— Borrowing of money from bank.

Cited in *People's Trust Co. v. Pabst*, 113 App. Div. 375, 98 N. Y. Supp. 1045, holding that statute prohibiting officers of banks from borrowing money from bank without consent of majority of directors and provides forfeiture to state for violation thereof imposes no other penalty on such loan than that expressly stated.

— Deposit in bank in contravention of charter.

Cited in *State v. Reid*, 125 Mo. 43, 28 S. W. 172, holding that fact that trust company receives deposits subject to check in contravention of charter, does not render it banking institution and its officers amenable to statute punishing bank officers for receiving deposits when bank is insolvent; *Chapman v. Comstock*, 58 Hun, 325, 11 N. Y. Supp. 920, holding corporation receiving deposit in violation of law liable to action therefor at time deposit was made; *Taylor v. Empire State Sav. Bank*, 66 Hun, 538, 21 N. Y. Supp. 643, holding that where bank receives deposits in excess of \$3,000 in violation of banking act, depositor is not thereby prevented from recovering full amount of his deposits from bank; *Ring v. Long Island Real Estate Exch. & Invest. Co.* 93 App. Div. 442, 87 N. Y. Supp. 682, holding that investment company having received money cannot be heard to plead as against party making investment that such investment as payment to it contemplated was ultra vires; *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E.

275, holding that depositor's right of action for money received by corporation under ultra vires contract accrues at once.

Sufficiency of complaint as to recovery of money illegally obtained.

Cited in *Pierson v. McCurdy*, 61 How. Pr. 134, on sufficiency of complaint by receiver of company against trustee of another company to recover for moneys illegally obtained.

35 AM. REP. 536, UNION HOTEL CO. v. HERSEE, 79 N. Y. 454.

Liability on stock subscription.

Cited in *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194, holding that person became stockholder of corporation where he recognized his liability as such to pay future calls on stock; *Presbyterian Church v. Cooper*, 45 Hun, 453, holding subscription "Sunday School, by R. F. Todd" invalid for "Sunday School" was incapable of binding itself as school by any form or agent; *Re Rochester, H. & L. R. Co.* 45 Hun, 126, 19 Abb. N. C. 421, holding that in absence of evidence to contrary it cannot be assumed that construction company was not authorized to subscribe to stock of railroad company; *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149, holding that parties waived objection that subscriptions of corporations were ultra vires where they knew when they subscribed that these corporations had subscribed, and afterwards paid part of amount of their subscription.

Cited in note in 81 A. D. 399, on subscription upon condition.

—Effect of amendment of charter.

Cited in *Yonkers Gazette Co. v. Taylor*, 30 App. Div. 334, 51 N. Y. Supp. 969, holding that proposed name of corporation is changed is immaterial in determining liability of subscribers; *Martin v. Remington-Martin Co.* 95 App. Div. 18, 88 N. Y. Supp. 573; *Close v. Noye*, 2 Misc. 226, 23 N. Y. Supp. 751,—to point that subscribers to stock of corporation whose charter is liable to be changed or altered by reserved right, must be regarded as consenting to change.

Cited in note in 53 A. D. 470, as to what constitutes acceptance of alteration of charter when legislature reserves right to amend.

Limitation of corporate powers.

Cited in *Dow v. Northern R. Co.* 67 N. H. 1, 36 Atl. 510, to point that powers of proprietors acting by majority are limited to matters properly embraced within purposes for which corporation was created; *Hinckley v. Schwarzschild & S. Co.* 107 App. Div. 470, 95 N. Y. Supp. 357, holding that acts which only regulate internal management of corporation are within power to alter and repeal, though exercise of power increases stockholder's liability or diminishes value of stock.

Effect of failure to complete railroad within time limited.

Distinguished in *Bybee v. Oregon & C. R. Co.* 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641, holding that railroad company had not forfeited its right to construct its road by failure to complete same within time limited.

Construction of words in statute.

Cited in *Re Silkman*, 88 App. Div. 102, 84 N. Y. Supp. 1025, holding that word "inhabitants" as used in reference to census enumeration should be confined to citizens of state; *People v. Platt*, 50 Hun, 454, 3 N. Y. Supp. 367, holding words "residence" and "domicil" in construction of statute identical and synonymous; *Strang v. Cook*, 47 Hun, 46, holding that omission of words "not including those taxed for dogs or highway tax only" in petition was juris-

dictional and had effect to render proceedings and bonds issued pursuant to it, invalid.

35 AM. REP. 540, NOONAN v. ALBANY, 79 N. Y. 470.

Liability of municipal corporation for damages.

Cited in *Harford County v. Wise*, 71 Md. 43, 18 Atl. 31, holding municipal corporation liable for damage caused by negligent or unskilful manner of constructing bridge on highway; *Ferris v. Board of Education*, 122 Mich. 315, 81 N. W. 98, holding board of education liable for injury sustained by person falling upon ice precipitated from school building upon person's premises after notice to remedy defect; *Gordon v. Ellenville & K. R. Co.* 195 N. Y. 137, — L.R.A. (N.S.) —, 88 N. E. 14, holding corporations engaged in performance of work of public nature authorized by law not liable for consequential damages to others; *Morton v. New York*, 65 Hun, 32, 19 N. Y. Supp. 603, holding city liable for nuisance caused by its maintenance of pumping station; *Chattanooga v. Dowling*, 101 Tenn. 342, 47 S. W. 700, holding municipality liable for commission of nuisance to special injury of citizen; *Galveston v. Posnainsky*, 62 Tex. 118, 50 A. R. 517, holding city liable for injury resulting from failure to keep its streets in repair.

Cited in notes in 15 A. S. R. 848, on liability of municipal corporation for maintaining a nuisance; 29 A. S. R. 743, on municipal liability for injury by surface water; 30 A. S. R. 396, on liability of municipality for nuisance created by its act or neglect; 5 L.R.A. 128, on liability of municipal corporation for nuisances it creates and maintains; 1 L.R.A. (N.S.) 51, on effect of legislative authority on liability for private nuisance.

—By obstruction of stream.

Cited in note in 30 A. S. R. 390, on municipal liability for grading streets so as to interfere with water course.

Distinguished in *A. L. Lakey Co. v. Kalamazoo*, 138 Mich. 644, 110 A. S. R. 338, 67 L.R.A. 931, 101 N. W. 841, holding city not liable for obstruction of creek by contents of warehouse erected over it at point where owner of warehouse owned both banks and bed of stream.

—By casting surface water upon land.

Cited in *Carmichael v. Texarkana*, 94 Fed. 561; *Evansville v. Decker*, 84 Ind. 325, 43 A. R. 86,—holding that city may not collect water into sewer, conduct it to corporate limits and cast it upon another's land; *Hitchins Bros. v. Frostburg*, 68 Md. 100, 6 A. S. R. 422, 11 Atl. 826, holding municipality liable for flooding private property by surface water as result of negligent execution of plan adopted for construction of sewers; *Guest v. Church Hill*, 90 Md. 689, 45 Atl. 882, holding municipal corporation liable for drains causing surface water overflow of abutting land; *West Orange Twp. v. Field*, 37 N. J. Eq. 600, 45 A. R. 670, holding that municipality may be enjoined from discharging drainage of certain streets upon party's land by which they are submerged and rendered valueless; *Soule v. Passaic*, 47 N. J. Eq. 28, 20 Atl. 346, holding that equity will restrain municipality from casting surface water collected from large area upon private property although property is already lawfully subjected to considerable burden in drainage of other lands; *Hamilton Twp. v. Wainwright*, 52 N. J. Eq. 419, 29 Atl. 200, to point that municipality is liable for discharge of surface waters collected in large quantities upon private property by construction of street; *Butler v. Edgewater*, 2 Silv. Sup. Ct. 3, 6 N. Y. Supp. 174, 25 N.

Y. S. R. 315, holding city liable for collecting drainage and casting it upon party's land; *Congress & E. Spring Co. v. Saratoga Springs*, 6 N. Y. S. R. 385, holding city not liable for insufficiency of sewer for extraordinary freshet where for all ordinary occasions its capacity was sufficient; *Daggett v. Cohoes*, 27 N. Y. S. R. 630, 7 N. Y. Supp. 882, holding city liable for damages to walls of person's house where sewer overflowed by reason of discharging into it waters collected in surface well; *Clark v. Rochester*, 43 Hun, 271, holding municipality liable to one upon whose lands it conducts surface water wrongfully diverted from its natural channel; *Ordway v. Canisteo*, 66 Hun, 569, 21 N. Y. Supp. 835, holding municipal corporation liable to riparian neighbor for damages resulting from diversion of stream; *Anchor Brewing Co. v. Dobbs Ferry*, 84 Hun, 274, 32 N. Y. Supp. 371, holding municipality liable for damages caused by flow of surface water upon private lands from streets constructed by it; *McCarthy v. Far Rockaway*, 3 App. Div. 379, 38 N. Y. Supp. 989, holding village liable for discharging accumulated surface water upon lands of individual; *Spink v. Corning*, 61 App. Div. 84, 70 N. Y. Supp. 143, holding construction of artificial drains into natural watercourse, not unlawful provided water course is not thereby made to overflow its banks; *Hentz v. Mt. Vernon*, 78 App. Div. 515, 79 N. Y. Supp. 774, holding city collecting surface water into stream which overflows its banks liable to riparian owner for resulting damages; *Sadlier v. New York*, 104 App. Div. 82, 93 N. Y. Supp. 579, holding city liable for injury to property from debris and water coming from bridge above it; *Jung v. New York*, 132 App. Div. 18, 116 N. Y. Supp. 368, holding municipality not liable for damages to lands caused by surface waters flowing from unpaved street without curb sewage system; *Vogel v. New York*, 92 N. Y. 10, 44 A. R. 349, holding city liable for damages to party's lands by diverting and casting surface waters thereon by excavations; *Tremblay v. Harmony Mills*, 171 N. Y. 598, 64 N. E. 501, to point that city may not construct sewer so as to collect water and discharge it to injury of adjacent lands; *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341, to point that city which negligently diverts water on to property of party is liable in damages; *Scranton's Appeal*, 22 W. N. C. 274, on right to restrain city from building culvert for purpose of draining surface water.

Cited in reference notes in 34 A. R. 240, on liability of municipal corporation for surface water escaping on adjacent land; 36 A. R. 788, on liability of city for obstructing flow of water and turning it onto land of lot owners; 37 A. R. 763, on liability of municipal corporation for casting surface water on adjoining proprietor.

Cited in notes in 85 A. S. R. 731, on right to accelerate or increase flow of surface water over another's land in large quantities; 85 A. S. R. 734, on right to accelerate or increase flow of surface water by draining into stream or natural channel.

Distinguished in *Watson v. Kingston*, 43 Hun, 367, holding city not liable to adjoining property owner for damages by water caused by grading of street; *Rutherford v. Holley*, 105 N. Y. 632, 11 N. E. 818, 1 Silv. Ct. App. 387, holding that substantial change in direction of surface water must be shown to have resulted from acts of corporation in making street improvements to render it liable therefor; *Barber v. New Scotland*, 88 Hun, 522, 34 N. Y. Supp. 968, holding culvert insufficient to carry off water in freshets not such as to render municipality liable as for defective highway.

—By discharge of sewage upon private property.

Cited in *Seifert v. Brooklyn*, 15 Abb. N. C. 97, holding city liable for discharge of sewage upon private property because of sewer's incapacity; *Van Rensselaer v. Albany*, 15 Abb. N. C. 457, 2 How. Pr. N. S. 42, holding municipal corporation liable to owner of land for creating nuisance thereon by discharge of sewer upon it; *Jackson v. Rochester*, 7 N. Y. S. R. 853, holding that injunction lies restraining city's continuance of use of sewer adjudged a nuisance; *Morgan v. Binghamton*, 32 Hun, 602, holding that city may not turn its sewage upon property of person to his injury; *Gillett v. Kinderhook*, 77 Hun, 604, 28 N. Y. Supp. 1044, holding village liable for damages sustained by its act in collecting and throwing on person's premises sewage and surface water from its streets; *Bolton v. New Rochelle*, 84 Hun, 281, 32 N. Y. Supp. 442, holding municipality liable for maintenance of nuisance caused by sewer; *Magee v. Brooklyn*, 18 App. Div. 22, 45 N. Y. Supp. 473, holding municipality liable for collecting in one sewer drainage of several and discharging all upon private property; *O'Donnell v. Syracuse*, 102 App. Div. 80, 92 N. Y. Supp. 555, holding city not relieved from liability for its neglect to prevent injury from overflow by discharge of sewage into stream, upon principle that matter rested in discretion of officers; *Duryee v. New York*, 96 N. Y. 477, holding city liable for discharge of sewage on private premises; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 A. R. 664, 4 N. E. 321, holding city liable for overflowing party's premises by sewage as consequence of defective plan; *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030, holding city liable for discharge of sewage on private premises; *New York C. & H. R. R. Co. v. Rochester*, 127 N. Y. 591, 28 N. E. 416, holding that owner of lands can restrain discharge of sewage thereon committed or threatened by city; *Reading Iron Works v. South Chester*, 2 Del. Co. Rep. 455, holding that equity will not interfere to restrain municipality from creating nuisance by construction of sewer, unless injury is such as is not capable of adequate compensation by suit at law.

Cited in note in 16 E. R. C. 626, on liability of municipal corporation in respect to sewers.

—By pollution of waters with sewage.

Cited in *Hooker v. Rochester*, 37 Hun, 181, holding city liable for pollution of stream by sewage; *Schrivver v. Johnstown*, 71 Hun, 232, 24 N. Y. Supp. 1083, holding that pollution of private pond by municipality presents case for perpetual injunction, with at least nominal damages; *Moody v. Saratoga Springs*, 17 App. Div. 207, 45 N. Y. Supp. 365, holding village liable to one whose stream is polluted by sewage; *Huffmire v. Brooklyn*, 102 N. Y. 584, 48 L.R.A. 421, 57 N. E. 176 (affirming 22 App. Div. 406, 48 N. Y. Supp. 132), holding city liable for destruction of oyster bed on private property by discharge of sewage thereon.

Cited in notes in 66 A. D. 442, on municipal liability as to surface water and drainage; 84 A. S. R. 912, on pollution of waters by city while making reasonable use of stream; 84 A. S. R. 924, on injuries due to negligence of city in pollution of water; 1 L.R.A. 297, on duties and liabilities of municipal corporation in regard to drainage and sewerage; 48 L.R.A. 697, on statutory right of municipal corporation to drain sewage into waters; 24 L.R.A.(N.S.) 904, on draining surface water into water course.

Distinguished in *Prime v. Youker*, 192 N. Y. 105, 84 N. E. 571, holding city

not liable for increased discharge of surface waters into stream, resulting from grading and paving of streets.

Liability of railroad company as to surface water.

Cited in *Coleman v. Kansas City, St. J. & C. B. R. Co.* 36 Mo. App. 476, holding railroad company not liable for injury caused by diverting water into body into stream which had not theretofore received it as consequence of unprecedented storm; *Deigleman v. New York, L. & W. R. Co.* 34 N. Y. S. R. 4, 12 N. Y. Supp. 83, holding railroad company liable for discharge of surface water upon neighbor's land by its construction of pits; *Mitchell v. New York, L. E. & W. R. Co.* 36 Hun, 177, holding railroad company liable for damages to one on whose land accumulated surface water is discharged by erection of embankment; *Wickham v. Lehigh Valley R. Co.* 85 App. Div. 182, 83 N. Y. Supp. 146, holding railroad company liable for flooding land by change in course of surface water caused by its embankment; *Gordon v. Ellenville & K. R. Co.* 119 App. Div. 797, 104 N. Y. Supp. 702, holding railroad company not liable for damages resulting from diversion of water course over neighbor's land caused during freshet by giving away of embankment.

Liability of landowner generally for obstruction or diversion of water.

Cited in *Phillips v. Waterhouse*, 69 Iowa, 199, 58 A. R. 220, 28 N. W. 539, to point that one cannot collect surface water into stream and precipitate it onto another's premises; *Jackman v. Arlington Mills*, 137 Mass. 277, to point that owner of land has no right to collect surface water into artificial stream and discharge it upon adjoining land of another to his injury; *Gregory v. Bush*, 64 Mich. 37, 8 A. S. R. 797, 31 N. W. 90; *Fremont, E. & M. Valley R. Co. v. Marley*, 25 Neb. 138, 13 A. S. R. 482, 40 N. W. 948; *Bunderson v. Burlington & M. River R. Co.* 43 Neb. 545, 61 N. W. 721,—holding that party has no right to gather up surface water and discharge it on land of another to his damage; *Schrieber v. Driving Club*, 15 Misc. 632, 37 N. Y. Supp. 348, holding land owner liable for surface water overflow of neighboring land as result of construction of ditches; *Seely v. Shaffer*, 32 N. Y. S. R. 480, 10 N. Y. Supp. 283, to point that land owner is liable for damages resulting from his collecting, diverting and discharging water upon neighbor's land; *Vernum v. Wheeler*, 35 Hun, 53, holding one changing and discharging surface water upon neighbor's land liable for damages; *Egener v. New York & R. B. R. Co.* 3 App. Div. 157, 38 N. Y. Supp. 319, to point that land owner cannot by artificial means collect surface water into channels and discharge it upon land of his neighbor; *Branson v. New York C. & H. R. R. Co.* 111 App. Div. 737, 97 N. Y. Supp. 788, holding that landowner cannot collect water into artificial channel upon his lands and discharge it in increased volume upon another's land so as to cause injury; *Barkley v. Wilcox*, 86 N. Y. 140, 40 A. R. 519, to point that landowner cannot collect surface water into channels and discharge it upon neighbor's land; *McKee v. Delaware & H. Canal Co.* 125 N. Y. 353, 21 A. S. R. 740, 26 N. E. 305, holding riparian owner who retains waters of natural stream and discharges them so as to overflow its banks to injury of lower owner liable therefor; *Brewster v. J. & J. Rogers Co.* 169 N. Y. 73, 58 L.R.A. 495, 62 N. E. 164, holding that one has no right to store water along stream which is natural highway and discharge it so as to overflow and wash away banks to injury of riparian owners; *McCormick v. Horan*, 81 N. Y. 86, 37 A. R. 479, holding that landowner could compel neighbor to remove dam erected in natural stream which caused water to flow upon former's land.

Cited in reference note in 37 A. R. 150, on liability for concentrating and casting surface water on another's land.

Cited in notes in 32 A. D. 127, on servitude to receive flow of water; 21 L.R.A. 606, on right to cast surface water into natural streams; 41 L.R.A. 747, on right as between upper and lower proprietors to increase quantity in flow of stream; 41 L. ed. U. S. 838-840, on drainage of surface water.

35 AM. REP. 543, MORGAN v. SCHUYLER, 79 N. Y. 490.

Right to use firm name.

Cited in *Macdonald v. Trojan Button Fastener Co.* 29 N. Y. S. R. 867, 9 N. Y. Supp. 383, holding that neither partner can have exclusive use of firm name.

Cited in reference notes in 85 A. S. R. 83, on matters as to trademarks; 96 A. S. R. 611, on right to use firm name.

Right to be styled successor of firm.

Cited in *Brown v. Dennison*, 15 App. Div. 525, 44 N. Y. Supp. 535, holding that partner by purchase of copartners' interests in assets and good will of partnership acquired right to represent himself as successor of firm; *Blumenthal v. Strauss*, 53 Hun, 501, 6 N. Y. Supp. 393, 23 Abb. N. C. 339, holding that members of firm purchasing partner's interest have no right to maintain sign and paper heading signifying that they are successors of original firm.

Cited in reference note in 48 A. R. 232, on rights of partner purchasing partnership property.

Cited in note in 96 A. S. R. 614, on right of partner selling out to another partner to set up business.

Name as part of good will of business.

• Cited in *Re Randell*, 2 Connolly, 29, 8 N. Y. Supp. 652; *Read v. Mackay*, 47 Misc. 435, 95 N. Y. Supp. 935,—holding that good will of business does not include firm name.

Cited in note in 15 L.R.A. 465, on name of business establishment as part of good will.

Distinguished in *Caswell v. Hazard*, 50 Hun, 230, 2 N. Y. Supp. 783 (former appeal in 14 Jones & S. 559), holding that partner purchasing retiring partner's interest in business and good will of firm has right to use latter's name.

Right to use another person's name in business.

Cited in *Scheer v. American Ice Co.* 32 Misc. 351, 66 N. Y. Supp. 3, holding that where ice dealer sells out and agrees not to engage in that business for term of years, he does not expressly grant right to use his name.

Distinguished in *Van Wyck v. Horowitz*, 16 Abb. N. C. 121, 2 How. Pr. N. S. 279, holding that employee setting up business for himself in competition with his hitherto employer, has no right to use latter's name, upon sign to indicate that he was "late with" person so named.

35 AM. REP. 550, POWER v. CASSIDY, 79 N. Y. 602.

Validity of trust generally.

Cited in *McHugh v. McCole*, 97 Wis. 166, 40 L.R.A. 724, 72 N. W. 631, on creation of valid trust by will; *Re Herrick*, 32 N. Y. S. R. 1032, 12 N. Y. Supp. 105, holding that valid trust for support and maintenance of testator's son may be created; *Re Southerland*, 6 Dem. 220, 5 N. Y. S. R. 369, to point that trust relating only to personalty was not affected by provision of revised statutes in

respect to validity of trust estates; *Cass v. Cass*, 15 App. Div. 235, 44 N. Y. Supp. 186, to the point that the law does not limit or confine trusts as to personality, except in reference to suspension of ownership.

Cited in notes in 3 L.R.A. 146, on express trusts in respect to personal property; 5 L.R.A. 104, on maxim, Equity looks upon that as done which ought to have been done.

— Of bequest or devise for masses.

Cited in *Re Black*, 1 Connoly, 477, 5 N. Y. Supp. 452, holding that bequest of sum of money to executor in trust for masses for repose of souls of testatrix and husband by particular clergyman, not invalid on account of indefiniteness of beneficiary.

Cited in reference notes in 67 A. D. 184, on charitable uses and devises thereto; 1 A. S. R. 416, on validity of devises and bequests to charitable uses; 2 A. S. R. 440, on what bequests to charitable uses are sustainable.

Cited in notes in 14 L.R.A.(N.S.) 82, on creation and general requisites of trust for charity or religion in jurisdictions repudiating statute of uses; 5 E. R. C. 579, on validity of bequest in trust for charitable purposes.

Distinguished in *Hagenmeyer v. Hanselman*, 2 Dem. 87, 12 Abb. N. C. 432, holding bequest for purpose of masses for testator's soul and for other charity institutions as pastor of certain church sees fit, not invalid as for uncertainty of beneficiary; *Holland v. Alcock*, 108 N. Y. 312, 2 A. S. R. 420, 16 N. E. 305 (reversing 40 Hun, 372), holding devise to have prayers said in church to be selected by executors, for repose of testator's soul and souls of his family and also souls of all others who may be in purgatory, invalid because of no beneficiary in existence.

Validity of trust as dependent on certainty of beneficiaries.

Cited in *Re Gibson*, Cof. Prob. Dec. 62, 1 Cof. Prob. Dec. Anno. 9, holding that charitable institution need not be named by its corporate name; *Allen v. Stevens*, 33 App. Div. 485, 54 N. Y. Supp. 8 (dissenting opinion), on validity of trust where will provides no power of selection of beneficiaries; *Riker v. Leo*, 115 N. Y. 93, 21 N. E. 719 (reversing 15 N. Y. S. R. 932, 1 N. Y. Supp. 128), on validity of gift for benefit of corporate society existing at death of testator's nephew where there was more than one corporate society in existence answering description; *Ludlam v. Holman*, 6 Dem. 194, holding devise of furniture, wearing apparel and jewelry to A. and B., to be distributed as testator may direct and designate them while living, void for uncertainty in failing to give means of identifying beneficiaries; *Re Mullen*, 25 Misc. 253, 55 N. Y. Supp. 432, holding gift to sister superior of home, who shall be in charge at time of testator's death, valid; *Loch v. Mayer*, 50 Misc. 442, 106 N. Y. Supp. 837, holding trust for benefit of sufferers of Slocum disaster sufficiently definite and certain to be executed; *Re Sacrison*, — N. D. —, 26 L.R.A.(N.S.) 724, 123 N. W. 518, holding will the language of which shows apparent intention to restrict charity to poor and destitute children in Touskogsöcken, not invalid; *Webster v. Morris*, 66 Wis. 366, 57 A. R. 278, 28 N. W. 353, holding bequest to needy relatives sufficiently definite and certain to be executed.

Cited in notes in 60 A. R. 230; 64 A. S. R. 759,—on certainty and unity required in charitable trusts; 3 L.R.A. 149, on sufficiency of designation of beneficiaries in bequest for charitable use; 12 L.R.A. 415, on necessity, to validity of benevolent trust, that objects of bounty be clearly defined; 13 L.R.A.(N.S.) 1180, on validity of devise or bequest for charitable purposes which

leaves selection of objects of charity and beneficiaries entirely to discretion of executor or trustee; 14 L.R.A.(N.S.) 119, 120, 129, on necessary certainty as to beneficiaries of bequest for charity or religion; 14 L.R.A.(N.S.) 126, 127, on necessary certainty as to beneficiaries in bequest as applied to relief of poor.

Distinguished in *Fairchild v. Edson*, 77 Hun, 298, 28 N. Y. Supp. 401, holding that bequest of rest, residue and remainder of my estate not disposed of by my will or codicil, to my executors, to be divided among such incorporated religious and charitable societies of New York city in such amounts as they shall fix, with approval of named friend, is void; *Fosdick v. Hempstead*, 125 N. Y. 581, 11 L.R.A. 715, 26 N. E. 801, holding bequest to town in trust for benefit of poor of town, not confined to those for whose support town is under statutory liability, invalid for want of ascertained beneficiary.

Limited in *Re Ingersoll*, 2 Connolly, 453, 12 N. Y. Supp. 103, holding bequest of sum to executor in trust for aid in extending Christian religions, to be expended through agency of Baptist church and its various societies, void for uncertainty as to beneficiary.

Disapproved in *Simmons v. Burrell*, 8 Misc. 388, 28 N. Y. Supp. 625, holding bequest of money to church in trust for purchase of garments to enable poor children to attend Sabbath school void on account of indefiniteness of beneficiaries.

—Empowering executors or trustees to designate beneficiaries.

Cited in *Atwater v. Russell*, 49 Minn. 57, 51 N. W. 629, on validity of trust where trustees are directed to pay proceeds to one of two hospitals which in their judgment was most deserving; *Riker v. Cromwell*, 7 N. Y. S. R. 316, holding that bequest to executor with expression of hope that executors will carry out testator's purpose, is in effect absolute gift for objects such as testator would have favored; *Prichard v. Thompson*, 95 N. Y. 76, 47 A. R. 9 (reversing 29 Hun, 295), holding trust for benefit of such incorporated societies in certain states as executors might select invalid because of uncertainty in designation of beneficiaries; *Re O'Hara*, 95 N. Y. 403, 47 A. R. 53, 14 Abb. N. C. 71, holding trust in aid of charities and purposes named in will or in any other charity which majority of trustees may prefer, invalid; dissenting opinion in *Tilden v. Green*, 130 N. Y. 29, 27 A. S. R. 487, 14 L.R.A. 33, 28 N. E. 880 (affirming 54 Hun, 231, 7 N. Y. Supp. 382), on validity of trust execution of which is left to discretion of executors; *People v. Powers*, 147 N. Y. 104, 35 L.R.A. 502, 41 N. E. 432 (reversing 83 Hun, 449, which affirmed 8 Misc. 628, 29 N. Y. Supp. 950), holding trust for charitable and benevolent institutions of Rochester which trustee shall choose unenforceable for failure to designate beneficiary with reasonable certainty; *Gumble v. Pfluger*, 62 How. Pr. 118, holding bequest for benefit of such Protestant charitable institutions as executors may choose, valid; *Fairchild v. Edson*, 5 Misc. 451, 25 N. Y. Supp. 937, holding bequest of remainder of estate to executors to be divided among such charitable societies and in such amounts as shall be appointed by testator's friend, named, if living, valid; *Re Bailey*, 24 Abb. N. C. 206, 10 N. Y. Supp. 877, holding fact that power is conferred upon executors to designate beneficiaries, does not render will void for uncertainty; *Selleck v. Thompson*, 28 R. I. 350, 67 Atl. 425, holding that where testatrix expressed desire to devote greater portion of property to charitable purposes, gave same to trustees with power to select beneficiaries, gift was sufficiently definite for judicial cognizance.

Cited in note in 14 L.R.A. (N.S.) 138, on selection of beneficiaries by trustees in bequest for charity or religion.

What constitutes an equitable conversion of realty into personalty.

Cited in *Skae's Estate*, 1 Cof. Prob. Dec. Anno. 405, holding that equitable conversion may take place by implication as well as by express words; *Re Wheeler*, 1 Misc. 450, 22 N. Y. Supp. 1075, 1 Power, 160, holding that will empowering executors to sell realty constitutes equitable conversion of real estate; *Re Cobb*, 14 Misc. 409, 36 N. Y. Supp. 448, *Gibbons*, Sur. Rep. 402, holding that intent governs in determining whether there is an equitable conversion of realty under will; *Allen v. Stevens*, 22 Misc. 158, 49 N. Y. Supp. 431, holding that property must be treated as personal for purposes of trust where will directs sale of it; *McGowan v. Tift*, 35 Misc. 603, 72 N. Y. Supp. 132, holding that will authorizing and empowering sale of realty works equitable conversion; *Re McKay*, 37 Misc. 590, 75 N. Y. Supp. 1069, holding that if will contains imperative directions to sell, real estate is converted into personal property at death of testator; *Re Faile*, 51 Misc. 166, 100 N. Y. Supp. 856, holding that gift of whole residuary estate to executors, accompanied by power of sale, evinces purpose of conversion; *Mutual L. Ins. Co. v. Bailey*, 19 App. Div. 204, 45 N. Y. Supp. 1069; *Stebbins v. Turner*, 55 Misc. 587, 105 N. Y. Supp. 945,—holding that real estate will be deemed converted into personalty where executors are clothed with power to sell and distribute proceeds as directed by will; *Re Hesdra*, 2 Connolly, 514, 20 N. Y. Supp. 79, holding that will providing that real and personal estate whenever found shall be disposed of as deemed best by executor contemplates conversion of realty and personalty into general fund; *Dennis v. Jones*, 1 Dem. 80, holding that provision of will which directed sale of realty operated as equitable conversion thereof into personalty; *Canfield v. Crandall*, 4 Dem. 111, to point that where testator authorizes executors to sell realty, and it is apparent that he intended sale, estate will be deemed personal, under doctrine of equitable conversion though power of sale is not in terms absolute; *Wardlow v. Home for Incurables*, 4 Dem. 473, holding that direction of testator to executors to convert entire estate, real and personal, into money brought about at testator's death equitable conversion of realty into personalty; *Smith v. Buchanan*, 5 Dem. 169, holding that there was conversion of realty into personalty under provisions of will directing executors to sell and turn realty into money; *Re Buchanan*, 5 N. Y. S. R. 351; *Gallup v. Wright*, 61 How. Pr. 286,—holding that by direction in will to executors to sell realty and convert same into cash, there was equitable conversion of realty into personalty; *Wetmore v. Peck*, 66 How. Pr. 54, holding that provisions of will empowering trustees to sell realty constitute equitable conversion of realty into personalty; *Re Dodge*, 40 Hun, 443, holding that there is equitable conversion where testator devised \$1,000 of "proceeds of realty" and then "rest and residue of proceeds of realty above directed to be sold"; *Re Russell*, 59 App. Div. 242, 69 N. Y. Supp. 563, holding that doctrine of equitable conversion equally applies whether sale of realty is directed or merely authorized by will; *Shipman v. Rollins*, 98 N. Y. 311, 15 Abb. N. C. 288, holding that there is equitable conversion where although direction to sell was not imperative, it is apparent from general provisions of will that testator intended such realty to be sold; *Fritz v. Fritz*, 43 N. Y. S. R. 755, 17 N. Y. Supp. 800; *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 585,—holding that realty will be deemed converted into personalty where executors are clothed with power and duty to sell realty and distribute pro-

ceeds as will directs; *Hope v. Brewer*, 136 N. Y. 126, 18 L.R.A. 458, 32 N. E. 558, 48 N. Y. S. R. 834, holding that direction in will to sell operated to convert real estate into personalty; *Doane v. Mercantile Trust Co.* 160 N. Y. 494, 55 N. E. 296, holding that real estate was converted into personal property at death of testator by imperative direction to sell; *Northrop v. Marquam*, 16 Cr. 173, 18 Pac. 440, holding that will which directs sale of real estate of testator by executors does not work equitable conversion of interest of child not named or provided for by will; *Ford v. Ford*, 70 Wis. 19, 5 A. S. R. 117, 33 N. W. 188, holding that discretionary authority of executors to sell could not operate as equitable conversion; *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488, holding that will authorizing executor to sell real estate and apply proceeds as directed, operates conversion of real, into personal property.

Cited in notes in 3 L.R.A. 145, on conversion of real property into personalty; 7 E. R. C. 25, on equitable conversion.

Distinguished in *Bijur v. Bijur*, 49 Hun, 235, 1 N. Y. Supp. 630, holding conversion of real into personal property not essential to effectual division of estate, where language of will shows different intent and partition is not impracticable; *Hobson v. Hale*, 95 N. Y. 588, holding that provisions of will must be of such character as to leave no doubt of testator's intent to have his realty converted into personalty, in order to sustain theory of equitable conversion.

Right of devisees to defeat equitable conversion.

Cited in *Smith v. A. D. Farmer Type Founding Co.* 18 Misc. 434, 41 N. Y. Supp. 788, 26 N. Y. Civ. Proc. Rep. 141, holding that discretionary as well as mandatory power of sale may be defeated whenever devisees unite and elect to take land instead of money; *Geiger v. Bitzer*, 80 Ohio St. 65, 22 L.R.A. (N.S.) 285, 88 N. E. 134, 17 A. & E. Ann. Cas. 151, holding that doctrine of equitable conversion does not apply to interest of child not named or provided for in will.

35 AM. REP. 556, NICHOLSON v. COX, 83 N. C. 44.

Effect of acceptance of service of summons.

Cited in *Johnson v. Futrell*, 86 N. C. 122, holding acceptance of service of summons by one sufficient to authorize court to proceed against him as party to cause; *Godwin v. Monds*, 106 N. C. 448, 10 S. E. 1044, to point that acceptance of service of summons in writing will be treated as written admission of service as contemplated by statute.

35 AM. REP. 558, GOOCH v. MCGEE, 83 N. C. 59.

What property of quasi public corporation is subject to execution.

Cited in *Buncombe County v. Tommey*, 115 U. S. 122, 29 L. ed. 305, 5 Sup. Ct. Rep. 1186, holding property of railroad company necessary to enable it to effectuate objects of incorporation not subject to lien laws; *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 A. S. R. 514, 51 N. W. 240, holding that property of public corporation, such as bridge company, which is essential to exercise of its franchise cannot, in absence of statutory authority, be seized and sold to satisfy ordinary judgment; *Hughes v. Craven County*, 107 N. C. 598, 12 S. E. 465, holding that property of county being necessary for public purposes cannot be sold under execution to satisfy debt of individual; *McNeal Pipe & Foundry Co. v. Howland*, 111 N. C. 615, 20 L.R.A. 743, 16 S. E. 857 (dissenting opinion), as to whether property of corporation chartered for purpose of supplying water to city is subject to lien for materials furnished; *Wall v.*

Norfolk & W. R. Co. 52 W. Va. 485, 94 A. S. R. 948, 64 L.R.A. 501, 44 S. E. 294, holding such property of railroad company as is necessary to enable it to effectuate objects of incorporation is not subject to execution.

Cited in note in 20 L.R.A. 738, on execution or judicial sale of corporate franchise or property necessary to its enjoyment.

Right to dispose of corporate property separate from franchise.

Cited in Connor v. Tennessee C. R. Co. 54 L.R.A. 687, 48 C. C. A. 730, 109 Fed. 931, holding that section of railroad cannot be sold under decree of court, separate from franchises, for purpose of enforcing contractor's lien; Logan v. North Carolina R. Co. 116 N. C. 940, 21 S. E. 959, holding that railroad company cannot sell separate from franchise real estate dedicated to strictly corporate purposes; Vaughn v. Forsyth County, 118 N. C. 636, 24 S. E. 425, holding that public corporation cannot sell its corporate property where alienation of it would tend to prevent performance of its duties to public; Bradley v. Ohio River & C. R. Co. 119 N. C. 918, appx., 78 Fed. 387, to point that property of railroad company must be kept in association with its franchises; James v. Western North Carolina R. Co. 121 N. C. 523, 46 L.R.A. 306, 28 S. E. 537, holding that sale of corporate property includes franchise; Carolina Coal & Ice Co. v. Southern R. Co. 144 N. C. 732, 57 S. E. 444, holding that franchise passed to purchaser in sale of tangible property of domestic public service corporation.

Cited in note in 61 L.R.A. 871, on sale or lease of canal by private corporation.

Grantor's right of reverter.

Cited in Bass v. Roanoke Nav. & Water Power Co. 111 N. C. 439, 19 L.R.A. 247, 16 S. E. 402, on grantor's right of reverter on dissolution of corporation.

35 AM. REP. 564, COTTEN v. WILLOUGHBY, 83 N. C. 75.

Validity of mortgage of thing not in esse.

Cited in Perry v. White, 111 N. C. 197, 16 S. E. 172, holding mortgage upon subsequently acquired property, other than crops, valid between parties.

Cited in reference note in 37 A. R. 728, by taking possession of after-acquired property by mortgagee.

Cited in notes in 5 E. R. C. 136, as to what personal property may be mortgaged; 10 E. R. C. 476, on validity of sale of property to be subsequently acquired.

— Crops.

Cited in Rawlings v. Hunt, 90 N. C. 270, holding crop to be planted on one's own land subject of valid mortgage; Atkinson v. Graves, 91 N. C. 99, holding cotton which party may make during year subject of mortgage; Rountree v. Britt, 94 N. C. 104, holding mortgage of crop to be planted valid; Womble v. Leach, 83 N. C. 84; Harris v. Jones, 83 N. C. 317; Wooten v. Hill, 98 N. C. 48, 3 S. E. 846,—holding unplanted crop subject of mortgage; Gwathney v. Etheridge, 99 N. C. 571, 6 S. E. 411, holding mortgage on crops to be produced, valid, where land on which they are to be raised is identified at time lien is created.

Cited in reference notes in 54 A. S. R. 139, on chattel mortgage on unplanted crops; 4 A. S. R. 69, on validity of mortgage of growing crop.

Cited in notes in 81 A. S. R. 44, on sale of crops growing or to be grown; 23 L.R.A. 464, as to what crop or part of crop sale or mortgage of future crops
Am. Rep. Vol. XVII.—63.

extends to; 23 L.R.A. 476, on special state doctrines and laws as to sale or mortgage of future crops.

Agricultural lien as mortgage.

Distinguished in *Patapasco Guano Co. v. Magee*, 86 N. C. 350, holding that instrument, which is intended by parties to operate as agricultural lien and which purports to be one, cannot prevail as mortgage.

Counterclaim in action upon note.

Cited in *Penn Lumber Co. v. McPherson*, 133 N. C. 287, 45 S. E. 577, holding that in action on note to recover possession of mortgaged property defendant may set up counter claim arising from breach of contract.

When creditor holds debtor's property as trustee.

Cited in *Austin v. Secrest*, 91 N. C. 214, holding that plaintiff upon recovering in claim and delivery holds as trustee and judgment, directing adjustment of all equities involved is proper; *Vick v. Smith*, 83 N. C. 80, holding that where mortgagee holding secured and unsecured debt, sells mortgaged property under power he is trustee for himself to extent of mortgage debt, and for debtor as to balance in his hands; *Sessoms v. Tayloe*, 148 N. C. 369, 62 S. E. 424, to point that plaintiffs upon recovering in foreclosure hold as trustees.

Who may bring action of claim and delivery.

Cited in *Livingston v. Farish*, 89 N. C. 140, holding that landlord may bring claim and delivery to recover possession of crops raised by tenant where his right of possession is denied.

35 AM. REP. 566, SIMMONS v. TAYLOR, 83 N. C. 148.

Removal of cause to Federal court.

Cited in *Seaboard Air Line R. Co. v. North Carolina R. Co.* 123 Fed. 629, holding that proceeding to condemn right of way for railroad being separable controversy as between lessor and nonresident lessee, can be removed to Federal court; *O'Kelly v. Richmond & D. R. Co.* 89 N. C. 58, holding that to entitle removal of cause to Federal court, there must exist in suit separate and distinct cause of action, in respect to which all necessary parties on one side are citizens of different states from those on other.

Cited in note in 5 L.R.A.(N.S.) 54, 93, on removal of cause to Federal court because of separable controversy.

35 AM. REP. 571, HOWARD v. STEAMSHIP CO. 83 N. C. 158.

Liability of carrier for misdelivery.

Cited in reference note in 4 A. S. R. 628, on carrier's duty as to delivery and liability for misdelivery.

Cited in note in 37 L.R.A. 177, on delivery to imposter by carrier.

35 AM. REP. 574, TURNER v. GAITHER, 83 N. C. 357.

Ratification of infant's contract.

Cited in *American Mortg. Co. v. Wright*, 101 Ala. 658, 14 So. 399, holding that infant's contract may be ratified by infant after majority by declaration or acts that clearly recognize existence of contract as binding obligation; *State ex rel. Petty v. Rousseau*, 94 N. C. 355, holding express confirmation or new promise after coming of age, necessary to bind infant on executory contract; *Ward v. Anderson*, 111 N. C. 115, 15 S. E. 933, holding that recital

"which said tract is subject to prior lien in favor of J. B." contained in mortgage executed by infant to another mortgagee after majority was ratification of mortgage executed during infancy; *Cox v. McGowan*, 116 N. C. 131, 21 S. E. 108, to point that infant's deed, being voidable executed conveyance, could be ratified without execution of another deed.

Cited in reference notes in 36 A. R. 86, on right of minor to disaffirm loan after attaining majority; 48 A. R. 687, on promise of infant after majority in ignorance of invalidity of contract; 1 A. S. R. 384, on power of infant to avoid his contract.

Cited in notes in 18 A. S. R. 607, on infants' bills and notes; 18 A. S. R. 705, on ratification by infant as matter of intention; 18 A. S. R. 709, on ratification of contracts, executory on infants' part, by new promises or acknowledgments; 41 L. ed. U. S. 763, on validity of ratification and disaffirming of infants' contracts.

What are necessities for infants.

Cited in *Mauldin v. Southern Shorthand & Business University*, 126 Ga. 681, 55 S. E. 922, 8 A. & E. Ann. Cas. 130, to point that professional education is not a necessary; *Englebert v. Troxell*, 40 Neb. 195, 42 A. S. R. 665, 26 L.R.A. 177, 58 N. W. 852, holding services of guardian ad litem of infant in defending foreclosure of mortgage executed by infants ancestor not necessities.

Cited in reference note in 67 A. D. 261, on timber to build home as necessary of infant.

Cited in note in 18 A. S. R. 652, 654, on test of what are necessities for infants.

35 AM. REP. 579, GREEN v. GREENSBORO FEMALE COLLEGE, 83 N. C. 449.

Removal of statutory bar by part payment.

Cited in *Riggs v. Roberts*, 85 N. C. 151, 39 A. R. 692, holding that bar of statute may be removed by act of partial payment proved to have been made at time commencing from which prescribed limitation would not have expired at beginning of action; *McDonald v. Dickson*, 87 N. C. 404, on removal of statutory bar by partial payment on debt; *State Nat. Bank v. Harris*, 96 N. C. 118, 1 S. E. 459, holding that effect of section 172 of the code is to leave law as it was prior to adoption of code of civil procedure as regards effect of partial payment in removing bar of statute of limitations; *Taylor v. Slater*, 16 R. I. 86, 12 Atl. 727, holding that new promise made on debt not yet barred by statute of limitations does not create new cause of action, but merely suspends bar of statute for period of limitation which begins with such new promise.

— By one of two or more obligors.

Cited in *Wood v. Barber*, 90 N. C. 76, holding that payment upon claim before barred by lapse of time, by one of several obligors of same class, becomes legal act of all, and arrests operation of statute as to them, but does not revive liability of others of different class; *Long v. Miller*, 93 N. C. 227, holding that payment on note by security after bar of statute has arisen, does not revive debt against co-sureties; *Moore v. Beaman*, 111 N. C. 328, 16 S. E. 177, holding that partial payment by either of two obligors before bond is barred continues it in force; *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315, holding that partial payments by maker after maturity kept note alive as against sure-

ty; *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636 (dissenting opinion), to point that where one surety makes payment on note after bar of statute has arisen it does not revive debt against co-sureties.

Cited in reference notes in 39 A. R. 419, on effect of payment of interest by one of joint makers of promissory note in statute of limitations; 58 A. R. 749, on effect on surety of payment by principal of debt barred by limitations.

Cited in notes in 65 A. S. R. 686, on part payment or acknowledgment of barred claim by one joint debtor; 65 A. S. R. 688, on payment or acknowledgment by one joint debtor before statute of limitations has run.

Distinguished in *Le Duc v. Butler*, 112 N. C. 458, 17 S. E. 428, holding that part payment of note by payee who has indorsed it, will not repel bar of statute of limitations as against maker.

35 AM. REP. 582, *FIRST NAT. BANK v. LINEBERGER*, 83 N. C. 454.

What will discharge surety.

Cited in *Stallings v. Lane*, 88 N. C. 214, holding that usurious contract, where consideration is executed, though avoidable by creditor, will exonerate surety.

— **Extension of time.**

Cited in *Lemmon v. Whitman*, 75 Ind. 318, 39 A. R. 150, holding that valid and binding contract between payee and principal debtor, for extension of time, without consent of sureties and upon executed consideration, discharged sureties; *Commercial Nat. Bank v. Simpson*, 90 N. C. 467, holding surety not released from liability where bank discounted note and at maturity extended time of payment to makers of valuable consideration, but reserved its rights against surety; *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. 817, holding agreement with principal, on sufficient consideration, to forbear to sue for fixed period, without reserving right to proceed against surety and made without his assent, exonerates him from liability; *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. 989, holding that contract to forbear, founded upon usurious consideration, made without surety's knowledge or consent will release him from liability; *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56, holding forbearance to sell principal security without wife's knowledge or consent discharges mortgage by wife for debt of husband.

Cited in notes in 36 A. R. 871, on effect upon indorser's liability of creditor's extension of time founded on usurious consideration; 53 L.R.A. 319, on effect of payment of usury in consideration of extension of time to principal on surety's liability; 17 E. R. C. 274, on discharge of surety by giving time to principal where remedy is reserved.

Modified in *Flemming v. Borden*, 127 N. C. 214, 53 L.R.A. 326, 37 S. E. 219, holding mortgage on wife's separate estate to secure husband's debt is discharged where husband secures extension without wife's consent, though consideration of extension was usurious.

Overruled in *Carter v. Duncan*, 84 N. C. 676, holding surety exonerated where creditor by parol contract extends time of payment of bond beyond date of commencement of suit thereon, without knowledge or consent of surety.

Cited as overruled in *Fleming v. Barden*, 126 N. C. 450, 78 A. S. R. 671, 53 L.R.A. 316, 36 S. E. 17, holding that debtor's payment of additional sum, after wife's death, for year's extension of time discharges mortgage by wife for husband's debt, although additional payment is usurious.

— **Effect of reservation of rights against surety.**

Cited in *Boatmen's Sav. Bank v. Johnson*, 24 Mo. App. 316, holding surety not discharged under agreement by which principal is discharged from liability to creditor, but by which rights of surety against principal, and of creditor against surety, are reserved; *Rockville Nat. Bank v. Holt*, 58 Conn. 526, 18 A. S. R. 293, 20 Atl. 669, holding that where creditor, holding notes of insolvent corporation, agreed to take in payment stock of reorganized company but reserving all rights against surety, latter is not discharged.

Invalidity of usurious note.

Cited in *Ward v. Sugg*, 113 N. C. 489, 24 L.R.A. 280, 18 S. E. 717, holding note embracing usurious interest void as against maker in hands of purchaser before maturity for value and without notice of extent to which contract is usurious.

35 AM. REP. 586, STATE v. JONES, 83 N. C. 605.

Guilt as principals of aiders and abettors.

Cited in *Rosencranz v. United States*, 83 C. C. A. 634, 155 Fed. 38, holding that one who aids and abets another in commission of crime may be charged in indictment and convicted as principal; *Bishop v. State*, 118 Ga. 799, 45 S. E. 614, holding that one aiding and abetting embezzlement may be held guilty of that crime as principal; *People v. McKane*, 143 N. Y. 455, 38 N. E. 950, 9 N. Y. Crim. Rep. 377, holding that person who, although not member of registry board, induces its members to wilfully violate provision of election law as to registration of voters, is guilty of crime and indictable as principal; *State v. Geddes*, 22 Mont. 68, 55 Pac. 919, holding indictment for murder, charging person as principal, sustainable by proof that he was guilty of advising and encouraging the crime; *Com. v. Hessler*, 17 Pa. Dist. R. 939, to point that one physically incapable may become principal offender in rape by abetting capable person.

Cited in reference note in 3 A. S. R. 91, on aiding and abetting crime of raps.

Cited in note in 51 A. D. 375, on liability of one incapable of committing offense as principal in first degree, as aider or abettor.

Liability of person in whose presence crime is committed.

Cited in *Hilmes v. Stroebel*, 59 Wis. 74, 17 N. W. 539, holding that mere presence at commission of assault and battery does not render person liable as participator therein, even though he did not use active endeavors to prevent its commission.

35 AM. REP. 587, STATE v. HOLLAND, 83 N. C. 624.

Effect of uncorroborated evidence of accomplice.

Cited in *State v. Miller*, 97 N. C. 484, 2 S. E. 363, holding conviction upon uncorroborated evidence of accomplice legal; *State v. Rowe*, 98 N. C. 629, 4 S. E. 506; *State v. Barber*, 113 N. C. 711, 18 S. E. 515,—holding that unsupported testimony of accomplice, if it produces entire belief of prisoner's guilt, is sufficient to warrant conviction.

Cited in notes in 71 A. D. 672; 50 A. S. R. 143, 917,—on conviction on uncorroborated testimony of accomplices; 98 A. S. R. 163, on advising and instructing jury as to necessity of corroborating testimony of accomplice.

35 AM. REP. 569, ENTERPRISE INS. CO. v. PARISOT, 35 OHIO ST. 35.**Effect of negligence of insured.**

Cited in *Beavers v. Security Mut. Ins. Co.* 76 Ark. 595, 90 S. W. 13, 6 A. & E. Ann. Cas. 585, holding insurer liable though negligent act of insured is proximate cause of damage by fire; *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832, holding that policy of marine insurance covers negligence of master and mariners; *Lovelace v. Travelers' Protective Asso.* 126 Mo. 104, 47 A. S. R. 638, 30 L.R.A. 209, 28 S. W. 877, to point that gross negligence of insured will not defeat recovery upon fire policy, unless latter so declares.

Cited in reference notes in 38 A. D. 731, on liability of insurer for negligence and carelessness of crew; 30 A. S. R. 539, on negligence of those in charge of ship as defense to action on marine policy.

Cited in notes in 36 A. S. R. 853, on effect of negligence or misconduct of assured or his servants on right to recover; 14 E. R. C. 340, on liability of insurer for loss by fire caused by negligence of master or crew.

Waiver of proofs of loss.

Cited in *Commercial Union Assur. Co. v. Meyer*, 9 Tex. Civ. App. 7, 20 S. W. 93, holding that there was waiver of preliminary proofs of loss where fire insurance company examined into circumstances of loss and offered certain sum in settlement; *Mosley v. Vermont L. Ins. Co.* 55 Vt. 142; *Findeisen v. Metropole F. Ins. Co.* 57 Vt. 520,—holding that whether there has been waiver of proof of loss in fire insurance is question of fact for jury.

35 AM. REP. 592, HILTABIDDLE v. STATE, 35 OHIO ST. 52.**Presumption as to capacity of boy under fourteen years of age to commit rape.**

Cited in *McKinny v. State*, 29 Fla. 565, 30 A. S. R. 140, 10 So. 732, to point that burden is on state to show capacity where boy under fourteen years of age is accused of rape; *Heilman v. Com.* 84 Ky. 457, 4 A. S. R. 207, 1 S. W. 731, holding boy under age of fourteen presumed to be incapable of committing rape; *Com. v. Hummel*, 7 Pa. Dist. R. 715, 21 Pa. Co. Ct. 445, 16 Lanc. L. Rev. 270, 4 Lack. Leg. News. 324, holding that boy under age of fourteen may be convicted of assault with intent to commit rape, notwithstanding want of capacity to perpetrate higher crime; *State v. Fisk*, 15 N. D. 589, 108 N. W. 485, 11 A. & E. Ann. Cas. 1061, holding presumption of physical incapacity not conclusive; *Foster v. Com.* 96 Va. 306, 70 A. S. R. 846, 42 L.R.A. 589, 31 S. E. 503, holding boy under age of fourteen conclusively presumed to be incapable of committing crime of rape.

Cited in reference notes in 45 A. D. 539; 4 A. S. R. 210,—on rebuttability of presumption that boy under age of fourteen cannot commit rape; 34 A. S. R. 323, on crime of rape.

Cited in notes in 70 A. D. 498, on rape by infant between ages of seven and fourteen; 80 A. D. 363, on capacity of defendant to commit rape; 36 L.R.A. 199, on prima facie presumption as to nonliability of children criminally; 36 L. R.A. 203, on presumption as to liability of children for rape.

Questions for jury.

Cited in *Darling v. Younker*, 37 Ohio St. 487, 41 A. R. 532, on question of negligence determinable as one of law.

35 AM. REP. 596, STATE v. HARPER, 35 OHIO ST. 78.**Admissibility of dying declarations on prosecution for abortion.**

Cited in *Edwards v. State*, 79 Neb. 251, 112 N. W. 611, holding dying declarations of deceased admissible in prosecution for homicide in procuring abortion; *Com. v. Bruce*, 16 Phila. 510, 41 Phila. Leg. Int. 242, holding dying declarations admissible in trial for procuring miscarriage; *Railing v. Com.* 110 Pa. 100, 1 Atl. 314, 16 Pittab. L. J. N. S. 142, 16 W. N. C. 452, 42 Phila. Leg. Int. 446, holding dying declarations not admissible in trial for abortion, although death has ensued.

Cited in reference notes in 25 A. S. R. 436, on admissibility of declarations as to cause of illness; 65 A. S. R. 349; 84 A. S. R. 516,—on admissibility of dying declarations.

Cited in notes in 66 A. D. 91, on admissibility of dying declarations in prosecution for causing abortion; 86 A. S. R. 667, on admissibility of dying declarations in prosecution for abortion; 44 A. S. R. 202; 56 L.R.A. 369; 40 L. ed. U. S. 532,—on dying declarations; 56 L.R.A. 365, on admissibility of dying declarations in criminal cases; 95 A. D. 787; 11 E. R. C. 306,—on admissibility of dying declarations.

Distinguished in *Montgomery v. State*, 8 Ind. 338, 41 A. R. 815, holding dying declarations competent where death results from unlawful attempt to produce abortion.

35 AM. REP. 598, KIROHNER v. MYERS, 35 OHIO ST. 85.**Wife's right of action under civil damage act.**

Cited in *Rantz v. Barnes*, 40 Ohio St. 43, holding persons, though in no way connected in business, who by sales of liquor contributed to keep up habitual intoxication of husband, jointly liable to wife for injury to means of support; *Mead v. Stratton*, 87 N. Y. 493, 41 A. R. 386; *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485,—holding in action for injury to means of support in consequence of intoxication which caused death, damages resulting from death can not be recovered.

Cited in reference notes in 39 A. R. 456, on right of wife to recover for death of husband under civil damage act; 102 A. S. R. 692, on liability under civil damage acts for death of intoxicated person.

Cited in notes in 48 A. D. 627, on who may be sued under civil damage liquor laws; 48 A. D. 630, on action by relative for injury to means of support; 52 A. R. 160, on application of proximate and remote cause to cases arising under civil damage act.

Disapproved in *Gardner v. Day*, 95 Me. 558, 50 Atl. 892, holding that wife may maintain action for injury to means of support by reason of husband's death by intoxication, against person who sold or gave him liquor that produced intoxication.

Contributory negligence as defense.

Cited in *New York, C. & St. L. R. Co. v. Swartout*, 14 Ohio C. C. 582, holding that where evidence raises question of ordinary care on part of plaintiff in action for personal injuries, defendant is entitled to have jury charge that if plaintiff was injured by reason of his failure to exercise ordinary care he cannot recover.

35 AM. REP. 601, FIREMAN'S INS. CO. v. HOLT, 35 OHIO ST. 189.

Effect of stipulation as to additional insurance.

Cited in *Phenix Ins. Co. v. Lamar*, 106 Ind. 513, 55 A. R. 764, 7 N. E. 241, holding that where parties have stipulated that other insurance, whether valid or not, shall avoid policy, effect of such stipulation cannot be avoided by showing prohibited insurance invalid; *American Ins. Co. v. Replegle*, 114 Ind. 1, 15 N. E. 810; *Sweeting v. Mutual F. Ins. Co.* 83 Md. 63, 32 L.R.A. 570, 34 Atl. 826,—holding that condition against other insurance relates only to other valid insurance; *Hughes v. Insurance Co. of N. A.* 40 Neb. 626, 59 N. W. 112, holding that violation of clause against additional insurance renders voidable first insurance contract at election of insurer; *Royal Ins. Co. v. McCrea*, 8 Lea, 531, 41 A. R. 656, holding that policy of insurance conditioned to be void in case of additional insurance without insurer's consent is avoided by subsequent valid insurance of which first insurer had no notice; *Turner v. Meridan F. Ins. Co.* 16 Fed. 454; *Wilyson v. Aetna Ins. Co.* 12 Tex. Civ. App. 512, 33 S. W. 1085,—holding that policy of insurance containing additional insurance clause "valid or not" is avoided by procurement of additional insurance though invalid.

Cited in reference notes in 40 A. D. 554, on effect of condition in policy against other insurance; 4 A. S. R. 123, as to whether subsequent void insurance is breach of condition against further insurance.

Cited in notes in 43 A. R. 221, on what constitutes other insurance within condition in insurance policy; 14 E. R. C. 29, on rules of construction of contracts of insurance.

35 AM. REP. 604, DYE v. SCOTT, 35 OHIO ST. 194.

Parol evidence as to indorsements.

Cited in *Sloan v. Gibbes*, 56 S. C. 480, 76 A. S. R. 559, 35 S. E. 408, holding parol evidence admissible to show that indorsers in blank of promissory note agreed that liability should be that of cosureties and not of successive sureties; *United States Nat. Bank v. Geer*, 55 Neb. 462, 70 A. S. R. 390, 41 L.R.A. 444, 75 N. W. 1088 (dissenting opinion), on admissibility of parol evidence to contradict or explain restrictive indorsement; *Holmes v. First Nat. Bank*, 38 Neb. 326, 41 A. S. R. 733, 56 N. W. 1011, holding evidence of contemporaneous parol agreement to explain or qualify blank indorsement of promissory note in action between parties inadmissible; *Bailey v. Stoneman*, 41 Ohio St. 148, holding that indorsement of note being in blank, parol evidence of what was said by parties in and about transfer was properly admitted.

Cited in note in 11 E. R. C. 230, on admissibility of parol evidence to vary terms of negotiable instruments.

—As to waiver of demand and notice.

Cited in *Lenhart v. Ramey*, 3 Ohio C. C. 135 (dissenting opinion), on admissibility of testimony to prove as between indorser and indorsee waiver of demand and notice; *Cummings v. Kent*, 44 Ohio St. 92, 58 A. S. R. 796, 4 N. E. 710; *Bassenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75; *Farr v. Ricker*, 46 Ohio St. 265, 21 N. E. 354,—to point that parol evidence is admissible to show waiver of demand and notice by indorser of note.

Cited in note in 57 A. D. 665, on parol testimony of waiver of right to demand and notice on part of indorser.

What constitutes waiver of notice of nonpayment of note.

Cited in *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886, holding that waiver

of presentment for payment constitutes waiver of notice of dishonor to indorser; *Bassenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75, holding that extension of time of payment constitutes waiver of demand and notice.

Credit to be given testimony.

Cited in reference note in 86 A. D. 478, on effect on testimony of witness who has wilfully sworn falsely in one material point.

Cited in note in 81 A. D. 270, on jury's disregard of uncontradicted and unimpeached witness.

35 AM. REP. 608, HORNBECK v. STATE, 35 OHIO ST. 277.

Admissibility of declarations of prosecutrix in trial for rape.

Cited in *Barnett v. State*, 83 Ala. 40, 3 So. 612, holding complaint by prosecutrix inadmissible in trial for rape; *Com. v. Cleary*, 172 Mass. 175, 51 N. E. 746, holding evidence of complaint by injured child to mother next morning after act admissible in trial for rape; *Ashford v. State*, 81 Miss. 414, 33 So. 174, to point that declarations of female in respect to violence done admissible in trial for rape; *State v. Patrick*, 107 Mo. 147, 17 S. W. 666, to point that immediateness of complaint of rape is essential to its admissibility; *Dunn v. State*, 45 Ohio St. 249, 12 N. E. 826, holding declarations of victim of rape made several days after its perpetration, inadmissible as evidence in chief to prove commission of offense; *Kenney v. State*, (Tex. Crim. App.) 65 L.R.A. 316, 79 S. W. 817 (dissenting opinion), on admissibility of statements of one who claims to be victim of rape, made only few minutes after outrage.

Cited in reference note in 1 A. S. R. 389, on admissibility in chief of details of complaint by prosecutrix in trial for rape.

— When she does not testify as witness.

Cited in *State v. Meyers*, 46 Neb. 152, 37 L.R.A. 423, 64 N. W. 697, holding that when victim of rape does not testify as witness, her declarations relating to offense are inadmissible; *Foster v. State*, 1 Ohio C. C. 467, holding declarations made by person assaulted, to other persons, shortly after commission of act, inadmissible in prosecution for sodomy where it is not shown that person injured was examined as witness in case.

Cited in note in 65 L.R.A. 318, on admissibility of declarations of infant too young to be sworn as witness at the trial.

Admissibility of underclothing worn by prosecutrix at time of rape.

Cited in *State v. Peterson*, 110 Iowa, 647, 82 N. W. 329, holding underclothing worn by prosecutrix at time rape was alleged to have been committed admissible.

Failure of prosecutrix to make complaint as evidence.

Cited in *State v. Wolf*, 118 Iowa, 564, 92 N. W. 673, holding fact that injured female makes no complaint for some time after injury, is admissible in prosecution for rape as affecting her credibility.

35 AM. REP. 611, WILLIAMS v. URMSTON, 35 OHIO ST. 206.

Right of married woman as to separate estate.

Cited in *Stagge v. Nichols*, 1 Ohio C. C. 408, holding that married woman can be compelled to execute contract in writing, made jointly with husband, to convey her separate real estate, though contract is not in form of deed, and there is no acknowledgment by her separate and apart from husband.

Cited in reference note in 2 A. S. R. 320, on note of married woman.

Cited in note in 30 A. D. 240, on power of feme covert over separate estate in absence of statutory regulation.

— Right to lease.

Cited in *Heal v. Niagara Oil Co.* 150 Ind. 483, 50 N. E. 482, on right of married woman to lease her separate estate.

— Right to charge.

Cited in *Sidway v. Nichol*, 62 Ark. 146, 34 S. W. 529, to point that promissory note of married woman, given for money borrowed by her before passage of enabling statutes, would have been enforced in equity against her separate estate; *Boatmen's Sav. Bank v. Collins*, 75 Mo. 280, holding that married woman possessed of separate estate may bind it by giving her promissory note; *Deglow v. Kruse*, 2 Ohio N. P. 235, holding that mortgage executed by wife on her own property to secure debt of firm of which husband is member, no consideration passing to her and there being no merger of firm debts, is void; *Pelzer v. Campbell*, 15 S. C. 581, 40 A. R. 705, holding married woman liable for payment of debt where she signed notes of her son as surety without advantage to herself or estate; *Patrick v. Littell*, 36 Ohio St. 79, 38 A. R. 552, holding that married woman's separate estate is chargeable with performance of her agreement to pay for services to be rendered in procuring loan of money to remove mortgage therefrom; *Sticken v. Schmidt*, 64 Ohio St. 354, 60 N. E. 561, to point that married woman could charge her separate estate in equity for her obligations; *Ankeney v. Hannon*, 147 U. S. 118, 37 L. ed. 105, 13 Sup. Ct. Rep. 206, holding contracts of married woman not chargeable in equity upon subsequently acquired estates.

Cited in reference note in 37 A. R. 817, on liability of married woman's estate for goods purchased.

Presumption upon married woman's execution of note as surety.

Cited in *Cartan v. David*, 18 Neb. 310, 4 Pac. 61, holding assignment by married woman of note and mortgage upon her separate estate as collateral security for payment of her husband's debts, enforceable in equity against her separate estate; *Grand Island Bkg. Co. v. Wright*, 53 Neb. 574, 74 N. W. 82 (dissenting opinion), on existence of presumption that married woman who executes note, intended thereby to charge her separate estate; *Hershizer v. Florence*, 39 Ohio St. 516; *Harris v. Wilson*, 40 Ohio St. 300,—holding that married woman, who signs promissory note as surety for husband is presumed to intend thereby to charge her separate estate.

When right of action accrues to married woman.

Distinguished in *Westlake v. Youngstown*, 62 Ohio St. 249, 56 N. E. 873, 43 Ohio L. J. 261, holding that right of action did not accrue to married woman until death of husband to recover possession of lands of which she became seized, from one who during her coverture had taken it without right.

35 AM REP. 617, PRATT v. STATE, 35 OHIO ST. 514.

What constitutes separate property of married woman.

Cited in *Smith v. Abair*, 87 Mich. 62, 49 N. W. 509, holding that husband has sufficient title to wearing apparel purchased by wife with his money to maintain replevin against officer who seizes it in satisfaction of tax against wife's separate property; *State v. Carl*, 71 Ohio St. 259, 73 N. E. 463, to point that indictment laying property in husband where wife's separate property has been stolen from residence is insufficient to authorize conviction.

Cited in reference note in 32 A. R. 510, on apparel given wife by husband as part of her separate estate.

Cited in note in 21 L.R.A.(N.S.) 313, as to whether indictment involving felonious taking may lay ownership in one in possession as agent, bailee, etc.

Measure of damages for larceny of things having no market value.

Cited in *State v. McDermet*, 138 Iowa, 86, 115 N. W. 884, holding cost or value when purchased to be considered in fixing actual value when taken in absence of market value; *The State v. Maggard*, 160 Mo. 469, 83 A. S. R. 483, 61 S. W. 184, holding that where things stolen have no market value, owner may testify to actual value of property regardless of market value for it.

35 AM. REP. 620, PENNSYLVANIA CO. v. MILLER, 35 OHIO ST. 541.

What constitutes baggage.

Cited in *Kansas City, P. & G. R. Co. v. State*, 65 Ark. 363, 67 A. S. R. 933, 41 L.R.A. 333, 46 S. W. 421, holding samples of merchandise carried for purpose of making sales of goods of same class, not baggage; *Smith v. Cincinnati, H. & D. R. Co.* 2 Ohio N. P. 29, holding that baggage does not include merchandise or other valuables designed for other purposes such as sale or the like.

Cited in reference note in 67 A. S. R. 937, on what is included in baggage.

Cited in notes in 71 A. D. 160; 99 A. S. R. 354,—on merchandise as baggage.

Extent of implied undertaking of carrier to insure safety of baggage.

Cited in *Charlotte Trouser Co. v. Seaboard Air Line R. Co.* 139 N. C. 382, 51 S. E. 973, to point that railroad company receiving trunks from passenger without knowledge of contents is liable for loss or damage resulting from failure to use ordinary care; *Toledo & O. C. R. Co. v. Ambach*, 10 Ohio C. C. 490, holding that obligation of carrier is that of bailee for hire, not insurer, where agents accept trunks for transportation without knowledge that they contain other than personal baggage.

Cited in notes in 34 A. R. 381, on liability of carrier as warehouseman; 14 L.R.A. 517, on liability of carrier in transporting merchandise intrusted to it by passenger; 36 L.R.A. 787, on liability of common carrier as warehouseman for baggage after reaching destination.

Overruled in *Toledo & O. C. R. Co. v. Bowler & B. Co.* 63 Ohio St. 274, 58 N. E. 813 (reversing 19 Ohio C. C. 737, same case on earlier appeal in 10 Ohio C. C. 272), holding carrier of passengers not liable for loss of package containing merchandise, shipped under guise of baggage, where neither carrier nor its proper agent has actual knowledge of contents of package.

What constitutes gross negligence.

Cited in *Western U. Teleg. Co. v. Griswold*, 37 Ohio St. 301, 41 A. R. 500, holding that in case of carrier gross negligence includes want of that reasonable care, skill and expedition which may be properly expected of him.

35 AM. REP. 623, BYERS v. FARMERS' INS. CO. 35 OHIO ST. 606.

What is material to insurance risk.

Cited in *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 23, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 79, 19 C. C. A. 316, 43 U. S. App. 75, 73 Fed. 653,—holding that where by terms of policy application and its

answers were made basis of contract, question and answer concerning other insurance gave that fact contractual materiality.

Cited in reference note in 59 A. D. 706, on representations in application or survey for insurance as warranties when not made so by policy.

— Statements as to title or encumbrances.

Cited in Connecticut F. Ins. Co. v. Manning, 87 C. C. A. 334, 160, Fed. 382, holding warranty regarding existence or amount of encumbrance upon property insured thereunder material to risk as matter of law; Union Ins. Co. v. Barwick, 36 Neb. 223, 54 N. W. 519, holding that mortgage of chattels where there is no change of possession will not avoid policy of insurance; Sun Fire Office v. Clark, 53 Ohio St. 414, 38 L.R.A. 562, 42 N. E. 248, holding that provision in insurance contract against change of title is not invalidated by making of mortgage.

What constitutes change of title of insured property.

Cited in Farmers' Ins. Co. v. Archer, 36 Ohio St. 608, holding that deed in fee simple, with reconveyance back of life use of property is breach of provision, of insurance contract, against change of title.

Cited in notes in 59 A. D. 309, on effect of clause restricting any sale, transfer, change of title, or possession of insured property; 4 L.R.A. 540, as to what constitutes a sale or transfer within meaning of clause avoiding insurance policy in case of sale or transfer; 38 L.R.A. 564, on mortgage as a sale, alienation, conveyance, transfer, or change of title of insured property.

Effect of mortgage or encumbrance as to insurance contract.

Cited in Henderson v. Farmers' Ins. Co. 2 Ohio N. P. 17, to point that encumbrance in violation of express provision of policy of fire insurance, avoids it.

Cited in reference notes in 35 A. R. 378, on undisclosed mortgage as breach of condition in insurance policy as to sole ownership; 9 A. S. R. 75, on effect of mortgage of insured property.

Effect of untrue representations by insured.

Cited in Seal v. Farmers' & M. Ins. Co. 59 Neb. 253, 80 N. W. 807, holding policy of insurance avoided by misstatement, in application, of fact material to risk; Indiana Ins. Co. v. Brehm, 88 Ind. 578, holding that misrepresentation in application as to liens avoids policy of fire insurance.

Construing application and policy together.

Cited in Phoenix Ins. Co. v. Benton, 87 Ind. 132, holding that application and policy are to be construed together as one contract where application is made part of policy.

35 AM. REP. 632, TINICUM FISHING CO. v. CARTER, 90 PA. 85.

Liability for injury to fishery.

Cited in Newport News Shipbuilding & Dry Dock Co. v. Jones, 105 Va. 503, 6 L.R.A.(N.S.) 247, 54 S. E. 314, holding shipbuilding company having acquired water front and done work thereon indicative of its purpose to occupy it as ship yard in pursuance of its charter powers, has title superior to third party who leases part of front for oyster bed.

Cited in reference note in 23 A. S. R. 399, on damages for injury to fishery.

Cited in notes in 60 L.R.A. 507, on exercising right to fish in conflict with other rights; 23 E. R. C. 755, on establishment of a right to a several fishery.

35 AM. REP. 634, REESE v. REESE, 90 PA. 89.**Admissibility of opinion evidence as to hand writing.**

Cited in *Sebastian v. Rass*, 57 Ill. App. 417, holding evidence of expert as to handwriting and inks admissible as to alteration of paper; *Shorb v. Kinzie*, 100 Ind. 429, holding that it was error to submit to jury, over objection affidavit and paper in dispute, that they might judge of handwriting by comparison; *Graham v. Spang*, 1 Monaghan (Pa.) 167, 16 Atl. 91, holding opinion of expert admissible to prove that interlineation in note and signature are in same hand writing.

Cited in reference notes in 35 A. R. 356, on admissibility of writing made pending trial for evidence on question of hand writing; 4 A. S. R. 18, on competency to testify to genuineness of signature; 37 A. R. 539, on opinion on hand writing by one whose knowledge was required alone in the proceedings in the suit.

Cited in notes in 66 A. D. 240, on points respecting which handwriting experts may testify; 62 L.R.A. 855, on comparison of handwriting; 62 L.R.A. 872, on weight of evidence as to comparison of handwriting; 63 L.R.A. 979, on nonexpert witnesses' knowledge of handwriting acquired post litem motam; 20 L. ed. U. S. 418, on evidence of handwriting of signature.

Distinguished in *Berryhill v. Kirchner*, 96 Pa. 489, holding evidence of expert to prove that signature of deed was made by same person who signed mortgage inadmissible.

Admissibility of instrument without proof of its execution.

Cited in *Medary v. Cathers*, 161 Pa. 87, 28 Atl. 1012, holding instrument admissible without proof of execution when its execution is not denied in answer, nor notice given that proof of execution will be required; *Standard Underground Cable Co. v. Johnstown Teleph. Co.* 26 Pa. Super. Ct. 432, to point that instrument on which suit is brought is admissible in evidence without proof of its execution, when execution has not been denied of notice given that proof would be required.

Effect of affidavit of defense.

Cited in *Lancaster County Nat. Bank v. Henning*, 171 Pa. 399, 37 W. N. C. 112, 33 Atl. 335, 12 Lanc. L. Rev. 393, holding that denial in affidavit of defense is sufficient to put plaintiff on proof of execution of note on which suit is founded.

Power of court to make rules.

Cited in *McGreevy v. Kulp*, 126 Pa. 97, 17 Atl. 541 (affirming 5 Kulp, 134), holding that orphans' court has power to make rule as to publication of accounts of executors, administrators, guardians, and trustees.

35 AM. REP. 636, WAYNE COUNTY v. WALLER, 90 PA. 99.**Liability of county for compensation of officers.**

Cited in *Newton v. Luzerne County*, 12 Pa. Dist. R. 695, 11 Kulp, 89; *Newton v. Luzerne County*, 30 Pa. Super. Ct. 347,—holding that county cannot be liable for fees and charges of officers without express statute upon subject; *Tippecanoe County v. Barnes*, 123 Ind. 403, 24 N. E. 137; *Ginter v. York County*, 3 Pa. Co. Ct. 111; *Douthett v. Lawrence County*, 16 Pa. Co. Ct. 406, 4 Pa. Dist. R. 608; *Charters v. Dauphin County*, 17 Pa. Co. Ct. 300, 5 Pa. Dist. R. 145; *De Vinney v. Clearfield County*, 36 Pa. Co. Ct. 651; *Lehigh*

County v. Semmel, 124 Pa. 358, 23 W. N. C. 346, 16 Atl. 876, 19 Pittab. L. J. N. S. 453, 46 Phila. Leg. Int. 261,—holding that public officers who are paid for their services by fees can claim no compensation out of public treasury without statutory warrant therefor; Openrider v. Sugarloaf Twp. 14 Luzerne Leg. Reg. Rep. 336, holding that public officers can receive no compensation unless specially authorized by statute; Shiffert v. Montgomery County, 12 Montg. Co. L. Rep. 21, 17 Pa. Co. Ct. 241, 13 Lanc. L. Rev. 254, 5 Pa. Dist. R. 568, holding county not liable for fees of public officers without statutory warrant therefor; Cumberland County v. Beltzhoover County, 6 Pa. Dist. R. 625, 19 Pa. Co. Ct. 614, holding that county commissioners will be surcharged for unauthorized expenses paid by them; Com. v. Painton, 8 Lanc. L. Rev. 376, holding that court has no power to direct county to pay costs incurred in issuing and serving defendants' subpoena; Price v. Lancaster County, 24 Pa. Co. Ct. 225, 17 Lanc. L. Rev. 353, holding that public officers cannot be paid out of public treasury for services rendered without statutory warrant therefor; Hoak v. Lancaster County, 29 Pa. Super. Ct. 585, 23 Lanc. L. Rev. 57, to point that there must be express liability imposed upon county or such as can reasonably be implied from nature of transaction to recover payment from county funds; Assessors Compensation, 17 Pa. Co. Ct. 572, 5 Pa. Dist. R. 253, holding district assessor entitled to receive per diem compensation for making enumeration of school children under compulsory school law together with such other services as he performs under authority of law, out of funds of proper county; Russell v. Luzerne County, 3 Pa. Dist. R. 493, 7 Kulp, 279, holding county not liable for additional compensation for extra services rendered out of office hours by clerks in office of recorder of deeds where their salaries had been fixed by statute.

— Constables.

Cited in Altemose v. Monroe County, 31 Pa. Co. Ct. 213, 10 North. Co. Rep. 48, 23 Lanc. L. Rev. 142; 4 Justices' L. Rep. 73, 15 Pa. Dist. R. 220, holding constable not entitled to fees for which there is no specific provision; McCallister v. Armstrong County, 9 Pa. Super. Ct. 423, holding constable not entitled to charge for car fare expended in transporting prisoners to office of justice; Walsh v. Luzerne County, 36 Pa. Super. Ct. 425, 14 Luzerne Leg. Reg. Rep. 17, holding that member of state constabulary cannot collect from county for use of commonwealth fee, for serving criminal warrant.

— Deputy constables.

Cited in Adams v. Sweden Twp. 9 Pa. Dist. R. 450, holding townships not liable for services of deputy constable without statutory provision therefor; Re Cawley, 5 Kulp, 455, holding that deputy constables can have no claim upon county for compensation without statutory therefor.

— Attorneys appointed by court.

Cited in Hyatt v. Hamilton County, 121 Iowa, 292, 100 A. S. R. 354, 63 L.R.A. 614, 96 N. W. 855, holding county liable for compensation of attorney appointed by court to prosecute disbarment proceedings; Com. v. Ramuno, 10 Del. Co. Rep. 278; Com. v. Ramuno, 16 Pa. Dist. R. 449; Com. v. Darmaka, 16 Pa. Dist. R. 892; McElroy v. York County, 13 Pittab. L. J. N. S. 55,—holding county not liable for services of attorney rendered in prosecution of capital offense at request of court; Johnson v. Whiteside County, 110 Ill. 22; Presby v. Rlickitat County, 5 Wash. 329, 31 Pac. 876,—holding that attorney is obliged to conduct defense of pauper criminal without compensation when requested by court.

Cited in reference notes in 38 A. R. 339, on attorney's right to compensation from county for defending poor person; 100 A. S. R. 358, on claim against public for fees and expenses of attorney assigned by court to defend indigent person charged with crime.

Compulsory attendance of witness.

Cited in *Com. v. Lindsey*, 2 Chester Co. Rep. 268, holding that officers and witnesses, in case of pauper prisoners, must give their services as duty which they owe to their position and to government; *Com. v. Cochran*, 31 Pa. Co. Ct. 344, 14 Pa. Dist. R. 805, 9 Del. Co. Rep. 547, 10 North. Co. Rep. 74, holding that physician may be required to attend court upon subpoena of district attorney and testify as expert, without previous tender of professional fee.

35 AM. REP. 641, KNECHT v. MUTUAL L. INS. CO. 90 PA. 118.

Statement by insured as to temperance as material to risk.

Cited in *Standard L. & Acci. Ins. Co. v. Lauderdale*, 94 Tenn. 635, 30 S. W. 732, to point that insurance applicant's statement in respect to his habits on subject of temperance is material to risk.

Cited in reference note in 58 A. S. R. 554, as to when warranty of temperate habits of insured was broken.

Cited in notes in 38 A. R. 617, defining "intemperate habits;" 15 L.R.A. (N.S.) 211, on scope and effect of provisions in policy as to use of liquor as a pernicious habit; 13 E. R. C. 537, on avoidance of policy by breach of statement as to future event over which insured had no control.

Sufficiency of notice of loss.

Cited in *Coventry Mut. Live Stock Ins. Co. v. Evans*, 102 Pa. 281, 13 W. N. C. 203, 2 Chester Co. Rep. 5, 40 Phila. Leg. Int. 329, holding that insured might recover if he gave notice of loss within reasonable time after he knew of it where policy provided that notice of loss should be given within twenty-four hours after it occurred but provided no penalty or forfeiture.

35 AM. REP. 644, LEHIGH VALLEY R. CO. v. McKEEN, 90 PA. 122.

Proximate cause as question of fact.

Cited in *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. 261, holding that ordinarily question of what was proximate cause of injury is one for jury; *Hoehle v. Allegheny Heating Co.* 40 W. N. C. 553, 5 Pa. Super. Ct. 21, 28 Pittsb. L. J. N. S. 65, holding that whether heating company's negligence in cutting off heat was proximate cause of person's death by pneumonia was question for jury; *Baker v. Pennsylvania Co.* 142 Pa. 503, 12 L.R.A. 698, 28 W. N. C. 220, 21 Atl. 979, 48 Phila. Leg. Int. 404, holding instruction in action for personal injuries, that if injury was remote cause of injured person's last sickness and death, recovery might be had for pain suffered in that sickness, is not error, where it appears from context that "remote" was not used in its legal sense and that jury could not have been misled by it.

Cited in reference notes in 2 A. S. R. 608, on proximate or remote damages as question for jury; 12 A. S. R. 303, on loss of profits as element of damages; 20 A. S. R. 852, on proximate cause as question for jury; 54 A. S. R. 190, on necessity of damages being proximate result of act complained of.

—Of loss by fire.

Cited in *Philadelphia & R. R. Co. v. Young*, 33 C. C. A. 251, 62 U. S. App. 400, 90 Fed. 709, holding evidence tending to show escape of sparks from ash

pan of engine sufficient to justify submission of question of railroad company's negligence to jury in action for personal injury; *Van Steuben v. Central R. Co.* 178 Pa. 367, 34 L.R.A. 577, 39 W. N. C. 217, 35 Atl. 992, holding that where engine, although provided with sufficient spark arrester, had on various occasions thrown out coals of unusual size, case should be submitted to jury in action against railroad company to recover for loss by fire caused by emission of sparks from locomotive; *Haverly v. State Line & S. R. Co.* 135 Pa. 50, 20 A. S. R. 848, 26 W. N. C. 321, 19 Atl. 1013, 21 Pittsb. L. J. N. S. 30, 47 Phila. Leg. Int. 337, holding that question whether wind was new cause was for jury in action against railroad company for loss by fire through its negligence; *Matthews v. Pittsburg & L. E. R. Co.* 18 Pa. Super. Ct. 10 (affirming 24 Pa. Co. Ct. 370), holding that if evidence in action against railroad company for loss by fire tends to show that sparks which caused fire were emitted from particular locomotive, case should be submitted to jury notwithstanding testimony that engine was provided with sufficient spark arrester.

Cited in reference notes in 50 A. R. 81, on liability of owner of premises for negligently starting fire thereon which is communicated to other property; 5 A. S. R. 737, on liability for communication of fire to adjoining premises.

Cited in notes in 38 A. D. 77, on negligence of railroad company as proximate or remote cause of fire; 42 A. R. 391, on proximate and remote cause; 62 A. R. 158, on application of proximate and remote causes to cases of communication of fire; 36 A. S. R. 826, on acts of landowners and others as affecting proximate and remote cause of spread of fires; 21 L.R.A. 261, on liability for setting fires which spread to property of others across intervening building.

Admissibility of evidence as to proximate cause of fire from locomotive.

Cited in *Alpern v. Churchill*, 53 Mich. 607, 19 N. W. 549, holding that where in action for injury caused by sparks from burner, there was evidence that warranted inference that burner was in defective condition, it was proper to show that when change had been made after damage was done, dangerous emission of sparks ceased; *Albert v. Northern C. R. Co.* 98 Pa. 316, 38 Phila. Leg. Int. 461, holding evidence of emission of sparks from engines generally inadmissible when fire is shown to have been caused by sparks from one of two particular engines; *Henderson v. Philadelphia & R. R. Co.* 144 Pa. 461, 27 A. S. R. 652, 16 L.R.A. 299, 28 W. N. C. 479, 22 Atl. 851, holding that when fire is shown to have been caused by sparks from engine which is known and identified evidence should be confined to condition management and practical operation of that engine.

Setting aside verdict.

Cited in *Smith v. Times Co.* 36 W. N. C. 561, 4 Pa. Dist. R. 399, 16 Pa. Co. Ct. 39, holding that no verdict should be set aside because, in opinion of court, damages are excessive, unless some obvious wrong produced such damages and unless there be some rule by which damages may be computed; *Orbaun v. Philadelphia Traction Co.* 19 Phila. 413, 46 Phila. Leg. Int. 280, 7 Pa. Co. Ct. 39, holding that verdicts where pain and deformity are subjects of compensation are left to jury exclusively; *Peacock v. Reilly*, 21 Montg. Co. L. Rep. 100, holding that new trial should not be granted merely because verdict was set that which court would have rendered on same evidence; *Fowler v. Houghton*, 12 Pa. Dist. R. 8, holding that court should not set aside verdict because it

does not agree with jury's view of facts, if reasonable men might find verdict which was found.

Sufficiency of complaint for negligent setting of fire.

Cited in *Badman v. Pennsylvania R. Co.* 17 Pa. Dist. R. 983, holding statement of claim, alleging that by defendants' negligence an engine threw out sparks, setting fire to plaintiff's property "on or about June 27th, 1906" insufficient on demurrer.

35 AM. REP. 651, BRENEMAN v. FURNISS, 90 PA. 186.

Parol evidence as to indorsements.

Cited in *Dominion Nat. Bank v. Manning*, 60 Kan. 729, 57 Pac. 949, holding parol evidence inadmissible in suit by bank against maker of promissory note, to prove execution of note for purchase of stock in bank but under agreement that transaction should be merely colorable; *Witherow v. Slayback*, 158 N. Y. 649, 70 A. S. R. 507, 53 N. E. 681, holding that indorsement of note may be qualified by parol; *Wertsner v. Graber*, 14 Montg. Co. L. Rep. 217, holding verbal agreement between indorser and immediate indorsee that latter shall not sue former but maker only, good defense in suit against indorser by other party to agreement; *Dickinson v. Burke*, 8 N. D. 118, 77 N. W. 279, holding parol evidence admissible to prove prior agreement by which indorser was freed from and indorsee assumed all liability upon check.

Cited in reference notes in 39 A. R. 116, on admissibility of parol evidence to vary liability of one indorsing after payee; 61 A. S. R. 244, on parol evidence to vary terms of check.

Cited in notes in 13 L.R.A. 54, on admissibility of parol evidence to show that indorsement was procured by fraud; 13 L.R.A. 649, on admissibility of parol evidence as between immediate parties to promissory note.

— Of consideration for indorsement.

Cited in *Smythe v. Scott*, 106 Ind. 245, 6 N. E. 145, holding it competent to prove actual consideration for indorsement of note if that which law presumes was in dispute; *State Bank v. Forayth*, 41 Mont. 249, 28 L.R.A.(N.S.) 501, 108 Pac. 914, holding want of consideration valid defense to action on note by party to whom it was delivered by maker.

Cited in note in 13 L.R.A. 53, on parol evidence to show want of consideration for indorsement.

35 AM. REP. 654, CROYLE v. MOSES, 90 PA. 250.

False representations of vendor as ground for rescission.

Cited in *Nelson v. Martin*, 105 Pa. 229, 15 W. N. C. 448, 41 Phila. Leg. Int. 186, holding that false assertion of soundness of mare by vendor, knowing his assertion to be false, will entitle vendee to rescission on account of fraud.

Cited in reference notes in 43 A. R. 166, on false representation of value as fraud; 18 A. S. R. 556, on false representations by acts.

Cited in note in 12 L.R.A. 696, as to what defects in animals constitute a breach of warranty.

— Question of facts as to false representation.

Cited in *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73, holding whether vendee was induced by and relied on fraudulent representations of vendor a question of fact for jury.

35 AM. REP. 656, McCLURE v. WATERTOWN F. INS. CO. 90 PA. 277.
Violation of conditions in policy as ground for forfeiture — As to increase of risk.

Cited in *Long v. Beeber*, 106 Pa. 466, 51 A. R. 532, 41 Phila. Leg. Int. 490, holding that landlord could not recover upon policy of fire insurance where tenant had violated condition as to risk whether with or without knowledge of former; *McCurdy v. Orient Ins. Co.* 30 Pa. Super. Ct. 77, holding insurer not liable where tenant of insured without his knowledge uses gasoline stove on premises in violation of condition in policy.

— As to vacancy.

Cited in *Schuermann v. Dwelling House Ins. Co.* 57 Ill. App. 200, holding that policy containing provision as to premises being vacant is suspended during time premises are vacant; *Barry v. Prescott Ins. Co.* 35 Hun, 601, holding that premises had become unoccupied where tenant had moved out and landlord's furniture had been moved in with intention of occupying house but no one was living there at time of fire; *Hardiman v. Fire Asso.* 212 Pa. 383, 61 Atl. 990, holding that vacation of premises against provision against vacancy will render fire insurance policy void; *Mooney v. Glens Falls Ins. Co.* 4 Pa. Dist. R. 639, holding that proof of abandonment of premises by tenant from August 4th to following Sept. 11, when fire occurred, was sufficient to relieve insurer from liability under fire insurance policy containing condition against vacancy; *Niagara F. Ins. Co. v. Drda*, 19 Ill. App. 70; *East Texas F. Ins. Co. v. Smith*, 3 Tex. App. Civ. Cas. (Willson) 344,—holding that utmost diligence on part of insured to supply vacancy of house would not avoid forfeiture for unoccupancy.

Cited in notes in 35 A. R. 443, on when premises are vacant or unoccupied within provision of insurance policy; 10 A. S. R. 394, on phrase "vacant and unoccupied" in insurance policies; 3 L.R.A.(N.S.) 986, on effect on vacancy clause of tenant's removal without knowledge of insured; 12 L.R.A.(N.S.) 435, on effect upon insurance policy of breach of condition by tenant.

Distinguished in *Doud v. Citizens' Ins. Co.* 141 Pa. 47, 23 A. S. R. 263, 28 W. N. C. 20, 21 Atl. 505, 48 Phila. Leg. Int. 337, holding that condition of fire insurance policy as to house being vacant was not violated where tenant did not finish moving out until two days before fire and owner took possession day before fire, was in house all day, and had some furniture then in it; *Roe v. Dwelling House Ins. Co.* 149 Pa. 94, 34 A. S. R. 595, 30 W. N. C. 281, 23 Atl. 718, 23 Pittsb. L. J. N. S. 3, holding that condition of fire insurance policy as to house being vacant is not violated where tenant, whose term continued until April 1st moved out on March 24th, completing removal of goods on March 27th and premises were leased to new tenant to commence from April 1st but were destroyed by fire on March 28th, being then unoccupied.

Waiver of vacancy clause in policy.

Cited in *Chismore v. Anchor F. Ins. Co.* 131 Iowa, 180, 108 N. W. 230, holding that disclosure in application for insurance that applicant holds simply sheriff's certificate of sale of property will not operate as waiver of provision in policy that it shall be void in case premises become vacant.

35 AM. REP. 659, PENNSYLVANIA CANAL CO. v. BURD, 90 PA. 281.
Liability of canal company for injuries by flood.

Cited in *Saylor v. Pennsylvania Canal Co.* 183 Pa. 167, 63 A. S. R. 749, 41 W. N. C. 245, 38 Atl. 598, holding canal company, not remiss in performance of

its duty to keep canal in repair, not responsible for injuries occasioned by flood.

Cited in reference note in 37 A. R. 53, on liability of canal company for loss of goods transported by it.

35 AM. REP. 662, BOWER v. FENN, 90 PA. 359.

Liability for misrepresentations.

Cited in *Farrel v. National Shoe & Leather Bank*, 43 Fed. 123, holding bank not liable in action of deceit where its representation was made in good faith and mistake which caused misrepresentation was mistake of law upon state of facts imperfectly understood; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 9 A. S. R. 727, 18 N. E. 168, holding lessee of mine liable to purchaser for fraudulent misrepresentation, although his statements are true; *Jack v. Hixon*, 23 Pa. Super. Ct. 453, holding that if vendor permits vendee to contract with him on faith of his statements of value, he is bound not merely to believe but to know that they were true; *Smalley v. Morris*, 157 Pa. 349, 33 W. N. C. 171, 27 Atl. 734, holding fraudulent misrepresentations good defense to notes given for oil leases; *Muehlhof v. Boltz*, 215 Pa. 124, 64 Atl. 427, holding that where vendor permits vendee to contract with him on strength of his statements he is bound not merely to believe but to know that they are true.

Cited in notes in 4 L.R.A. 158, on necessity to action of deceit of proving intent to deceive and reliance upon representations; 35 L.R.A. 432, on effect of belief of fraud in making reckless statement of opinion.

Right to rescind contract because of misrepresentations.

Cited in *Lake v. Weber*, 6 Pa. Super. Ct. 42, holding that to assert for truth what one professes to know and may fairly be supposed to know, but does not know it to be so, may be treated as known falsehood in determining right of other party to rescind contract; *Wilson v. Talheimer*, 20 Pa. Co. Ct. 203, to point that party may rescind contract on ground of misrepresentations though innocently made; *Sutton v. Morgan*, 24 Pittsb. L. J. N. S. 47, holding purchaser entitled to rescind contract where he was induced to purchase farm relying on false representations of vendor.

Cited in note in 6 E. R. C. 502, as to what will constitute a warranty in sense of condition on failure of which other party may repudiate contract in toto.

Power of court to modify conditions of verdict in equitable ejectment.

Cited in *Moore v. Habel*, 14 Luzerne Leg. Reg. 199, on power of court in equitable ejectment to modify conditions of verdict in order more effectually to do equity.

35 AM. REP. 664, HAMAKER v. BLANCHARD, 90 PA. 377.

Rights of finder of lost property.

Cited in *Re Moneys in Registry of Dist. Ct.* 170 Fed. 470, holding salvor of derelict property found at sea entitled thereto when no owner appears for number of years; *Livermore v. White*, 74 Me. 452, 43 A. R. 600, holding that finder acquired no title to hides which owner of tannery forgot to remove on removal of other hides; *Weeks v. Hackett*, 104 Me. 264, 129 A. S. R. 390, 19 L.R.A.(N.S.) 1201, 71 Atl. 858, 15 A. & E. Ann. Cas. 1156, holding title to treasure-trove in finder as against world except true owner; *Sovern v. Yoran*, 16 Or. 269, 8 A. S. R. 293, 20 Pac. 100, holding that finder of money hidden in earth for safe keeping has

no right of possession against owner; *Danielson v. Roberts*, 44 Or. 108, 102 A. S. R. 627, 65 L.R.A. 526, 74 Pac. 913, holding finders of lost property entitled to possession thereof for purpose of returning it to true owner.

Cited in reference notes in 8 A. S. R. 300, on rights of finder of lost property; 85 A. S. R. 237, on servant's ownership of property found by him in course of his employment.

Cited in notes in 37 L.R.A. 118, on place of finding property as affecting rights and liabilities of finder; 129 Am. St. R. 402, 404, 407, 409, on lost property and its finder and owner.

— As against others than owner.

Cited in *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. 335, 94 A. S. R. 740, 70 S. W. 878, holding finder of lost chattel entitled to its possession as against other persons except true owner regardless of place where found; *Frank v. Symons*, 35 Mont. 56, 88 Pac. 561, holding that finder of animal as an estray has good title thereto as against everyone but the true owner; *Loucks v. Gallogly*, 1 Misc. 22, 23 N. Y. Supp. 126, holding that finder of lost property has valid claim to same against all the world except true owner; *Kuykendall v. Fisher*, 61 W. Va. 87, 8 L.R.A.(N.S.) 94, 56 S. E. 48, 11 A. & E. Ann. Cas. 700, to point that finder of lost property has right of possession as against all the world except rightful owner; *Burns v. Clark*, 133 Cal. 634, 85 A. S. R. 233, 66 Pac. 12; *Burns v. Schoenfeld*, 1 Cal. App. 121, 81 Pac. 713,—holding employee entitled to gold found while excavating to establish mill site for owners of land.

35 AM. REP. 666, CROZIER'S APPEAL, 90 PA. 384.

Widow's right of election to take against will — Who may exercise right in behalf of widow.

Cited in *Penhallow v. Kimball*, 61 N. H. 596, holding that statutory right of widow to waive provisions of husband's will and take under statute is personal and cannot be exercised by her representatives; *Camardella v. Schwartz*, 126 App. Div. 334, 110 N. Y. Supp. 611, holding widow's right of election between dower and testamentary provision in lieu thereof wholly personal; *Wash v. Wash*, 189 Mo. 352, 107 A. S. R. 353, 87 S. W. 993; *Fleming's Estate*, 217 Pa. 610, 11 L.R.A.(N.S.) 379, 66 Atl. 874, 10 A. & E. Ann. Cas. 826; *Church v. McLaren*, 85 Wis. 122, 55 N. W. 152,—holding that widow's right of election to take provision made by law cannot be exercised by any one in her name or otherwise after her death; *Garrett's Estate*, 14 W. N. C. 310, 16 Phila. 341, 41 Phila. Leg. Int. 95, on right of committee of widow non compos mentis to elect for her to take under or against husband's will.

Cited in reference notes in 44 A. R. 539, on effect of insanity of widow on her right to dissent from dower provision in husband's will; 111 A. S. R. 690, on widow's right to elect between dower and provisions of will.

Cited in notes in 107 A. S. R. 360, on widow's statutory right to elect between dower and provisions of will; 2 L.R.A.(N.S.) 960, on effect of legacy in lieu of dower in case of widow's death during period of election; 11 L.R.A.(N.S.) 382, on right of one's personal representatives, heirs, or devisees to make or control election for or against a will or between different provisions of will or statute; 10 E. R. C. 369, on election by widow between testamentary provision and dower.

— Effect of widow's failure to exercise right.

Cited in *Flynn v. McDermott*, 183 N. Y. 62, 111 A. S. R. 687, 2 L.R.A.(N.S.)

959, 75 N. E. 931, 5 A. & E. Ann. Cas. 81; Jackson's Appeal, 126 Pa. 105, 17 Atl. 535; Anderson's Estate, 185 Pa. 174, 39 Atl. 818,—holding that where widow fails to make election to take against husband's will, her heirs or personal representatives cannot make the election; Geist's Estate, 193 Pa. 398, 45 Atl. 437, holding that widow, must take under provisions of husband's will where she failed to exercise right of election given by statute.

Cited in note in 17 L.R.A. 297, on power of court to elect against a will on behalf of an insane widow.

35 AM. REP. 670, ALLEGHENY COUNTY v. GIBSON, 90 PA. 397.

Liability of municipality for damages by mob.

Cited in Pennsylvania Co. v. Chicago, 81 Fed. 317, holding that state may constitutionally compel its counties and cities to indemnify against losses of property arising from mobs and riots within their limits; Chicago v. Pennsylvania Co. 57 C. C. A. 509, 119 Fed. 497, holding city liable for injury of property by mob where such liability is imposed by statute; Spring Valley Coal Co. v. Spring Valley, 65 Ill. App. 571, as to origin and history of laws relating to recovery of damages for property destroyed by mobs; Sturges v. Chicago, 237 Ill. 46, 86 N. E. 683, holding Mobs and Riots act not invalid because it imposes liability regardless of negligence; Clark Thread Co. v. Hudson County, 54 N. J. L. 265, 23 Atl. 820, on sufficiency of declaration in action against county to recover damages for injuries to buildings by mob; Adamson v. New York, 110 App. Div. 58, 96 N. Y. Supp. 907, holding municipality, without notice, not liable for injury to unoccupied frame house by boys where police interfered as soon as notice was given; Chapin v. Ferry, 3 Wash. 386, 15 L.R.A. 116, 28 Pac. 754, to point that counties are liable for damages caused by rioters; Chicago v. Manhattan Cement Co. 178 Ill. 372, 69 A. S. R. 321, 45 L.R.A. 848, 53 N. E. 68, holding mob law of 1887, giving owner of property destroyed by mob right of action against cities or counties, constitutional.

Cited in notes in 88 A. D. 267-269, on municipality's liability for injuries committed by mobs; 68 A. D. 295, on liability of counties for torts; 24 L.R.A. 594, 595, on liability for property destroyed by mob; 24 L.R.A. 598, on necessity of notice as to intention of mob to destroy property to render municipality liable; 27 L. ed. U. S. 936, on municipal liability for property destroyed by mob; 23 E. R. C. 140, on riot.

Liability under statute, generally.

Cited in New Haven Steam Mill Co. v. New Haven, 72 Conn. 276, 44 Atl. 229, holding that damages sustained by adjoining proprietors by removal of grade crossings became statutory obligation payable as fixed by commissioners where commissioners were empowered by statute to remove grade crossings and to determine at whose expense improvement should be made.

Construction of constitution.

Cited in Mestas v. Diamond Coal & Coke Co. 12 Wyo. 414, 76 Pac. 567, holding that constitutional or statutory provision will operate prospectively only, unless words employed show clear intention that it should have retrospective effect.

— Of new constitution.

Cited in Ratliff v. Beale, 74 Miss. 247, 34 L.R.A. 472, 20 So. 865, to point that to find true meaning of language of constitution we are to look to former constitutions; Reading's Constables, 8 Pa. Co. Ct. 101, to point that new con-

stitution is but amendment of former one; *Com. v. Costello*, 1 Pa. Dist. R. 745, to point that new constitution which does not change frame of government, is to be regarded, not as repeal, but as amendment of prior one; *Crawford County v. Nash*, 99 Pa. 253, 12 Pittsb. L. J. N. S. 305, 39 Phila. Leg. Int. 297, holding constitution not self-executing except wherein it so expressly provides; *Rothermel v. Zeigler*, 7 Pa. Co. Ct. 505, holding statute not in violation of existing constitution at time of passage, not affected by new constitution which is a mere amendment of the old one; *Com. v. Balph*, 111 Pa. 365, 17 W. N. C. 53, 3 Atl. 220, 16 Pittsb. L. J. N. S. 367, 43 Phila. Leg. Int. 163, holding that writ of certiorari is a writ of common right, to be taken away only by express words and was not affected by the new constitution which was a mere amendment of the preceding one.

Construction of statutes.

Cited in *Re Baumgarten*, 39 App. Div. 174, 57 N. Y. Supp. 284, holding that words "improperly assessed" in statute providing against "any tax illegally or improperly assessed" do not comprehend assessment which is simply excessive.

—According to legislative intent.

Cited in *Hoffman v. Matthes*, 6 Pa. Co. Ct. 487; *Kaier Co. v. Stevens*, 9 Kulp. 520,—to point that where statute is free from ambiguity, intention of legislature is to be gathered from its words; *Hoffman v. Matthes*, 3 Del. Co. Rep. 575; *Brackenridge's Nomination*, 4 Pa. Dist. R. 98, 15 Pa. Co. Ct. 647; *Deckman v. Herald Printing & Pub. Co.* 5 Pa. Dist. R. 357, 17 Pa. Co. Ct. 507,—to point that where statute is free from ambiguity, intention of legislature is to be gathered from its words.

—Relating to destruction of property by riot.

Cited in *Marshall v. Buffalo*, 50 App. Div. 149, 64 N. Y. Supp. 411; *Long v. Neenah*, 128 Wis. 40, 107 N. W. 10, 8 A. & E. Ann. Cas. 463,—holding that statutes rendering city liable for property destroyed by riot must be liberally construed.

Cited in notes in 56 A. D. 590; 24 L.R.A. 600, 602,—on construction of statutes imposing liability for property destroyed by mob.

Repeal of special act by general act.

Cited in *Beaumont v. Wilkes-Barre*, 6 Kulp. 103, holding local act authorizing assessments according to frontage rule for paving, not in conflict with article of constitution relating to uniformity of taxation, and was not repealed thereby; *Com. v. Kemp Smith*, 13 Pa. Co. Ct. 667, holding that where under special act chief burgess is authorized to preside over proceedings of town council, such power is not taken away by acceptance of provisions of subsequent general act containing no such provision on subject; *Com. v. Brown*, 25 Pa. Super. Ct. 269, holding local act relating to contracts by county commissioners in certain counties of commonwealth, not repealed by general act to regulate erection of county buildings; *Risheberger v. Wilson*, 25 Pa. Co. Ct. 465, holding that constitutional article providing that all laws relating to courts shall be general and of uniform operation does not repeal act which established return days for several counties of district.

33 AM. REP. 683, SALTONSTALL v. LITTLE, 90 PA. 422.

Cited in *Union Tanning Co. v. Shug*, 22 Pa. Co. Ct. 647, holding that under Rights of grantee under contract to cut and remove timber.

deed reserving all bark upon all hemlock trees, grantee is bound within reasonable time after notice to remove bark from trees.

Cited in reference note in 123 A. S. R. 67, on grantor's right to remove timber reserved by deed.

Cited in note in 6 L.R.A.(N.S.) 470, on effect of contract with respect to standing timber, to pass title to same.

—Contract containing limitation as to time.

Cited in *Olser v. Bennett*, 33 Pa. Co. Ct. 193, on construction of timber contract by which right to cut terminated at given date; *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 123 A. S. R. 58, 9 L.R.A.(N.S.) 663, holding that grantee under conveyance of all timber of certain size does not forfeit title to timber by failure to remove it within specified time; *Indiana & A. Lumber & Mfg. Co. v. Eldridge*, 89 Ark. 361, 116 S. W. 1173, holding that when timber was severed from soil it became the grantee's personalty; *Watson v. Adams*, 32 Ind. App. 281, 69 N. E. 696, to point that right to cut and remove timber within specified time ceases with expiration of time limit; *Donworth v. Sawyer*, 94 Me. 242, 47 Atl. 521; *Bennett v. Vinton Lumber Co.* 28 Pa. Super. Ct. 495; *Lehtonen v. Marysville Water & Power Co.* 50 Wash. 359, 97 Pac. 292; *Macomber v. Detroit, L. & N. R. Co.* 108 Mich. 491, 62 A. S. R. 713, 32 L.R.A. 102, 66 N. W. 376,—holding that under contract for sale of timber on land, to be removed by vendee within specified time, title to timber remaining uncut at expiration of time limited reverts to owner of realty; *Clark v. Ingram-Day Lumber Co.* 90 Miss. 479, 43 So. 813; *Mahan v. Clark*, 23 Montg. Co. L. Rep. 65; *Bunch v. Elizabeth City Lumber Co.* 134 N. C. 116, 46 S. E. 24,—holding that vendee cannot remove timber after expiration of time specified under contract conveying it to be removed within specified time; *Mahan v. Clark*, 219 Pa. 229, 68 Atl. 667, 12 A. & E. Ann. Cas. 729, holding that title to timber cut down under right to cut and remove but which was not removed within time specified is in vendee as personal property; *Carson v. Three States Lumber Co.* 108 Tenn. 681, 69 S. W. 320, to point that under contract to cut and remove timber title of grantee terminates with his right of entry; *Mengal Box Co. v. Moore*, 114 Tenn. 596, 87 S. W. 415, 4 A. & E. Ann. Cas. 1047, holding that contract to cut and remove timber for five years, but no longer, confers no right thereafter to remove logs previously cut.

Cited in reference note in 119 A. S. R. 719, on time in which purchaser of standing timber must remove it.

Cited in notes in 55 L.R.A. 526, on effect of failure to remove standing timber within time specified in contract of sale; 3 L.R.A.(N.S.) 650, on effect of reservation of right to remove timber within specified time.

Construction of reservation clause in deed.

Cited in *Smith v. Messinger*, 7 North. Co. Rep. 408, on construction of reservation clause in deed of land.

35 AM. REP. 685, CRAIGHEAD v. WELLS, 8 BAXT. 38.

Rights of holder of note given for pre-existing debt.

Cited in *Bank of Charleston v. Johnston*, 105 Tenn. 521, 59 S. W. 131, holding holder of note, taken before maturity in payment of a pre-existing debt is not holder for value in due course of trade, in such sense that maker's defenses and equities are cut off.

Cited in reference notes in 37 A. R. 494, on antecedent debt constituting one

bona fide holder; 40 A. R. 92, on right of transferee of negotiable note as security for existing debt.

Cited in note in 32 A. S. R. 713, on rights as bona fide holder of one taking collateral to secure pre-existing debt.

Distinguished in *Roach v. Woodall*, 91 Tenn. 206, 30 A. S. R. 883, 18 S. W. 407, holding that bona fide holder of negotiable note transferred before maturity, as collateral security, upon valid and sufficient consideration accruing at time of transfer, will be protected as innocent holder for value in due course of trade.

Rights of pledgee of collateral security for money borrowed.

Cited in *Cherry v. Frost*, 7 Lea, 1, holding that where note is given for money borrowed at time, secured by stocks pledged as collateral, and note is renewed at maturity, upon extension of time, and new note secured by pledge of same or other stocks, assigned with power of attorney to transfer, pledgee, who receives them without notice of any outstanding equity, takes them in due course of trade, free from such equity.

Cited in reference note in 17 A. S. R. 466, on rights of assignee of negotiable paper as collateral security.

Cited in note in 31 L.R.A. (N.S.) 292, on holder of bill or note as collateral as bona fide holder.

35 AM. REP. 691, BANK OF LOUISVILLE v. FIRST NAT. BANK, 8 BAXT. 101.

Liability of collecting bank for negligence of correspondent.

Cited in *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. Rep. 141, holding bank in accepting for collection draft payable at distant bank liable for default of correspondent; *Irwin v. Reeves Pulley Co.* 20 Ind. App. 101, 48 N. E. 601, holding bank in accepting for collection draft payable at distant bank not liable for default of correspondent, where due care was exercised in selection of latter; *Power v. First Nat. Bank*, 6 Mont. 251, 12 Pac. 597, holding bank liable to its customer for amount collected by its agent on draft accepted by it; *Plymouth County Bank v. Gilman*, 9 S. D. 278, 62 A. S. R. 868, 68 N. W. 735, holding bank receiving notes secured by mortgage on land in another state as collateral, without express agreement on part of bank to collect collateral notes when due, not liable for negligence of lawyer employed by it to collect notes, provided it selected attorney having reputation of being competent and reliable; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199, holding that home bank which receives draft for collection and sends it to correspondent for that purpose is liable for latter's default; *Waterloo Mill. Co. v. Kuentner*, 158 Ill. 259, 49 A. S. R. 156, 29 L.R.A. 794, 41 N. E. 906; *St. Nicholas Bank v. State Nat. Bank*, 59 Hun, 383, 12 N. Y. Supp. 864; *First Nat. Bank v. Sprague*, 34 Neb. 318, 33 A. S. R. 644, 15 L.R.A. 498, 51 N. W. 846,—holding bank receiving for collection note payable at distant point not liable for default of correspondent to which it transmits note for collection; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 13 L.R.A. 241, 27 N. E. 849, holding that bank receiving commercial paper for collection is liable for loss occasioned by default of its correspondents or other agents selected by it to make collection; *Second Nat. Bank v. Cummings*, 89 Tenn. 609, 24 A. S. R. 618, 18 S. W. 115, holding that bank receiving draft for collection payable at distant point, has implied authority to send it for collection to suitable agent at place of payment and such agent becomes agent of owner of draft and not of transmitting bank; *Gowan v. Bank of Alexandria* (Tenn.

Ch. App.) 47 L.R.A. 270, 52 S. W. 923, holding that selection of suitable intermediate bank for purpose of sending check for collection discharges duty of initial bank to person who deposited check; *Winchester Mill. Co. v. Bank of Winchester*, 120 Tenn. 225, 18 L.R.A.(N.S.) 441, 111 S. W. 248, holding bank handling claims for collection agent of owner and liable to him for neglect of collecting agents.

Cited in reference note in 13 A. S. R. 253, on liability of banks in making collections for acts of correspondent banks.

Cited in notes in 34 A. D. 315; 34 A. R. 315,—on liability of collecting bank for negligence of notaries, correspondents, etc.; 35 A. R. 696, on bank to which another sends bill or note for collection, as agent of owner; 41 A. R. 116, on liability of bank receiving draft for collection at a distance for negligence of its subagent or notary; 36 A. R. 266, on liability of attorney who has received claim for collection for embezzlement by another attorney intrusted with the actual collection; 77 A. S. R. 626, on liability of collecting banks for their own negligence and that of their notaries, correspondents, and other agents; 7 L.R.A. 857, on liability of indorsee bank for collection for neglect and default of correspondents and agents; 3 E. R. C. 777, 778, on liability of bank for negligence of its correspondent bank in making collections at distant place.

Disapproved in *Baillie v. Augusta Sav. Bank*, 95 Ga. 277, 51 A. S. R. 74, 21 S. E. 717, holding bank accepting for collection draft payable at distant bank, liable for default of correspondent.

Liability of correspondent bank in collecting note.

Cited in *Bank of Lindsborg v. Ober*, 31 Kan. 599, 3 Pac. 324, holding that where home bank receives notes for collection with understanding that it shall be sent to another bank for collection, latter bank is liable to owner of note for any negligence in its collection.

Law governing validity of contract.

Cited in *Shaw v. Postal Teleg. & Cable Co.* 79 Miss. 670, 89 A. S. R. 666, 56 L.R.A. 486, 31 So. 222, holding that validity of contract made in Massachusetts for transmission and delivery of cypher dispatch to addressee in Tennessee is to be determined by statutes of state where made as construed by its supreme court, although such construction be in conflict with principles of common law.

35 AM. REP. 696, HALL v. CARMICHAEL, 8 BAXT. 211.

Conveyances in fraud of wife.

Cited in reference note in 4 A. S. R. 215, on conveyance fraudulent as against intended marriage.

Cited in note in 6 E. R. C. 877, on degree of proof necessary on part of one who occupies position of trust or sustains position of legal or natural authority over another, to establish validity of gift or benefit from latter to former or any financial settlement between them.

35 AM. REP. 700, WARD v. GREENVILLE, 8 BAXT. 228.

Validity of municipal ordinances.

Cited in reference notes in 38 A. R. 629, as to what ordinances are proper exercise of police regulation; 40 A. R. 55, on municipal power to regulate business; 36 A. R. 523, as to whether power to license peddlers implies power to tax; 50 A. R. 352, on unreasonableness of ordinance requiring use of best

spark arrester known or in use; 4 A. S. R. 36, on ordinances which municipalities may lawfully enact; 16 A. S. R. 137; 21 A. S. R. 392,—on municipal ordinances; 31 A. S. R. 225, on constitutionality of municipal ordinances; 28 A. S. R. 614; 41 A. S. R. 439, 684; 46 A. S. R. 402,—on reasonableness of municipal ordinances; 35 A. S. R. 163, on validity of ordinances exercising police power; 123 A. S. R. 36, on test of validity of municipal ordinances as denying equal protection of the law; 78 A. S. R. 235, on reasonableness and validity of municipal ordinances.

Cited in notes in 34 A. D. 633, on invalidity of unreasonable municipal ordinances; 38 A. R. 296, on city's right to regulate hacks; 7 E. R. C. 282, on reasonableness of ordinance made by municipal corporation; 7 E. R. C. 283, 284, on reasonableness or validity of by-law made by private corporation.

— Ordinance regulating sale of intoxicating liquors.

Cited in *Grills v. Jonesboro*, 8 Baxt. 247, holding that incorporated town cannot, under its police powers, pass ordinance prohibiting licensed retail liquor dealers from selling goods on certain specified days of week or during certain hours of those days; *Gorrell v. Newport*, 1 Tenn. Ch. App. 120, holding ordinance reasonable which limits sale of intoxicating liquors to certain specified area in which about ninety per cent of business is done and wherein it does not appear there is not sufficient space for establishing of other saloons; *Bradford v. Jellico*, 1 Tenn. Ch. App. 700, holding ordinance confining business of liquor dealers to daylight and prohibiting them from selling during night hours, not unreasonable or oppressive; *Bennett v. Pulaski* (Tenn. Ch. App.), 47 L.R.A. 278, 52 S. W. 913, holding ordinance making it a misdemeanor to let person in or out of saloon during hours in which saloon is required to be closed is unreasonable and void; *Newbern v. McCann*, 105 Tenn. 159, 50 L.R.A. 476, 58 S. W. 114, holding ordinances that are not unreasonable and oppressive, requiring closing of saloons on Sunday, valid and enforceable.

Cited in reference notes in 37 A. R. 60, on right of municipal corporation to impose license tax; 43 A. R. 402, on municipal power to limit hours for selling intoxicants; 37 A. R. 568; 51 A. R. 768,—on validity of statutes regulating sale of intoxicants; 41 A. S. R. 224, on power of municipality to regulate liquor traffic; 104 A. S. R. 703, on power of municipalities to limit hours during which certain businesses can be carried on.

35 AM. REP. 704, COOPER v. STATE, 8 BAXT. 324.

Right to enforce commands upon servant.

Cited in *Tinkle v. Dunivant*, 16 Lea, 503, holding that master has no right to enforce his commands upon his servant or employe by use of force or personal chastisement.

Right to correct or expel pupils.

Cited in notes in 41 L.R.A. 594, 595, on right to exclude, suspend, or expel pupils for misconduct; 65 L.R.A. 892, on liability of school-teacher for reasonable restraint or correction of pupil.

35 AM. REP. 705, NASHVILLE & C. R. CO. v. SPRAYBERRY, 8 BAXT. 341.

Right to enforce action based on statute of another state.

Cited in *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439, holding right arising under statute of a state, where action is transitory, enforceable in any circuit court of United States having jurisdiction of subject matter and par-

ties; *St. Louis & S. F. R. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225, holding that non-resident may sue domestic corporation in courts of this state on transitory cause of action arising under statute of another state, where such statute does not conflict with public policy of this state; *Hamilton v. Hannibal & St. J. R. Co.* 39 Kan. 56, 18 Pac. 57, to point that where right of action becomes fixed and legal liability is incurred under statute law of state, such action is transitory and liability enforceable in courts of any state having jurisdiction of subject matter and can obtain jurisdiction of parties; *Delahaye v. Heitkemper*, 16 Neb. 475, 20 N. W. 385, holding cause of action which accrued in Iowa under statute of that state, which is not in contravention of public policy of laws of this state, enforceable in courts of this state; *Whitlow v. Nashville, C. & St. L. R. Co.* 114 Tenn. 344, 68 L.R.A. 503, 84 S. W. 618, holding that courts of Tennessee have power to enforce rights of action under foreign statutes.

Cited in notes in 37 A. R. 162, on extraterritorial effect of statutes; 56 L.R.A. 194, on what law determines right of action for death or bodily injury.

—Action for death.

Cited in *Denver & R. G. R. Co. v. Warring*, 37 Colo. 122, 86 Pac. 305, holding that action being transitory may be brought in Colorado by personal representative for death caused in New Mexico; *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169, 15 N. E. 230, holding action maintainable in this state to enforce liability accruing under statute of another state for death of plaintiff's intestate by wrongful act of defendant, statutes of both states being similar and there being jurisdiction of defendant; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 977, holding that right of action for damages for killing husband given by statute of Tennessee may be asserted in courts of this state because of similarity of statutes; *Nelson v. Chesapeake & O. R. Co.* 88 Va. 971, 15 L.R.A. 583, 14 S. E. 838, holding suit against railroad company enforceable in Virginia for negligent killing of plaintiff's intestate in West Virginia where laws of latter place were not inconsistent with laws of former.

Cited in notes in 56 L.R.A. 196, on courts of one state taking jurisdiction of cause of action for death or bodily injury arising outside of the state; 56 L.R.A. 203, on courts taking jurisdiction of cause of action for death or bodily injury arising outside of state as affecting comity, public policy, or similar statute in forum; 56 L.R.A. 212, on who may sue on cause of action for death or bodily injury in other state; 56 L.R.A. 216, on law of place of contract as governing action for death or bodily injury in other state.

—Action for negligence of fellow servant.

Cited in *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 A. R. 771, 16 N. W. 413, holding action enforceable in this state, under Iowa statute, for injuries occasioned in that state by fellow servant of plaintiff; *Missouri K. & T. R. Co. v. Kellerman*, 39 Tex. Civ. App. 274, 87 S. W. 401, holding that fellow servant statute of Kansas being similar to that of Texas regarding liability of railroad company to employe for agents' negligence, enforceable by Texas courts where they have jurisdiction of parties and rights arising under it.

Liability of connecting carrier.

Cited in reference notes in 67 A. D. 606, on liability of common carrier on through contracts; 36 A. R. 759, on liability of carrier for injury, occurring beyond his own line; 38 A. R. 617, on liability of one of several connecting carriers accepting fare over entire line, without agreement as to risks, for bag-

gage; 31 A. S. R. 59, 865; 37 A. S. R. 775,—on liability of connecting carriers; 35 A. R. 126, on carrier's liability for loss of baggage by connecting carrier.

Cited in notes in 106 A. S. R. 610, on liability of initial carrier to passenger for torts or negligence of connecting lines; 1 L.R.A. 703, on carrier's liability for loss or damage on connecting lines; 99 A. S. R. 343; 5 E. R. C. 463,—on liability of carrier for negligence of connecting carrier.

35 AM. REP. 711, COLLIER v. LATTIMER, 8 BAXT. 420.

Liberal construction of exemption laws.

Cited in *Rose v. Wortham*, 95 Tenn. 505, 30 L.R.A. 609, 32 S. W. 458, to point that exemption laws should be liberally construed.

Cited in reference note in 37 A. R. 190, on exemption of public property.

Right of abandoned wife to homestead exemption.

Cited in *Watterson v. E. L. Bonner Co.* 19 Mont. 554, 61 A. S. R. 527, 48 Pac. 1108, holding that abandoned wife may claim homestead exemption.

Cited in reference note in 59 A. S. R. 374, as to who may claim exemption as head of family.

Cited in notes in 36 A. R. 249, as to who is head of a family within meaning of exemption laws; 4 L.R.A. (N.S.) 393, on rights acquired by widow having children under homestead and exemption laws.

35 AM. REP. 713, JONESBORO, F. B. & B. GAP. TURNP. CO. v. BROWN, 8 BAXT. 490.

Control of courts over governor.

Cited in *Lynn v. Polk*, 8 Lea, 121, holding that discretion of executive officers to determine validity of laws under which they act, cannot be controlled by court; *State ex rel. Cranner v. Thorson*, 9 S. D. 149, 33 L.R.A. 582, 68 N. W. 202; *Smith v. Myers*, 109 Ind. 1, 58 A. R. 375, 9 N. E. 692,—to point that courts cannot control by injunction, or by any other writ, exercise of purely legislative or executive power.

—By mandamus.

Cited in *State ex rel. Robb v. Stone*, 120 Mo. 428, 41 A. S. R. 705, 23 L.R.A. 194, 25 S. W. 376; *Vicksburg & M. R. Co. v. Lowry*, 61 Miss. 102, 48 A. R. 76; *State ex rel. Latture v. Board of Inspectors*, 114 Tenn. 516, 86 S. W. 319,—holding that mandamus will not lie against governor in any case; *Woods v. Sheldon*, 9 S. D. 392, 69 N. W. 602; *Hovey v. State*, 127 Ind. 588, 22 A. S. R. 663, 11 L.R.A. 763, 27 N. E. 175,—holding that mandamus does not lie to compel governor to issue commission to person claiming to be elected to office; *State ex rel. Hope v. Board of Liquidation*, 42 La. Ann. 647, 7 So. 706, as to whether mandamus will lie to chief executive of state; *Bates v. Taylor*, 87 Tenn. 319, 3 L.R.A. 316, 11 S. W. 266, holding that mandamus will not lie against governor to coerce or restrain him as to issuance to congressmen elect of their certificates of election.

Cited in reference note in 1 A. S. R. 116, as to when mandamus lies.

Cited in notes in 33 A. D. 361, on power of judiciary to issue mandamus against governor; 33 A. D. 368, on mandamus to compel governor to perform ministerial act; 31 A. S. R. 295, 296, on mandamus to control discretion; 3 L.R.A. 316, on mandamus to control official judgment and discretion; 89 A. D. 734; 48 A. R. 76; 3 L.R.A. 779; 6 L.R.A. (N.S.) 769,—on mandamus to governor.

Distinguished in *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162, holding that mandamus lies against governor as to purely ministerial duties.

35 AM. REP. 716, CAGILL v. WOOLDRIDGE, 8 BAXT. 580.

Doctrine of comity.

Distinguished in *Conley v. Deere*, 11 Lea, 274, holding that dignity of chancery court, within same jurisdiction, cannot be asserted by action of replevin in common law court, against party having in fact superior right to possession of property.

—Rights of foreign receiver.

Cited in *Humphreys v. Hopkins*, 81 Cal. 551, 15 A. S. R. 76, 6 L.R.A. 792, 22 Pac. 892 (dissenting opinion), on right of receiver appointed in another, state to maintain replevin against creditor attaching debtor's property in this state where receiver has actual possession; *The Willamette Valley*, 13 C. C. A. 635, 29 U. S. App. 447, 66 Fed. 565; *Jenkins v. Purcell*, 29 App. D. C. 209, 9 L.R.A. (N.S.) 1074; *Woodhull v. Farmers' Trust Co.* 11 N. D. 157, 95 A. S. R. 712, 90 N. W. 795; *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co* 108 Ill. 317, 48 A. R. 557,—holding that where receiver has once obtained rightful possession of personal property situated within jurisdiction of his appointment, he will not be deprived of its possession though he take it into foreign jurisdiction; *Robertson v. Staed*, 135 Mo. 135, 58 A. S. R. 569, 33 L.R.A. 203, 36 S. W. 610, holding that order of court of Mexico appointing receiver and subsequent possession thereunder vests in him special property in car which authorizes him to maintain replevin in courts of this state; *Commercial Nat. Bank v. Motherwell Iron & Steel Co.* 95 Tenn. 172, 29 L.R.A. 164, 31 S. W. 1002, holding that receiver appointed by courts of one state, cannot sue in another state, to recover property belonging to estate which has never been in his possession; *Dillingham v. Traders Ins. Co.* 120 Tenn. 302, 16 L.R.A. (N.S.) 220, 108 S. W. 1148, holding that assignment made in one State had no extraterritorial force in another State.

Cited in reference note in 56 A. R. 104, on right of receiver to maintain replevin against attaching creditor.

Cited in notes in 8 A. S. R. 51, on extraterritorial power of receivers; 71 A. S. R. 355, on recovery of assets by receiver; 20 L.R.A. 392, as to jurisdiction of receiver over property outside of jurisdiction of court appointing him; 23 L.R.A. 54, on rights of receiver as to property outside of jurisdiction in which he is appointed after obtaining possession; 4 L.R.A. (N.S.) 827, on power of receiver to sue out of jurisdiction of appointment.

35 AM. REP. 719, VALLE v. STATE, 9 TEX. APP. 57.

Right to counsel in criminal case.

Cited in reference note in 81 A. S. R. 154, on right of one charged with felony to counsel.

35 AM. REP. 726, McCAMPBELL v. STATE, 9 TEX. APP. 124.

Disqualification of juror unable to read and write.

Cited in reference note in 16 A. S. R. 231, on disqualification of jurors.

Cited in notes in 43 L.R.A. 72, on number and agreement of jurors necessary to constitute valid verdict in case of absent, sick, or unqualified juror; 43 L.R.A. 60, on consent and waiver as to number and agreement of jurors.

Distinguished in *Wright v. State*, 12 Tex. App. 163, holding that inability to read and write as cause for challenge in code of procedure has reference to English language and ability to read and write foreign language does not satisfy requirement.

Right of trial by jury in complicated account.

Cited in *Davis v. Dyer*, 62 N. H. 231, holding that in assumpsit upon account, items of which are so numerous and complicated that case cannot be intelligently understood by jury, there is no absolute right of trial by jury under constitution.

Who are principals.

Cited in *Smith v. State*, 21 Tex. App. 107, 17 S. W. 552, holding all principal offenders in conspiracy between three persons to commit theft, two to take the property and the other to sell it.

Conviction of receiving stolen property under indictment for theft.

Cited in *Vincent v. State*, 10 Tex. App. 330, holding that conviction for receiving or concealing property, knowing it to have been stolen, may be had and will be sustained under indictment charging theft of property; *Dreyer v. State*, 11 Tex. App. 631, holding that whenever, under ordinary indictment for theft, it is sought to hold defendant liable under evidence proving receipt and concealment of stolen goods, verdict of jury should show that they found him guilty of receiving and concealing stolen property, knowing it to be stolen.

Overruled in *Brown v. State*, 15 Tex. App. 581, holding that conviction for knowingly receiving stolen property cannot legally be had under an indictment for theft.

Requisites of verdict under special plea.

Cited in *Smith v. State*, 18 Tex. App. 329, holding that when a special plea is submitted to jury verdict must expressly determine whether such plea is true or untrue; *Grisham v. State*, 19 Tex. App. 504, holding that when special plea of former acquittal or conviction is submitted to jury verdict must expressly determine whether such plea is true or untrue.

35 AM. REP. 732, HUDSON v. STATE, 9 TEX. APP. 151.

Former jeopardy as bar.

Cited in *State v. Colgate*, 31 Kan. 511, 47 A. R. 507, 3 Pac. 346, holding former acquittal of setting fire to and burning mill good defense to subsequent prosecution for setting fire to and burning books of account where mill and books of account of owners of mill are destroyed by one single fire; *State v. Nash*, 86 N. C. 650, 41 A. R. 472 (dissenting opinion), on former acquittal of assault and battery on one of two persons, where crime charged was committed on another at same time, as bar of prosecution for assault and battery upon other; *Adams v. State*, 16 Tex. App. 102, holding that conviction of theft of one of yearlings would be bar to indictment for theft of other, notwithstanding yearlings were owned by different persons.

Cited in reference note in 14 A. S. R. 572, on former acquittal or conviction.

Cited in notes in 41 A. R. 476, as to whether criminal acts of similar nature done simultaneously or nearly so constitute independent crimes: 92 A. S. R. 117, on plea of former jeopardy in case of larceny of several articles; 92 A. S. R. 119, on plea of former jeopardy in case of larceny of several articles by different takings; 7 L.R.A.(N.S.) 522, as to when larceny is deemed con-

tinuous; 31 L.R.A.(N.S.) 724, on right to convict for several offenses growing out of same facts.

35 AM. REP. 736, DUNLAP v. STATE, 9 TEX. APP. 179.

Validity of judicial action on holiday.

Cited in *Pender v. State*, 12 Tex. App. 496, holding that statute prescribing legal holidays does not have affect to suspend proceedings of courts on those days; *Glenn v. Eddy*, 51 N. J. L. 255, 14 A. S. R. 684, 17 Atl. 145, holding that summons will not be quashed nor its service set aside because issued, tested and served by sheriff on holiday; *Bradley v. Claudon*, 45 Ill. App. 326, holding judgment not void because entered by clerk on 25th day of December, a legal holiday; *Michel v. Boxholm Co-op. Creamery*, 128 Iowa, 706, 105 N. W. 323, 5 A. & E. Ann. Cas. 918, holding that party having previously appeared and answered cannot have continuance based on fact that case was set for trial on legal holiday; *Stewart v. Brown*, 112 Mo. 171, 20 S. W. 451, holding that sale under deed of trust may be legally made on twenty-second of February, although such day is declared public holiday by statute; *Macklin v. State*, 53 Tex. Crim. Rep. 197, 109 S. W. 145, holding indictment returned on legal holiday valid.

Cited in note in 19 L.R.A. 318, on how far the law of holidays extends to matters other than those relating to commercial paper.

Mode of proving former testimony.

Cited in *Moffatt v. State*, 35 Tex. Crim. Rep. 257, 33 S. W. 344, holding that testimony taken at coroner's inquest and reduced to writing cannot be contradicted or added to by parol testimony of what may have then occurred; *Gilbreath v. State*, 26 Tex. App. 315, 9 S. W. 618, holding that prosecution may reproduce by oral testimony evidence delivered upon examining trial after proving witnesses are nonresidents and that depositions taken upon that trial have been lost; *O'Connell v. State*, 10 Tex. App. 567, holding that parol evidence of what witness said on examining trial, when reduced to writing, cannot be received; *Simms v. State*, 10 Tex. App. 131, holding that to reproduce testimony of deceased witness given at former trial, person may state substance if unable to repeat its precise language; *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337, holding that properly verified copy of reporter's stenographic notes of testimony of witness for government at former trial who was fully examined and cross examined and who died after first trial and before second may be admitted in evidence against accused on second trial; *Ballinger v. State*, 11 Tex. App. 323, with regard to objections to written testimony of witnesses taken on examining trial, impeaching its identification and authenticity.

Cited in reference note in 61 A. S. R. 889, on admissibility in criminal trial of evidence of deceased witness.

35 AM. REP. 738, HOLBERT v. STATE, 9 TEX. APP. 219.

Impeachment of witnesses.

Cited in *Trammell v. State*, 10 Tex. App. 467, holding that impeaching witness was properly held incompetent on failure to qualify as witness with regard to general reputation of another witness in neighborhood for truth and veracity; *Bluitt v. State*, 12 Tex. App. 39, 41 A. R. 666, holding that after impeaching witness has stated that he knows general reputation for truth of assailed witness is bad, he may be asked whether from that reputation assailed witness is

worthy of belief; *Dodson v. State*, 44 Tex. Crim. Rep. 200, 70 S. W. 969, on charge of court as to impeaching testimony; *Bradshaw v. State*, 44 Tex. Crim. Rep. 222, 70 S. W. 215, holding that witness must know general reputation as to particular characteristic before he is authorized to speak as to that matter.

Cited in reference notes in 8 A. S. R. 402, on impeachment of witness by reputation for veracity; 82 A. S. R. 28, on impeachment of witness by proof of character.

Cited in notes in 73 A. D. 772, on laying foundation for proof of character of witness for veracity; 73 A. D. 773, on cross-examination of impeaching witness; 41 L. ed. U. S. 471, on admissibility of evidence of character; 22 L.R.A. (N.S.) 657, on right to testify to character from personal knowledge.

35 AM. REP. 743, *ROLAND v. STATE*, 9 TEX. APP. 277.

Competency of wife as witness against husband in criminal prosecution.

Cited in *Lord v. State*, 17 Neb. 526, 23 N. W. 507, holding that on trial of husband on indictment for adultery, wife was competent witness against him; *State v. Chambers*, 87 Iowa, 1, 53 N. W. 1090, holding that wife may testify against husband on trial for incest.

Cited in reference notes in 29 A. S. R. 411, on competency of husband or wife to testify to other's adultery; 43 A. S. R. 354, on wife as witness against husband; 47 A. S. R. 561, on husband as witness to prove adultery with wife; 53 A. S. R. 722, on wife's competency in criminal case; 67 A. S. R. 830, on competency of husband or wife as witness in prosecution for adultery.

Cited in note in 106 A. S. R. 767, 770, on husband or wife as witness for or against the other in prosecution for adultery.

Overruled in *Compton v. State*, 13 Tex. App. 271, 44 A. R. 703, holding wife not competent witness against husband in prosecution against him for incest with her daughter and his step-daughter.

Cited as overruled in *People v. Quanstrom*, 93 Mich. 254, 17 L.R.A. 723, 53 N. W. 165, holding first or lawful wife not competent witness on husband's trial for bigamy.

35 AM. REP. 745, *WARREN v. STATE*, 9 TEX. APP. 619.

Admissibility of declarations of murdered person as part of *res gestæ*.

Cited in *Nelson v. State*, 130 Ala. 83, 30 So. 728, holding declarations to witness made by deceased while in flight, within range of assailant's gun, and within two minutes after firing of fatal shot admissible as part of *res gestæ* in murder case; *People v. Taylor*, 59 Cal. 640; *Drake v. State*, 29 Tex. App. 265, 15 S. W. 725; *Williams v. State*, 10 Tex. App. 528,—holding dying declarations of deceased shortly after being shot as to who shot him, admissible as part of *res gestæ*; *Castillo v. State*, 31 Tex. Crim. Rep. 145, 37 A. S. R. 794, 19 S. W. 892, holding declaration of victim of rape to grandmother when she reached home admissible as *res gestæ*; *Lambright v. State*, 34 Fla. 564, 16 So. 582 holding declarations of deceased as to who shot him, made at nine o'clock next morning after evening he was shot, inadmissible; *Boyle v. State*, 97 Ind. 322 (dissenting opinion), to point that declarations of deceased, are admissible in murder trials, only as to matters to which he would have been competent to testify if sworn in case; *McInturf v. State*, 20 Tex. App. 335, holding statements to wife by deceased as he staggered into house shortly after being shot as to who did it admissible as *res gestæ*; *Pierson v. State*, 18 Tex. App. 524.

Pierson v. State, 21 Tex. App. 14, 17 S. W. 468,—holding declarations of deceased made within five minutes after he was shot, as to who shot him, admissible as part of *res gestæ* in murder case; *Smith v. State*, 21 Tex. App. 277, 17 S. W. 471, holding statements to witnesses by deceased about fifteen minutes after he was shot admissible as *res gestæ* in murder case; *Chalk v. State*, 35 Tex. Crim. Rep. 116, 32 S. W. 534, holding statements to witness by deceased found lying in road wounded twenty minutes after being wounded at farthest, admissible as part of *res gestæ*.

Admissibility of dying declarations.

Cited in *Hunnicut v. State*, 18 Tex. App. 498, 51 A. R. 330, holding dying declarations of deceased made under sense of impending death, shortly after he was shot as to who shot him, admissible.

Cited in note in 86 A. S. R. 652, on admissibility of dying declarations showing intention or motive; 56 L.R.A. 354, 369, on dying declaration as evidence; 56 L.R.A. 373, on dying declarations as to antecedent and subsequent matters; 56 L.R.A. 428, on intention of dying declarations by signs; 56 L.R.A. 378, on admissibility of dying declarations consisting of opinions and conclusions; 40 L. ed. U. S. 535, on dying declarations.

—Nature of declarations.

Cited in *Montgomery v. State*, 80 Ind. 338, 41 A. R. 815, holding that dying declarations must speak to facts only and not to mere matters of opinion; *Boyle v. State*, 105 Ind. 469, 55 A. R. 218, 5 N. E. 203 (dissenting opinion), to point that dying declarations to be admissible must be of facts and not opinions; *Seifert v. State*, 160 Ind. 464, 98 A. S. R. 340, 67 N. E. 100, holding dying declarations of deceased in prosecution for abortion to effect that defendant promised to relieve her and gave her instrument to procure abortion admissible as relating to circumstances of the death; *Lipscomb v. State*, 75 Miss. 559, 23 So. 210, holding dying declaration being not statement of fact but expression of opinion, inadmissible; *Medina v. State*, 43 Tex. Crim. Rep. 52, 63 S. W. 331, holding dying declaration admissible to show all facts immediately connected with homicide to which witness, if present in court, could testify; *Connell v. State*, 46 Tex. Crim. Rep. 259, 81 S. W. 746, holding dying declarations admissible only as to such facts as deceased would have been authorized to testify to, had he been present at the trial.

Separation of jury.

Cited in notes in 43 A. D. 82, on effect of separation of jury during trial of cases of felonies not capital; 134 Am. St. R. 1062, on misconduct of jurors other than their separation for which a verdict may be set aside.

Distinguished in *De friend v. State*, 22 Tex. App. 570, 2 S. W. 641, holding that after jury has been sworn in felony case law expressly inhibits their separation until they have returned verdict, unless by permission of court with consent of attorneys representing state and defendant and in charge of officer.

35 AM. REP. 748, MASLIN v. BALTIMORE & O. R. CO. 14 W. VA. 180.

Duty of carrier of livestock to deliver.

Cited in *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461, holding carrier of livestock bound to deliver animals at place of designation to party designated to receive them if he presents himself or can with reasonable efforts be found or to his order.

Am. Rep. Vol. XVII.—65.

Cited in notes in 67 A. D. 209, on liability of carriers of animals; 67 A. D. 210, on rule that carrier of live animals is not liable for loss from their nature or propensities; 63 A. S. R. 549, on respective duties of carriers and shippers of live stock; 63 A. S. R. 550, on carrier's duty to receive and carry live stock; 18 L.R.A.(N.S.) 92, as to whether carrier is an insurer of live stock transported; 130 Am. St. R. 441, 451, on carrier's liability for loss of, or injury to, livestock.

Liability of carrier for loss of goods.

Cited in *Clyde S. S. Co. v. Burrows*, 36 Fla. 121, 18 So. 349; *McGraw v. Baltimore & O. R. Co.* 18 W. Va. 361, 41 A. R. 696,—holding common carrier at common law liable for loss of goods, except by act of God, public enemy or conduct of owner, unless loss arises from nature and inherent character of property, provided carrier has used care to avoid such loss.

Right of carrier to exempt itself from loss.

Cited in *Norris v. Savannah F. & W. R. Co.* 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. 475, holding carrier not liable for loss of perishable goods where delay causing loss is attributable to flood as an act of God; *Ballou v. Earle*, 17 R. I. 441, 33 A. S. R. 881, 14 L.R.A. 433, 22 Atl. 1113, holding that express company cannot limit its liability for loss of goods occasioned by its own negligence; *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640, holding that carrier cannot limit its liability, by contract, for injuries resulting from negligence of its agents; *Brown v. Adams Exp. Co.* 15 W. Va. 812, holding that carrier cannot contract to exempt itself from liability for loss caused by negligence of itself or its servants; *Zouch v. Chesapeake & O. R. Co.* 36 W. Va. 524, 17 L.R.A. 116, 15 S. E. 185 (dissenting opinion), on right of carrier to exempt itself from liability for loss; *Berry v. West Virginia & P. R. Co.* 44 W. Va. 538, 67 A. S. R. 781, 30 S. E. 143; *Lewis v. Chesapeake & O. R. Co.* 47 W. Va. 56, 81 A. S. R. 816, 35 S. E. 908,—holding that carrier cannot contract to exempt itself from liability for loss caused by its own negligence; *Bosley v. Baltimore & O. R. Co.* 54 W. Va. 563, 66 L.R.A. 871, 46 S. E. 613, holding that carrier of livestock cannot contract to exempt itself from liability for loss caused by negligence of itself or its servants.

Cited in reference note in 13 A. S. R. 784, on validity of contract with shipper limiting carrier's liability.

Cited in notes in 32 A. D. 500, on restriction on power of common carrier to limit its liability; 67 A. D. 213, on limitation of liability of carriers of animals by contract; 82 A. D. 292, on exemption of passenger carrier from liability by contract; 63 A. S. R. 566, on exemption of carrier of livestock from performance of duty; 88 A. S. R. 97, 99, on validity of limitation of carrier's liability for losses caused by negligence of carrier or employees; 4 E. R. C. 695, on right of carrier to exempt himself by contract from liability for negligence.

Rights and liabilities of traveler on drover's pass.

Cited in *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 48 A. R. 10, holding that traveler on drover's pass has same rights and liabilities as if he had bought his ticket.

Cited in notes in 57 A. R. 388, 398, on carrier's relation to one riding without making compensation; 61 A. S. R. 89, on person riding on drover's pass as passenger.

35 AM. REP. 760, BROOKE ACADEMY v. GEORGE, 14 W. VA. 411.

Purposes for which public moneys may be appropriated.

Cited in *Demoville v. Davidson County*, 87 Tenn. 214, 10 S. W. 353, to point that appropriation of public moneys to other than public purposes is beyond legislative power.

35 AM. REP. 772, STACHE v. ST. PAUL F. & M. INS. CO. 49 WIS. 89, 5 N. W. 36.

Waiver by insurer's adjustment of loss.

Cited in *West Coast Lumber Co. v. State Invest. & Ins. Co.* 98 Cal. 502, 33 Pac. 258, holding that giving of bill of exchange for amount of insurance constituted waiver of false proofs of loss; *Miller v. Consolidated Patrons & F. Mut. Ins. Co.* 113 Iowa, 211, 84 N. W. 1049, holding that determination of amount of loss by adjuster, raises implied promise on part of insurance company to pay it; *Stockton Combined Harvester & Agri. Works v. Glens Falls Ins. Co.* 98 Cal. 557, 33 Pac. 633; *New Hampshire F. Ins. Co. v. Wall*, 36 Ind. App. 238, 75 N. E. 668,—holding that settlement of liability under fire policy, in absence of fraud, cuts off any right of defense on ground of breach of warranty; *German F. Ins. Co. v. Gibbs*, 42 Tex. Civ. App. 407, 92 S. W. 1068, holding suit upon adjustment of loss under fire insurance policy defeasible by insurer only by showing fraud in adjustment unknown to insurer at time of adjustment and which could not have been discovered by use of reasonable diligence.

Effect of mistake in proofs of loss.

Cited in *Waldeck v. Springfield F. & M. Ins. Co.* 53 Wis. 129, 10 N. W. 88, holding honest mistake in proofs of loss as to ownership of property destroyed, though sworn to, not fatal to recovery.

Cited in reference note in 39 A. R. 517, on effect of misrepresentation by insured discovered after adjustment.

Cited in note in 44 L.R.A. 856, on conclusiveness as against insured of misstatements as to cause of fire in proof of loss.

35 AM. REP. 776, MUTCHA v. PIERCE, 49 WIS. 231, 5 N. W. 486.

Admissibility of declarations as part of *res gestæ*.

Cited in *Marler v. Texas & P. R. Co.* 52 La. Ann. 727, 27 So. 176, holding declarations of complainant made in answer to questions as to how accident occurred, not in presence of any one connected with transaction and considerable time after accident, inadmissible as part of *res gestæ*, in action for personal injuries; *Fitzgerald v. Weston*, 52 Wis. 354, 9 N. W. 13, holding wife's declarations made one or two days after accident, as to manner in which it occurred, inadmissible as part of *res gestæ* in action against town for injuries to husband from negligence; *Schillinger v. Verona*, 88 Wis. 317, 60 N. W. 272, holding statement by witness that morning after accident plaintiff pointed out to her exact place where it occurred, inadmissible, in action against town for injuries by defective highway.

Cited in reference note in 3 A. S. R. 240, on admissibility as part of *res gestæ* of declarations of person injured.

Cited in notes in 91 A. D. 61, on necessity that acts and declarations be contemporaneous with principal transaction to be admissible as part of *res gestæ*; 19 L.R.A. 733, on how near the main transaction declarations must be made to constitute part of *res gestæ*; 15 L.R.A.(N.S.) 1097, on probative effect of

admission by plaintiff of fault or responsibility for accident; 11 E. R. C. 291, on the doctrine of *res gestæ*.

Incompetency of opinion evidence.

Cited in *Atchison v. Dullam*, 16 Ill. App. 42, holding witness' expressions of opinion as to whether injury was accident incompetent in action for personal injuries.

35 AM. REP. 779, SCHULTZ v. MILWAUKEE, 49 WIS. 254, 5 N. W. 342.

Liability of municipality for damages.

Cited in *Williams v. Yorkville*, 59 Wis. 119, 17 N. W. 546, holding city not liable for acts of supervisors in entering and constructing ditch upon party's land where complaint does not show that they are acting in official capacity; *Robinson v. Rohr*, 73 Wis. 436, 9 A. S. R. 810, 2 L.R.A. 366, 40 N. W. 663, holding city not liable for injuries to person caused by negligence of employees of board of street commissioners engaged in repairing bridge pursuant to resolution contrary to charter of city; *Naumburg v. Milwaukee*, 77 C. C. A. 67, 146 Fed. 641, holding city liable where tender of drawbridge maintained by city was guilty of negligence in operation of bridge, causing injuries to complainant; *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030, holding city not liable for injuries caused by its board of public works in disposing of garbage at city; *Higgins v. Superior*, 134 Wis. 264, 13 L.R.A.(N.S.) 994, 114 N. W. 490, holding city not liable for negligence of numbers of its fire department.

Cited in reference notes in 36 A. S. R. 668, on municipal liability for acts of licensees; 46 A. S. R. 765, on municipal liability for acts of officers.

Cited in notes in 35 A. R. 403, on right of person to recover for injury as effected by his unlawful act not contributing thereto; 12 L.R.A.(N.S.) 538, on municipal liability for torts of police officers.

Distinguished in *Durkee v. Kenosha*, 59 Wis. 123, 48 A. R. 480, 17 N. W. 677, holding city liable in action of tort for acts of its officers in seizing and selling property to pay void special assessment for benefits from opening of street.

—For injuries by coasting.

Cited in *Faulkner v. Aurora*, 85 Ind. 130, 44 A. R. 1, holding city after having adopted ordinance prohibiting, upon its streets, sports tending to produce bodily injury, not liable for injury to pedestrian by coasting sled; *Dudley v. Flemingsburg*, 115 Ky. 5, 103 A. S. R. 253, 60 L.R.A. 575, 72 S. W. 327, 1 A. & E. Ann. Cas. 958, holding city not liable for injuries sustained by one who is run into by coasting sled on street; *Burford v. Grand Rapids*, 53 Mich. 98, 51 A. R. 166, 18 N. W. 571, holding that municipal ordinance permitting particular street to be coasted on does not make city liable for any injuries that may result from coasting to persons on street; *Howard v. Brooklyn*, 30 App. Div. 217, 51 N. Y. Supp. 1058, holding city not liable for injury of pedestrian by bicycle ridden upon sidewalk; *Jones v. Williamsburg*, 97 Va. 722, 47 L.R.A. 294, 34 S. E. 883, holding city not liable for damages resulting from collision of bicycle with pedestrian merely because it failed to pass ordinance forbidding such use of its sidewalks.

Cited in reference notes in 98 A. D. 587; 86 A. S. R. 441,—on liability of city for injuries by persons coasting; 65 A. S. R. 264, on coasting in city streets.

Cited in note in 103 A. S. R. 291, on accumulations of snow or ice on streets as defects.

—For injuries by discharge of cannon.

Cited in *Robinson v. Greenville*, 42 Ohio St. 623, 51 A. R. 857, holding city not liable for injury to resident by discharge of cannon in public street by disorderly persons; *O'Rourke v. Sioux Falls*, 4 S. D. 47, 46 A. S. R. 760, 19 L.R.A. 789, 54 N. W. 1044, holding city not liable for injury to person by discharge of cannon in public street, in violation of ordinance, although city officials knew cannon was to be fired and took no steps to prevent it.

Cited in reference note in 39 A. R. 771, on liability of municipal corporation for permitting firing of cannon in street.

—For injuries by rifle ball.

Cited in *Leonard v. Hornellsville*, 41 App. Div. 106, 58 N. Y. Supp. 266, holding city not liable where person standing upon public street was struck by rifle ball rebounding from target in shooting gallery.

—For dangerous structures in highway.

Cited in *Van Cleef v. Chicago*, 144 Ill. App. 488, holding municipality liable for injury to person occurring upon street by reason of its authorizing holding of street fair; *Hubbell v. Viroqua*, 67 Wis. 343, 58 A. R. 866, 30 N. W. 847, holding that structures erected near public highway in such manner as to interfere with safety of persons traveling thereon do not constitute insufficiency of highway itself so as to render city liable for damages caused by their existence.

Cited in reference note in 35 A. R. 796, on municipal liability for injury through frightening of team by licensed exhibition.

Distinguished in *King v. Oshkosh*, 75 Wis. 517, 44 N. W. 745, holding city liable for injuries sustained by person, in night time, falling over hydrant maintained by private company with consent of city.

—For permitting animals in street.

Cited in *Marth v. Kingfisher*, 22 Okla. 602, 18 L.R.A.(N.S.) 1238, 98 Pac. 436, holding municipal corporation not liable for failure to enact ordinance against horse racing upon its streets; *Little v. Madison*, 49 Wis. 605, 35 A. R. 793, 6 N. W. 249, holding city not liable where it licensed exhibition of wild animals without specifying any place and owner exhibited them in public street whereby complainant's wife sustained personal injury.

Power of municipalities over streets.

Cited in *State ex rel. Atty. Gen. v. Madison Street R. Co.* 72 Wis. 612, 1 L.R.A. 771, 40 N. W. 487, holding that power of municipalities with respect to streets and street railways is entirely derived from legislature.

Cited in reference note in 2 A. S. R. 169, on obligation of municipal corporation to keep streets and highways in safe condition.

Cited in notes in 51 A. R. 861, on municipal liability for injuries by unauthorized acts of private persons in streets; 9 A. S. R. 880, on rights of foot passengers; 30 A. S. R. 386, on municipal liability for negligence of officers and agents as to public streets; 23 L.R.A.(N.S.) 640, on liability of municipality for failure to prevent improper conduct in or use of streets.

35 AM. REP. 782, *PARRY v. SPIKES*, 49 WIS. 384, 5 N. W. 794.

Statute of frauds as affecting guaranty.

Cited in *Young v. Brown*, 53 Wis. 333, 10 N. W. 394, holding written agree-

ment guarantying payment "for all goods F. F. of Neenah and F. F. Menasha may buy from B. Young & Son" sufficiently expresses consideration and is valid.

— **Necessity for expressing consideration.**

Cited in *Commercial Nat. Bank v. Smith*, 107 Wis. 574, 83 N. W. 766, holding indorsement on promissory note "I hereby guaranty payment of within note" void because it fails to express consideration; *Klee v. Stephenson*, 130 Wis. 505, 110 N. W. 479, holding written instrument "R. S. agrees to assume one half of W. S's liability under above guaranty" failing to express consideration void under statute of frauds.

Cited in note in 60 A. S. R. 434, 436, on necessity and sufficiency of expression of consideration of contract.

What is a guaranty of another's debt.

Cited in *Eagle Mowing & Reaping Mach. Co. v. Shattuck*, 53 Wis. 455, 40 A. R. 780, 10 N. W. 690, holding that where debtor induces creditor to take in settlement of indebtedness note of third person, with such debtor's guaranty of its payment, not stating consideration, this is in effect promise by such debtor to pay his own debt in particular manner and is not within statute of frauds.

Cited in note in 95 A. D. 263, on consideration in new promise to take case out of statute of frauds.

Necessity for demand and notice on non-negotiable instruments.

Cited in *Continental Nat. Bank v. McGeoch*, 73 Wis. 332, 41 N. W. 409, holding demand and notice not necessary to charge indorsers as such on instruments that are not negotiable.

35 AM. REP. 785, MERRELL v. CAMPBELL, 49 WIS. 535, 5 N. W. 912.

Who is liable to garnishment.

Cited in *Bates v. Chicago, M. & St. P. R. Co.* 60 Wis. 296, 50 A. R. 369, 19 N. W. 72, holding that common carrier cannot be held liable as garnishee for goods in actual transit when process is served.

— **Municipality.**

Cited in *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. 816, to point that municipal corporation is not subject to ordinary process of garnishment; *Pittsburgh Testing Laboratory v. Milwaukee Electric R. & Light Co.* 110 Wis. 633, 84 A. S. R. 948, 86 N. W. 592, to point that municipal corporation is not liable to garnishment in attachment suit.

Cited in notes in 35 A. S. R. 119; 51 A. S. R. 115,—on garnishment of municipalities; 80 A. D. 785, on liability of municipal corporation to garnishment.

— **County.**

Cited in *Duval County v. Charleston Lumber & Mfg. Co.* 45 Fla. 256, 60 L.R.A. 549, 33 So. 531, 3 A. & E. Ann. Cas. 174; *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 53 A. S. R. 878, 37 L.R.A. 207, 45 Pac. 31,—holding county not liable to garnishment unless made so by express statutory provision; *Oneida County v. Tibbits*, 125 Wis. 9, 102 N. W. 897, to point that counties are not subject to garnishment and mechanics' lien statutes.

Cited in note in 37 L.R.A. 208, on liability of county to garnishment.

Effect of levy of execution on school warrant.

Cited in *Richardson v. Independent School Dist. No. 1*, 5 Dak. 277, 38 N. W. 553, holding that levy of execution on school warrant of judgment debtor prior

to its receipt and acceptance by him creates no liability in favor of plaintiff in execution as against school district.

35 AM. REP. 786, DELLS v. KENNEDY, 49 WIS. 555, 6 N. W. 246, 381.

Validity of statute, generally.

Cited in *State v. Sinks*, 42 Ohio St. 345, holding that act, providing for lien on real estate occupied by tenant, who is dealer in liquors, being within inhibition of constitution, which provides that "no license to traffic in intoxicating liquors shall hereafter be granted in this state," is void.

Validity of apportionment act.

Cited in *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724, holding apportionment act unconstitutional where disparity in number of inhabitants in districts is so great as not to be justified.

Validity of restrictions on right to vote.

Cited in *Ferguson v. Allen*, 7 Utah, 263, 26 Pac. 570, holding that elector's right to vote should not be impaired by regulation; *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964 (dissenting opinion), to point that legislature cannot add to qualifications of elector, nor take right of suffrage away from one so qualified.

—By registration laws.

Cited in *Choisser v. York*, 211 Ill. 56, 71 N. E. 940 (dissenting opinion), to point that right to vote being constitutional, right cannot be taken away by legislation; *Atty. Gen. ex rel. Conely v. Detroit*, 78 Mich. 545, 18 A. S. R. 458, 7 L.R.A. 99, 44 N. W. 388; *State ex rel. Boyle v. State Examiners*, 21 Nev. 67, 9 L.R.A. 385, 24 Pac. 614,—holding that registry laws must be calculated to facilitate and secure, rather than to subvert or impede, exercise of right to vote; *State ex rel. Stearns v. Corner*, 22 Neb. 265, 3 A. S. R. 267, 34 N. W. 499, holding registration law which absolutely deprives elector of right to vote unless registered on one of four days, last one being ten days prior to election, void; *State ex rel. Lamar v. Dillon*, 32 Fla. 545, 22 L.R.A. 124, 14 So. 383; *People ex rel. Phillips v. Strassheim*, 240 Ill. 279, 22 L.R.A. (N.S.) 1135, 88 N. E. 821; *Daggett v. Hudson*, 43 Ohio St. 548, 54 A. R. 832, 3 N. E. 538,—holding registration act having direct tendency to impair right of suffrage, unconstitutional and void; *White v. Multnomah County*, 13 Or. 317, 57 A. R. 20, 10 Pac. 484, holding that under constitution of this state, every law which requires previous registry as prerequisite to right to vote is ipso facto void; *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425 (dissenting opinion), to point that registration law will not be held valid which, under color of regulating manner of voting, really subverts right; *State v. Butts*, 31 Kan. 537, 2 Pac. 618, to point that provision for registry deprives no one of his right to vote but is only reasonable regulation under which right may be exercised.

Cited in reference note in 42 A. R. 65, on validity of municipal act requiring voters to be registered and pay a poll tax.

Cited in notes in 54 A. R. 844, on validity of statute making registration prerequisite to right to vote; 7 L.R.A. 99, on rights of voters to be registered.

Effect of partial invalidity of statute or ordinance.

Cited in *Mathias v. Cramer*, 73 Mich. 5, 40 N. W. 926, holding that unconstitutional provision or section in statute will not affect other provisions of

law unless they are essentially and inseparably connected in substance; *Moreland v. Millen*, 126 Mich. 381, 85 N. W. 882 (dissenting opinion), on effect of partial validity of statute; *State ex rel. Comstock v. Stewart*, 52 Neb. 243, 71 N. W. 998; *State ex rel. Cornish v. Tuttle*, 53 Wis. 45, 9 N. W. 791; *State ex rel. La Valle v. Sauk County*, 62 Wis. 376, 22 N. W. 572; *Gilbert-Arnold Land Co. v. Superior*, 91 Wis. 353, 64 N. W. 999,—holding that if void part of municipal ordinance is compensation for or inducement to valid portion, so that, looking at whole ordinance it is reasonably clear that legislature would not have enacted valid portion alone, whole ordinance will be held void.

Cited in note in 66 A. S. R. 505, on invalidity of statute in part.

35 AM. REP. 793, LITTLE v. MADISON, 49 WIS. 605, 6 N. W. 249.

Liability of municipality for damages.

Cited in *Burford v. Grand Rapids & I. R. Co.* 53 Mich. 98, 51 A. R. 105, 18 N. W. 571, holding that municipal ordinance permitting particular street to be coasted on does not make city liable for any injuries that may result from coasting to persons on street; *Robinson v. Greenville*, 42 Ohio St. 625, 51 A. R. 857, holding city not liable for injury to resident by discharge of cannon in public street by disorderly persons; *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565, holding city liable for injury to unskilled laborer by falling of walls of cistern in which he was working and which was being constructed by city; *Naumburg v. Milwaukee*, 77 C. C. A. 67, 146 Fed. 641, holding city liable where tender of draw bridge maintained by city was guilty of negligence in operation of bridge, causing injuries to complainant; *Robinson v. Rohr*, 73 Wis. 436, 9 A. S. R. 810, 2 L.R.A. 366, 40 N. W. 668, holding city not liable for injuries to person caused by negligence of employees of board of street commissioners engaged in repairing bridge pursuant to resolution contrary to charter of city; *Kansas City v. Lemen*, 6 C. C. A. 627, 12 U. S. App. 640, 57 Fed. 905, holding city not liable in damages where mayor and police of city close circus that is being held on ground claimed to have been dedicated as public graveyard; *Hubbell v. Viroqua*, 67 Wis. 343, 58 A. R. 866, 30 N. W. 847, holding that action will not lie against municipal corporation for not suppressing public nuisance when it is not created or maintained by express authority of municipality; *Waupaca County v. Matteson*, 79 Wis. 67, 48 N. W. 213, holding town not liable in any action for neglect or refusal of clerk to insert claim in tax roll of town for collection; *Williams v. Yorkville*, 59 Wis. 119, 17 N. W. 546, holding city not liable for acts of supervisors in entering and constructing ditch upon party's land where complaint does not show that they are acting in official capacity.

Cited in notes in 15 L.R.A. 365, on liability of municipality for injuries caused by horse becoming frightened at object in highway; 27 L.R.A. 728, on municipal liability for permitting animals in streets; 44 L.R.A. 800, on municipal liability for false imprisonment and unlawful arrest; 9 L.R.A.(N.S.) 146, on municipal liability for personal injury on account of exhibition permitted in public street; 12 L.R.A.(N.S.) 539, on municipal liability for torts of police officers; 23 L.R.A.(N.S.) 637, 639, on liability of municipality for failure to prevent improper conduct in or use of streets; 33 L. ed. U. S. 334, on liability of municipalities and individuals for obstructions or nuisances in street or want of repair thereof.

Distinguished in *Durkee v. Kenosha*, 59 Wis. 123, 48 A. R. 480, 17 N. W. 677,

holding city liable in action of tort for acts of its officers in seizing and selling property to pay void special assessment for benefits from opening of street; *King v. Oshkosh*, 75 Wis. 517, 44 N. W. 745, holding city liable for injuries sustained by person, in night time, falling over hydrant maintained by private company with consent of city.

Power of municipality over streets and street railways.

Cited in *State ex rel. Atty. Gen. v. Madison Street R. Co.* 72 Wis. 612, 1 L.R.A. 771, 40 N. W. 487, holding that power of municipalities with respect to streets and street railways is entirely derived from legislature.

Presumption of knowledge of vicious nature of animal.

Cited in *Bormann v. Milwaukee*, 93 Wis. 522, 33 L.R.A. 652, 67 N. W. 924, holding owner conclusively presumed to know that elks and deer kept by him are vicious and liable to do mischief unless properly restrained.

35 AM. REP. 796, HAZELTON v. WEEK, 49 WIS. 661, 6 N. W. 309.

Liability for interference with another's property.

Cited in *Tobin v. Deal*, 60 Wis. 87, 50 A. R. 345, 18 N. W. 634, holding that one who unlawfully interferes with or exercises acts of ownership over property of another, causing its loss, is liable therefor; *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465, to point that action for trespass can be maintained for timber removed, against former owner, by tax title claimant who has never been in actual possession of land.

Cited in reference notes in 70 A. D. 467, on any unlawful interference with another's property constituting trespass; 39 A. R. 251, on right of owner to recover timber converted into ties and sold to bona fide purchaser.

Measure of damages for cutting timber.

Distinguished in *Wright v. Bolles*, 50 Wis. 167, 6 N. W. 508, as to statutory rule of damages for logs wrongfully cut on plaintiff's land.

NOTES

ON THE

AMERICAN REPORTS.

CASES IN 36 AM. REP.

36 AM. REP. 1, TRAMMELL v. RUSSELLVILLE, 34 ARK. 105.

Liability of municipalities for acts done in exercise of their public and governmental functions.

Cited in *Stevens v. Muskegon*, 111 Mich. 72, 36 L.R.A. 777, 69 N. W. 227, holding city not liable; *Campbell v. Hyde*, 92 Ark. 128, 122 S. W. 99, holding that imprisonment by virtue of legal writ in due form does not constitute false imprisonment though improvidently or wrongfully issued; *Kansas City v. Lemen*, 6 C. C. A. 627, 12 U. S. App. 640, 57 Fed. 905, holding city is not liable in damages for the wrongful act of its mayor and police in closing without color of law an exhibition with intent to injure and oppress the owner thereof; *Kelly v. Barton*, 26 Ont. Rep. 608, holding that city is not liable for illegal acts of police officers; *Pocock v. Toronto*, 27 Ont. Rep. 635, holding city not liable for act of police in enforcing invalid ordinance against peddling in street; *Davis v. Knoxville*, 90 Tenn. 599, 18 S. W. 254, holding city not liable for assault on prisoner by another prisoner.

Cited in reference note in 83 A. D. 566, on liability of municipal corporation for acts of its agents.

Cited in notes in 30 A. S. R. 405, on municipal liability for ultra vires torts of officers and agents; 34 A. S. R. 27, on municipal liability for torts not sanctioned by its charter; 1 L.R.A. 608, on necessity that act be within scope of corporate powers to render municipality liable for agent's act; 44 L.R.A. 797, 800, 801, on municipal liability for false imprisonment and unlawful arrest.

—For injuries received by individuals in the enforcement of illegal ordinances.

Cited in *Masters v. Bowling Green*, 101 Fed. 101, holding where municipality acts in good faith, without malice in the arrest of one charged with violating an ordinance, it is not liable in damages though the ordinance be invalid; *Simpson v. Whatcom*, 33 Wash. 392, 99 A. S. R. 951, 63 L.R.A. 815, 74 Pac. 577, holding city not liable.

Cited in reference notes in 67 A. S. R. 424, on arrest under void ordinance

as false imprisonment; 47 L.R.A. 593, on municipal liability for arrest and imprisonment under invalid ordinance.

Protection of officer acting under process fair on its face.

Cited in *Hofschulte v. Doe*, 78 L. ed. 436; *Douglass v. Stahl*, 71 Ark. 226, 72 S. W. 568,—holding he is protected.

Cited in notes in 54 A. D. 266, on liability for false imprisonment on part of officer executing writ or warrant; 67 A. S. R. 410, on arrest with regular process as false imprisonment; 51 L.R.A. 193, 194, on liability of officer for making an arrest under warrant or writ valid on its face.

Liability of judicial officers for official acts.

Cited in *McClure v. Hill*, 36 Ark. 268, holding judges of courts of general jurisdiction are protected against civil suits for any act done in a judicial capacity.

Cited in note in 67 A. S. R. 422, on liability of judicial officer for false imprisonment.

What constitutes jurisdiction.

Cited in *Thompson v. Willard*, 66 Ark. 346, 50 S. W. 870, as to what constitutes.

36 AM. REP. 5, STATE v. PARKER, 34 ARK. 158.

Description of property in indictment.

Cited in *Cain v. State*, 58 Ark. 43, 22 S. W. 954, holding disjunctive description of property bad; *Atchison v. State*, 90 Ark. 457, 119 S. W. 651, holding that indictment for receiving stolen goods, which describes property as "five finger rings" is sufficient.

What constitutes larceny.

Cited in *Murphy v. Olberding*, 107 Iowa, 547, 78 N. W. 205, holding it is necessary that the property be taken and carried away to constitute larceny.

Cited in note in 88 A. S. R. 591, on larceny of property savoring of realty.

36 AM. REP. 6, KELLY v. ALTEMUS, 34 ARK. 184.

Regulation of ferry rates.

Cited in note in 59 L.R.A. 543, on regulation and supervision of ferries as to rates of toll.

Damages recoverable in replevin.

Cited in *Minkwitz v. Steen*, 36 Ark. 260, holding the measure of damages for the detention of property having unsalable value is the value of the use during detention; *Lesser v. Norman*, 51 Ark. 301, 11 S. W. 281, holding plaintiff may recover not only damages sustained by the detention of the property before suit is commenced, but also such as accrue thereafter and to the date of the verdict.

Damages which party sustains by defense of suit.

Cited in *Jacobson v. Poindexter*, 42 Ark. 97, holding in general the taxed costs are only damages recoverable and law makes no allowance to successful suitor for his time, indirect loss or counsel fees.

36 AM. REP. 8, LACEFIELD v. STATE, 34 ARK. 275.

Intent in assault with intent to kill.

Cited in *Scott v. State*, 49 Ark. 156, 4 S. W. 750; *Patterson v. State*, 85 Ga. 131, 21 A. S. R. 152, 11 S. E. 620; *Chrisman v. State*, 54 Ark. 283, 26 A. S. R.

44, 15 S. W. 889,—holding on an indictment for assault with intent to kill proof of the specific intent is necessary and such intent will not be inferred as a matter of law from proof of an assault with a deadly weapon without provocation; *Davis v. State*, 45 Ark. 464; *Dillard v. State*, 65 Ark. 404, 46 S. W. 533; *Satterwhite v. State*, 82 Ark. 64, 100 S. W. 70,—holding proof must show that it would have been murder had death resulted from the assault.

Cited in note in 41 L. ed. U. S. 481, 482, on assault with intent to kill or murder.

—Assault falling on person other than intended.

Cited in *State v. Mulhall*, 199 Mo. 202, 7 L.R.A.(N.S.) 630, 97 S. W. 583, 8 A. & E. Ann. Cas. 781, holding under statute a defendant be convicted of an assault with intent to kill by showing that he shot at one person and hit another.

Cited in reference notes in 52 A. R. 209, on criminal liability for intending to injure one and injuring another; 31 A. S. R. 576, on unlawfully firing at one person and hitting another as assault with intent to kill; 120 A. S. R. 681, on assault with intent to kill by unlawfully firing at one person and hitting another.

Disapproved in *People v. Raher*, 92 Mich. 165, 31 A. S. R. 575, 52 N. W. 625, holding instruction by court that if accused fired a revolver into a crowd intending to wound any of the persons composing it he might be convicted, notwithstanding he had no intention to shoot the person hit, not error.

Necessity of indictment for assault with intent to commit felony specifying facts necessary to constitute such felony.

Cited in *Russell v. State*, 52 Ark. 276, 12 S. W. 564, holding in indictment for assault with intent to kill, it is sufficient to allege that the assault was committed in the manner and with the intent necessary to constitute the offense charged without expressly averring the "present ability" necessary under statute to constitute the assault; *State v. Shunka*, 116 Iowa, 206, 89 N. W. 977, holding an indictment charging an assault with intent to commit murder by shooting with a revolver is sufficient under code although it fails to allege that the revolver was loaded with powder and ball; *State v. Peak*, 130 N. C. 711, 41 S. E. 887, holding an indictment for an assault with intent to commit rape need not contain the word "forcibly."

Sufficiency of charge in indictment.

Cited in *Williams v. State*, 47 Ark. 230, 1 S. W. 149, holding in an indictment for being interested in the sale of liquor without a license it is not necessary that the offense be stated in the caption but it is sufficient to charge it in the body of the indictment; *State v. De Long*, 89 Ark. 391, 117 S. W. 524, holding indictment for assault with intent to kill need not allege manner of using knife with which assault was made; *Lyman v. State*, 90 Ark. 596, 119 S. W. 1116, holding that indictment which gives statement of facts constituting crime is valid though it names offense inaccurately; *Chowning v. State*, 91 Ark. 503, 121 S. W. 735, 18 A. & E. Ann. Cas. 529, holding that to constitute assault with intent to kill, specific intent to take life must be shown.

Indictment for "felony."

Cited in *Johnson v. State*, 36 Ark. 242, holding it is inaccurate to charge one with a "felony" instead of naming the particular offense intended to be charged; but if the particular offense be made distinct and certain but the statement of the facts and circumstances of its commission, the indictment is sufficient.

Necessity of plea in criminal case.

Cited in *Perry v. State*, 37 Ark. 54; *Baker v. State*, 39 Ark. 180; *State v. Dillingham*, 43 Ark. 154,—holding in a criminal case there can be no valid trial of defendant without plea.

Cited in note in 13 L.R.A. (N.S.) 811, on effect upon conviction of failure to give accused an opportunity to plead.

Disapproved in *Hobbs v. State*, 86 Ark. 360, 111 S. W. 264, holding that conviction for felony will not be reversed because of trial without formal arraignment, if record shows defendant received all his rights; *Gaines v. United States*, 1 Ind. Terr. 296, 37 S. W. 98, holding under law in force in Indian Territory, arraignment may be dispensed with by the court with defendant's consent and if defendant voluntarily goes to trial without being arraigned, he waives arraignment and conviction will not be set aside.

Necessity of record showing formal plea.

Cited in *Lee v. State*, 73 Ark. 148, 83 S. W. 916, as to the necessity.

Errors reviewable on motion to arrest.

Cited in *State v. Bledsoe*, 47 Ark. 233, 1 S. W. 149, holding sufficiency of testimony cannot be questioned but only the sufficiency of the indictment or at most only such errors as appear of record.

36 AM. REP. 13, WOOD v. STATE, 34 ARK. 341.**Drunkenness as defense to crime.**

Cited in *Casat v. State*, 40 Ark. 511, holding no voluntary intoxication can reduce murder in first degree to a lower degree, unless it is accompanied by a temporary destruction of reason; *McNamara v. State*, 60 Ark. 400, 30 S. W. 762, holding it not error in a murder case to refuse to instruct that if at the time of the killing "defendant was so under the influence of liquor that a felonious intent could not be found in his own mind, the jury should acquit," where there was no proof that such was the condition of defendant's mind.

Cited in reference notes in 7 A. S. R. 21, as to when voluntary intoxication lessens accountability for crime; 19 A. S. R. 837, on drunkenness as an excuse for crime; 73 A. S. R. 758, on voluntary intoxication as defense to crime.

Cited in notes in 40 A. R. 560, on drunkenness as excuse for crime; 36 L.R.A. 469, as to when intoxication may be shown in excuse of larceny or robbery.

—As inhibiting specific criminal intent.

Cited in *Chatham v. State*, 92 Ala. 47, 9 So. 607; *Chrisman v. State*, 54 Ark. 283, 26 A. S. R. 44, 15 S. W. 889,—holding where intent is necessary to constitute the crime it may be shown that accused was so drunk that he could not entertain an intent; *People v. Blake*, 65 Cal. 275, 4 Pac. 1, holding in prosecution for forgery evidence of intoxication is admissible on question of intent; *Garner v. State*, 28 Fla. 113, 29 A. S. R. 262, 9 So. 835, holding where premeditated design is necessary to offense of murder in first degree, intoxication though voluntary, is evidence to be considered by the jury as to its effect upon ability of accused at time of killing to form or entertain such design; *Keeton v. Com.* 92 Ky. 522, 18 S. W. 359, holding accused may show that he was too drunk to have any intent at time he committed the act of robbery; *State v. Koerner*, 8 N. D. 292, 73 A. S. R. 752, 78 N. W. 981, holding intoxicated condition of defendant may be shown, to be considered by the jury for purpose of determining whether intent actually existed; *Chowning v. State*, 91 Ark. 503,

121 S. W. 735, 18 A. & E. Ann. Cas. 529, holding drunkenness precluding entertainment of intent, good defense to charge of assault with intent to kill.

Intent as element of crime.

Cited in notes in 88 A. S. R. 600, 601, on intent as element of larceny; 8 E. R. C. 56, on necessity of guilty intent to make act crime.

Effect of separation of jury.

Cited in *Maclin v. State*, 44 Ark. 115, holding it casts upon state burden of proving that no improper influence was brought to bear on juror during the separation.

Cited in note in 43 A. D. 81, on effect of separation of jury during trial of cases of felonies not capital.

36 AM. REP. 15, CARR v. STATE, 34 ARK. 448.

Carrying pistol as carrying a "weapon."

Cited in *Lemmon v. State*, 56 Ark. 559, 20 S. W. 404, holding a pistol is carried as a weapon when it is carried for the purpose of having it convenient for use in fight; *Henderson v. State*, 91 Ark. 224, 120 S. W. 966, holding that statute prohibiting "wearing" or "carrying" of pistol as weapon does not require to constitute offense, that it should be carried for any length of time; *Easlick v. United States*, 7 Ind. Terr. 707, 104 S. W. 941, holding that before person can be convicted for carrying concealed weapon, it must be shown that he carried it in order to have it available for use in fight.

Cited in reference note in 11 A. S. R. 203, on construction of statutes regarding carrying of weapons.

Cited in note in 23 L.R.A.(N.S.) 177, on what manner of carrying or concealment of weapon violates statute.

Carrying weapons "upon a journey."

Cited in *Davis v. State*, 45 Ark. 359, holding one who is going from home by the highway to a definite point far enough to carry him beyond the circle of his neighbors and to detain him throughout the day, and not within the routine of daily business, is upon a journey within meaning of statutory exception against carrying concealed weapons.

Cited in reference note in 87 A. S. R. 206, on carrying of concealed weapons by travelers.

Cited in note in 107 A. S. R. 304, on right of passengers to carry concealed weapons.

36 AM. REP. 17, HALBROOK v. STATE, 34 ARK. 511.

Marriage when party already has lawful husband or wife.

Cited in *State v. Sherwood*, 68 Vt. 414, 38 Atl. 352; *Williams v. Williams*, 63 Wis. 58, 53 A. R. 253, 23 N. W. 110,—holding it void ab initio.

Evidence sufficient to sustain indictment for bigamy.

Cited in *Pontier v. State*, 107 Md. 384, 68 Atl. 1059, holding that proof of divorce from defendant in bigamy case after his alleged second marriage is competent evidence to prove first marriage.

Cited in reference note in 9 A. S. R. 269, on marriage sufficient to support indictment for bigamy.

Cited in notes in 57 A. R. 453, on when proof of actual marriage is necessary; 47 A. S. R. 228, 232, on sufficiency of proof of former marriage in prose-

cution for bigamy; 17 E. R. C. 176, on sufficiency in prosecutions for bigamy of showing that first marriage was valid common-law marriage.

Admissions of former marriage as evidence in prosecution for bigamy.

Cited in *Lowery v. People*, 172 Ill. 466, 64 A. S. R. 50, 50 N. E. 165, holding it may be proved by admissions of defendant; *State v. Hughes*, 35 Kan. 626, 57 A. R. 195, 12 Pac. 128, holding deliberate admissions of defendant of former marriage coupled with cohabitation and repute, are evidence tending to prove an actual marriage upon which a jury may convict; *Le Grand v. State*, 88 Ark. 135, 113 S. W. 1028, holding that proof that defendant told witness that he married certain woman and that they cohabited and had a child born is sufficient to establish marriage in bigamy case.

Cited in notes in 47 A. D. 374, on defendant's admissions as to former marriage on indictment for bigamy; 93 A. D. 255, on declarations and confessions of accused as proof of marriage alleged to be bigamous.

Defense to charge of bigamy.

Cited in *McCombs v. State*, 50 Tex. Crim. Rep. 490, 123 A. S. R. 855, 9 L.R.A. (N.S.) 1036, 99 S. W. 1017, 14 A. & E. Ann. Cas. 72, holding that if prior marriage is nullity, subsequent marriage cannot constitute bigamy.

Cited in notes in 93 A. D. 253, on invalidity of second marriage as defense to bigamy; 26 L.R.A.(N.S.) 465, on admissibility of divorce decree in prosecution for bigamy; 126 Am. St. Rep. 202, on crime of bigamy.

Admissibility of record of divorce as evidence of marriage.

Cited in *Williams v. Williams*, 63 Wis. 58, 53 A. R. 253, 23 N. W. 110, holding it admissible as confession of marriage but not necessarily conclusive.

Divorce decree as evidence of life of divorced party.

Cited in *State v. Ashley*, 37 Ark. 403, holding in a prosecution for bigamy a decree divorcing from the accused his former wife, rendered after the alleged bigamous marriage is prima facie evidence that she was living at time of bigamous marriage.

Presumption of legality of marriage.

Cited in *Cash v. Cash*, 67 Ark. 278, 54 S. W. 744, holding the burden is upon the party attacking it.

Cited in note in 89 A. S. R. 199, on presumption in favor of validity of second marriage.

Necessity of record showing return of indictment by grand jury.

Cited in *Felker v. State*, 54 Ark. 489, 16 S. W. 663, holding the record in the prosecution of a felony must show that the grand jury returned the indictment into court and an omission in this respect cannot be cured by a nunc pro tunc order made in absence of defendant.

Cited in note in 26 L.R.A.(N.S.) 688, on necessity, mode, and record of bringing indictment into open court.

36 AM. REP. 24, THOMAS v. HOT SPRINGS, 34 ARK. 553.

Authority of cities to regulate drumming or soliciting.

Cited in *Humes v. Little Rock*, 138 Fed. 929, as to power to prohibit drumming for legitimate forms of business; *Emerson v. McNeil*, 84 Ark. 552, 15 L.R.A.(N.S.) 715, 106 S. W. 479, holding that ordinance making it unlawful to solicit customers upon depot platform invalid.

Cited in note in 21 L.R.A. 87, on injunction against prosecution under city ordinance affecting personal right.

Power of city under charter giving authority to "prevent and suppress gaming.

Cited in *Ex parte Ah Foy*, 23 Or. 89, 31 Pac. 220, holding under this power it may punish anyone who merely goes into a gambling room.

36 AM. REP. 30, PEOPLE v. HODGDON, 55 CAL. 72.

Dying declarations.

Cited in *Johnson v. State*, 102 Ala. 1, 16 So. 99, holding rereading of declaration to party making it is not a necessary prerequisite to its admissibility; *People v. Taylor*, 59 Cal. 640, holding it is not necessary that the declarations should be stated at the time to be so made; *State v. Jeswell*, 22 R. I. 136, 46 Atl. 405, as to policy of law toward their admissibility; *Bilton v. Territory*, 1 Okla. Crim. Rep. 586, 99 Pac. 163, holding that statement could not be admitted as dying declaration where party after making it sent for other medical aid.

Cited in notes in 42 A. S. R. 333; 56 L.R.A. 400,—on effect of abandonment of hope of recovery or renewed hope on admissibility of dying declarations; 11 E. R. C. 306, 307,—on admissibility of dying declarations; 40 L. ed. U. S. 533, on dying declarations.

—Imminence of death.

Cited in *People v. Ramirez*, 73 Cal. 403, 15 Pac. 33, holding under the evidence the declaration was made in fear of approaching death; *People v. Taylor*, 59 Cal. 640; *People v. Gray*, 61 Cal. 164, 44 A. R. 549; *People v. Fuhrig*, 127 Cal. 412, 59 Pac. 693; *State v. Gianfala*, 113 La. 463, 37 So. 30,—holding them not admissible if there is any hope of recovery.

Cited in notes in 86 A. S. R. 660, on admissibility of dying declarations made unde expectation of recovery; 86 A. S. R. 664, on time of making dying declarations as affecting their admissibility.

Authentication of settled case.

Cited in *Territory v. Bryson*, 9 Mont. 32, 22 Pac. 147, holding it may be settled and passed upon by successor of judge who tried the case.

Construction of statutes.

Cited in *People ex rel. Atty. Gen. v. Eichelroth*, 78 Cal. 141, 2 L.R.A. 770, 20 Pac. 364, holding when meaning of the words is not clear the statute should be given such construction as will not deprive the person interested in its construction of a substantial right.

36 AM. REP. 32, PEOPLE v. REDINGER, 55 CAL. 290.

Dismissal of appeal upon escape of appellant from custody.

Cited in *Allen v. Georgia*, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *Warwick v. State*, 73 Ala. 486, 49 A. R. 59; *People v. Elkins*, 122 Cal. 654, 55 Pac. 599; *Woodson v. State*, 19 Fla. 549; *Sargent v. State*, 96 Ind. 63; *State v. Scott*, 70 Kan. 692, 79 Pac. 126, 3 A. & E. Ann. Cas. 511,—holding if after an appeal a defendant convicted of a felony becomes a fugitive from justice the appeal will be dismissed; *State v. Port Royal & A. R. Co.* 45 S. C. 413, 23 S. E. 363 (dissenting opinion); *Vosburg v. Vosburg*, 131 Cal. 628, 63 Pac. 1009,—as to right of defendant who has escaped to have appeal heard; *Re Shortridge*, 5 Cal. App. 371.

Am. Rep. Vol. XVII.—66.

90 Pac. 478; *State v. Jacobs*, 107 N. C. 772, 22 A. S. R. 912, 11 S. E. 962; *People v. Tremayne*, 3 Utah, 331, 3 Pac. 85,—holding a defendant charged with felony, and who is a fugitive from justice, has no right to be heard upon any appeal in his behalf; *Tyler v. Oklahoma*, 3 Okla. Crim. Rep. 179, 26 L.R.A. (N.S.) 921, 104 Pac. 919, holding that court will not hear appeal of fugitive from justice.

Cited in reference note in 36 A. R. 275, on right of fugitive defendant to prosecute appeal from criminal conviction.

Cited in notes in 41 A. D. 272, 273, on right to appeal while a fugitive from justice; 44 A. R. 88, on right of escaped convicted prisoner, not on bail, to be heard in appeal; 26 L.R.A. (N.S.) 922, 923, on effect of escape on appeal from conviction.

— Order nisi for dismissal.

Cited in *State v. Dempsey*, 26 Mont. 504, 68 Pac. 1114; *State v. Handy*, 27 Wash. 469, 67 Pac. 1094,—holding where the accused in a criminal case breaks jail and becomes a fugitive from justice pending the hearing of an appeal taken by him the supreme court will direct a dismissal of the appeal to become effective on a day named, unless appellant shall in the meantime have yielded himself into custody.

Authority of counsel to waive arraignment in absence of accused.

Cited in *State v. McMichael*, 50 La. Ann. 428, 23 So. 992, holding when crime charged is a felony he has no authority.

Cited in note in 13 L.R.A. (N.S.) 814, on necessity of pleading in person in criminal cases.

36 AM. REP. 40, DAVIS v. ROCK CREEK LUMBER FLUME & MIN. CO. 55 CAL. 359.

Constructive fraud of person in fiduciary capacity in dealing with himself in individual capacity.

Cited in *Moore v. Gould*, 151 Cal. 723, 91 Pac. 616, as to right of one acting in fiduciary capacity to deal with himself in his individual capacity.

— Dealings of officer with corporation.

Cited in *Wyman v. Bowman*, 62 C. C. A. 189, 127 Fed. 257, holding contracts between individuals and corporations of which they are directors or officers which are unfair are voidable at the option of the corporation, its creditors or stockholders; *Blake v. Ray*, 110 Ky. 705, 62 S. W. 531 (dissenting opinion), as to right of officer to deal with corporation; *Santa Ana Water Co. v. San Buenaventura*, 65 Fed. 323; *Bensilk v. Thomas*, 13 C. C. A. 457, 27 U. S. App. 765, 66 Fed. 104; *Burnes v. Burnes*, 70 C. C. A. 357, 137 Fed. 781; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Blood v. La Serena Land & Water Co.* 113 Cal. 221, 41 Pac. 1017; *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 A. S. R. 42, 78 Pac. 350; *The Telegraph v. Lee*, 125 Iowa, 17, 98 N. W. 364; *Hutchinson v. Bidwell*, 24 Or. 219, 33 Pac. 560, holding directors and officers of corporation cannot deal with corporate property in their personal capacity, nor make profit out of it.

Cited in notes in 17 A. S. R. 304, on transactions between director and corporation; 4 L.R.A. 747, on trust relation of directors in stock corporations; 14 L.R.A. 359, on powers of corporate president and vice president as to mortgages.

—Effect of acquiring corporate debts.

Cited in *Patrick v. Boonville Gaslight Co.* 17 Mo. App. 462, holding a president of a corporation who purchases dishonored debentures of the corporation holds them prima facie as trustee of the corporation; *Hope v. Valley City Salt Co.* 25 W. Va. 780, holding where a director of a corporation claiming to be a creditor thereof has obtained from his codirectors a deed of trust upon corporate property to the exclusion of other creditors such transaction will be presumed to be fraudulent but presumption may be rebutted.

Ratification by corporation of contracts made by officers.

Cited in *Seeley v. San Jose Independent Mill & Lumber Co.* 59 Cal. 22, as to what contracts may be ratified.

Effect of agent acting for both parties.

Cited in *Hunter Realty Co. v. Spencer* (*Horner v. Spencer*) 21 Okla. 155, 17 L.R.A.(N.S.) 622, 95 Pac. 757, holding that where agent acts for both parties in making contract, requiring discretion, contract is void.

36 AM. REP. 43, HAYES v. CAMPBELL, 55 CAL. 421.

Followed without discussion in *Green v. Campbell*, 55 Cal. 477.

Authority of general agent.

Cited in *Tevis v. Savage*, 130 Cal. 411, 62 Pac. 611, as to his authority.

Cited in reference note in 79 A. D. 203, on power of factor to pledge goods consigned to him to sell.

Right to maritime lien for freight.

Cited in note in 70 L.R.A. 369, on what contracts will support maritime lien for freight.

36 AM. REP. 47, EX PARTE WESTERFIELD, 55 CAL. 550.**Unconstitutional special law.**

Cited in *Dougherty v. Austin*, 94 Cal. 601, 16 L.R.A. 161, 29 Pac. 1092, holding under constitution law of general nature must have a uniform operation; *Swigart v. People*, 50 Ill. App. 181, holding legislature has no power to exempt certain corporations from the effect of a general penal law; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 78 A. S. R. 17, 47 L.R.A. 338, 59 Pac. 304; *Standard Cotton Seed Oil Co. v. Matheson*, 48 La. Ann. 321, 20 So. 713,—as to constitutionality of statute giving exclusive privileges to certain class of corporation; *State v. Goodwill*, 33 W. Va. 179, 25 A. S. R. 863, 6 L.R.A. 621, 10 S. E. 285, holding act which prohibits persons engaged in mining and manufacturing from issuing for payment of labor any order or paper, except such as is specified in said act, is unconstitutional.

Cited in note in 21 L.R.A. 791, on class legislation in statute restricting contracts and business.

—Regulations of hours for trade.

Cited in *Ex parte Jentzsch*, 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803, holding statute making it a misdemeanor to keep barber shop open on Sunday is special legislation based upon an arbitrary classification, and not proper exercise of police power and is unconstitutional.

—Sunday laws.

Cited in *Armstrong v. State*, 170 Ind. 188, 15 L.R.A.(N.S.) 646, 84 N. E. 3,

holding that act making it misdemeanor for barbers to ply trade on Sunday is invalid because general law could be made applicable.

Cited in reference note in 52 A. S. R. 373, on statutes prohibiting work on Sunday.

Cited in notes in 22 L.R.A. 723, on constitutionality of Sunday laws; 15 L.R.A.(N.S.) 649, on special penalty for violation of Sunday closing act.

Distinguished in *State v. Dolan*, 13 Idaho, 693, 14 L.R.A.(N.S.) 1259, 92 Pac. 995, holding a law declaring Sunday a day of rest is not unconstitutional because it does not prohibit all kinds of labor on Sunday; *Ex parte Koser*, 6 Cal. 177, holding general Sunday law valid.

“General” laws.

Cited in *People v. Central P. R. Co.* 83 Cal. 393, 23 Pac. 303, as to what constitutes; *Henderson v. State*, 137 Ind. 552, 24 L.R.A. 469, 36 N. E. 257 (dissenting opinion), on necessity of general law including within its sanction all who come within its scope and purpose.

Collateral attack on conviction for violating unconstitutional attack.

Cited in reference note in 3 A. S. R. 903, on right to inquire on habeas corpus into constitutionality of statute forming basis of conviction.

Cited in note in 39 L.R.A. 455, 456, on conviction for violating unconstitutional statute or ordinance as a nullity subject to collateral attack.

**36 AM. REP. 50, BLAND v. SOUTHERN P. R. CO. 55 CAL. 570,
Later appeal in 65 Cal. 626, 4 Pac. 672.**

Ejection of passenger.

Cited in *Weber v. Southern R. Co.* 65 S. C. 356, 43 S. E. 888, as to right of passenger to re-enter after being once expelled.

Cited in reference note in 42 A. R. 669, on ejection of passenger for detaching coupon.

— **For failure to pay fare.**

Cited in reference note in 41 A. R. 640, on liability of railroad company for ejecting passenger for nonpayment of fare who offers to pay after train is stopped; 50 A. R. 532, on right of carrier to continue ejection of passenger for refusing to pay extra cash fare after tender of the higher amount; 8 A. S. R. 293, on right of conductor to eject passenger for refusing to pay extra fare; 24 A. S. R. 249, on expulsion of passenger for nonpayment of fare; 60 A. S. R. 719, on expulsion of passenger for nonpayment of fare.

Cited in notes in 16 L.R.A. 53, on right of passenger to pay fare after train stops for purpose of ejecting him; 31 L.R.A.(N.S.) 993, on sufficiency of tender of fare to prevent ejection.

— **Necessity for returning fare or ticket.**

Cited in *Braun v. Northern P. R. Co.* 79 Minn. 404, 79 A. S. R. 497, 49 L.R.A. 319, 82 N. W. 675; *Hanna v. Nassau Electric R. Co.* 18 App. Div. 137, 45 N. Y. Supp. 437; *Lake Shore & M. S. R. Co. v. Orndorff*, 55 Ohio St. 589, 60 A. S. R. 716, 38 L.R.A. 140, 45 N. E. 447, holding conductor has no right to expel passenger and retain the ticket.

Distinguished in *Elliott v. Southern P. Co.* 145 Cal. 441, 68 L.R.A. 393, 79 Pac. 420, holding the fact that the conductor improperly retained a limited ticket after it had become void and refused to return it, did not give plaintiff a right to remain on the train without the presentation of a valid ticket or payment or offer

of payment of fare; *Wright v. California C. R. Co.* 78 Cal. 360, 20 Pac. 740, holding a passenger who voluntarily leaves the train and terminates his trip cannot be aided in an action for damages for ejection by the fact that his ticket was not returned.

Validity of extra charge when fare paid on train.

Cited in notes in 41 A. D. 483, 484, on discrimination between fare paid on train and fare paid at ticket office; 11 A. S. R. 650, on when discriminations between passengers buying tickets and those paying on train are reasonable; 20 L.R.A. 483, on validity of extra charge for passenger fare when paid upon train.

36 AM. REP. 51, WILSON v. GRANBY, 47 CONN. 59.

Duty and liability of municipalities as to highways and bridges.

Cited in *Bartram v. Sharon*, 71 Conn. 686, 71 A. S. R. 225, 46 L.R.A. 144, 43 Atl. 143, holding protection given by state extends only to those persons for whose common use highway was established; *Anderson v. St. Cloud*, 79 Minn. 88, 81 N. W. 746, holding issue of duty owed by city to public in matter of maintaining bridge is for jury; *Lane v. Hancock*, 142 N. Y. 510, 37 N. E. 473, holding limit of duty of town concerning condition of its highways falls far short of making them absolutely safe, under all circumstances even for those who use them properly.

Cited in reference notes in 11 A. S. R. 65, on municipal liability for collapse of bridge; 33 A. S. R. 834, on town's liability for defects in bridges.

Cited in notes in 5 L.R.A. 254, on duty of municipal corporations to keep streets and sidewalks in safe condition; 20 L.R.A. (N.S.) 577, 587, 765, on liability of municipality for defects or obstructions in streets; 27 L.R.A. (N.S.) 833, on municipal duty to construct and maintain bridges in condition to sustain unusual weight.

Loads for which highway may be used.

Cited in *Missouri-Edison Electric Co. v. Weber*, 102 Mo. App. 95, 76 S. W. 736, holding highway, whether county road or city street, should be strong enough for safe passage, not only of average loads, but of such heavy loads as are likely to pass over it in ordinary course of travel and transportation; *Welch v. Geneva*, 110 Wis. 388, 85 N. W. 970, holding town not liable for injury sustained by person in driving over bridge engine which was heavier than limit fixed by the statute.

Admissibility of complaints of injured person concerning his suffering.

Cited in *Martin v. Sherwood*, 74 Conn. 475, 51 Atl. 526, holding unless complaints are made to physician with view to medical treatment, proof should be limited, upon proper objection, to complaints which are natural and instinctive, expressions of present suffering; *Gilmore v. American Tube & Stamping Co.* 79 Conn. 498, 66 Atl. 4, holding complaints made to physician for purpose of receiving medical treatment admissible.

Cited in notes in 24 L.R.A. (N.S.) 254, on admissibility of expressions or statements, subsequent to injury, of present pain; 11 E. R. C. 293, on the doctrine of *res gestæ*.

Limitation on exemplary damages.

Cited in *Burr v. Plymouth*, 48 Conn. 460, holding jury may not award smart money at their discretion.

Expenses of litigation as damages.

Cited in *Mason v. Hawes*, 52 Conn. 12, 52 A. R. 552, holding it error to charge jury in case of trespass to real estate that they might not only consider damage to plaintiff's property, but also expense incurred in seeking redress at law: *Shupack v. Gordon*, 79 Conn. 298, 64 Atl. 740; *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 A. S. R. 213, 42 Atl. 67,—holding expenses of litigation in excess of taxable costs, in cases in which they may be considered, limit amount of punitive damages which can be awarded.

36 AM. REP. 54, STATE v. HAMLIN, 47 CONN. 95.**Objections to mode of formation of grand jury.**

Cited in *State v. Ward*, 60 Vt. 142, 14 Atl. 187, holding objections to method of selecting, returning, or organizing grand jury are not waived by one, bound over to answer indictment, by failure to insist upon them at organization of a grand jury.

Right to challenge grand jurors.

Cited in *Peoples v. State*, 46 Fla. 101, 35 So. 223, 4 A. & E. Ann. Cas. 870, on existence independently of statute of grounds of challenge to the favor as to grand jurors; *Lascelles v. State*, 90 Ga. 347, 35 A. S. R. 216, 16 S. E. 945, on challenging grand jurors; *State v. Ames*, 90 Minn. 183, 96 N. W. 330, holding at common law challenge going only to prejudice or bias of individual jurors were required to be made before they were sworn; *People v. Koepping*, 178 N. Y. 254, 70 N. E. 780, 18 N. Y. Crim. Rep. 259, holding motion to dismiss indictment on ground accused was unlawfully deprived of his right to challenge individual grand juror properly denied, though accused was in prison at time jury was impaneled and destitute of means to employ counsel; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, holding there can be no challenge of grand jurors for favor.

Cited in reference notes in 46 A. R. 782, on how objection to grand jurors must be made; 34 A. S. R. 305, on bias of grand jurors as ground for quashing indictment.

Cited in notes in 34 A. R. 706, on taking advantage of incompetency of grand juror; 12 A. S. R. 900, on qualifications and competency of grand juror; 12 A. S. R. 907, on time and mode of challenging grand juror; 12 A. S. R. 906, on challenges of grand juror for opinions formed and expressed; 28 L.R.A. 37, on concurrence by proper number of grand jurors, as to parties, crimes, counts, and degree of crime charged; 28 L.R.A. 369, on improper influence or interference with grand jury by prosecuting attorney; 27 L. ed. U. S. 858, as to when and how objections to grand jurors must be taken.

Formation or expression of opinion as to guilt of accused by grand jur.

Cited in *United States v. Clune*, 62 Fed. 798, on objection to validity of indictment on ground one or more grand jurors had formed or expressed opinion as to guilt of accused; *United States v. Jones*, 69 Fed. 973, holding selection of persons who have formed and expressed opinion as to guilt of accused does not render indictment invalid; *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473, holding indictment not rendered invalid where such biased juror, instead of being discharged from panel, was instructed not to participate in cases wherein he might be biased; *Com. v. Woodward*, 157 Mass. 516, 34 A. S. R. 302, 32 N. E. 939; *State v. Baughman*, 111 Iowa, 71, 82 N. W. 452,—holding fact juror has formed or expressed opinion of guilt of accused is no objection to validity of indictment.

Cited in note in 28 L.R.A. 200, on opinion and prejudice as disqualifying grand juror.

Impeachment of proceedings of grand jury by members thereof.

Cited in *Gitchell v. People*, 146 Ill. 175, 37 A. S. R. 147, 33 N. E. 757 (affirming 45 Ill. App. 116), holding affidavits of grand jurors ought not to be received to show twelve were not in favor of finding true bill against accused; *Hooker v. State*, 98 Md. 145, 56 Atl. 390, 1 A. & E. Ann. Cas. 644, holding accused cannot be permitted to call members of grand jury to impeach indictments returned by them, after they have become and continue to be part of records of court.

Secrecy as to proceedings in grand jury room.

Cited in *Gitchell v. People*, 146 Ill. 175, 37 A. S. R. 147, 33 N. E. 757, holding same principle forbidding disclosure by grand jurors, applies to all persons authorized by law to be present in grand jury rooms.

Distinguished in *State v. Brewster*, 70 Vt. 341, 42 L.R.A. 444, 40 Atl. 1037, holding fact that state's attorney took his stenographer with him into grand jury room and had testimony of witnesses taken down for his use by such stenographer is not ground for abating indictment.

Powers and duties of grand jurors.

Cited in note in 12 A. S. R. 914, on powers and duties of grand jurors.

Distinctive degrees of murder.

Cited in *Smith v. State*, 50 Conn. 193, holding allegation that offense charged is murder in first degree necessarily charges offense was committed deliberately and with premeditation, and vice versa; *State v. Cross*, 72 Conn. 722, 46 Atl. 148, holding statute is in substance, that murder with express malice is murder in first degree, but murder with implied malice is murder in second degree, except those enumerated cases of murder with implied malice expressly made murder in first degree; *Com. v. Ibrahim*, 184 Mass. 255, 68 N. E. 231, holding statute authorized grand juries to present indictments for murder in second degree.

Operation of demurrer to plea in abatement.

Cited in *United States v. Terry*, 39 Fed. 355, holding when allegations of plea in abatement contradict record or can only be proved by testimony of grand jurors themselves, demurrer can only be allowed to operate as objection or exception to filing or allowance of plea; *Rush v. Foos Mfg. Co.* 20 Ind. App. 515, 51 N. E. 143, holding demurrer cannot be carried back to complaint, because not addressed to complaint.

Indictment of woman for rape on female.

Cited in *State v. Burns*, 82 Conn. 213, 72 Atl. 1083, 16 A. & E. Ann. Cas. 465, holding that woman may be guilty of carnally knowing and abusing female child by aiding and abetting man.

36 AM. REP. 64, COOK v. JOHNSON, 47 CONN. 175.

Validity and enforcement of contracts in restraint of trade.

Cited in *McCurry v. Gibson*, 108 Ala. 451, 54 A. S. R. 177, 18 So. 806, holding test of reasonableness is whether it affords only fair protection to interests of party in whose favor it is made without being so large in its operation or duration as to interfere with interests of public; *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946, holding fact restraint is indefinite as to time does not invalidate contract; *Southworth v. Davison*, 106 Minn. 119, 19 L.R.A. (N.S.) 769, 118 N. W. 363, 16

A. & E. Ann. Cas. 253, holding sale of goods will in connection with business not void because unlimited as to time; *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680, 39 Atl. 923, holding reasonableness of covenant against competition with existing business is tested by area of exclusion from competition in its relation to territorial extent of the business; *Hulen v. Earel*, 13 Okla. 246, 73 Pac. 927, holding contract in restraint of trade will be upheld if partial or restricted in its operation in respect of either time or place if on some good consideration; and if affording only fair protection to interests of party in whose favor it is made, and not so large in its operation as to interfere with interest of public; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, 46 A. R. 527, holding restrictions allowed must depend largely on character of trade or business; *Cottingham v. Swan*, 128 Wis. 321, 107 N. W. 336, holding agreement not to engage in livery business in village while purchasers of business or either of them, or their heirs, executors or administrators should be engaged in such business within said village is valid.

Cited in reference notes in 60 A. R. 317, on validity of contract in restraint of trade; 4 A. S. R. 343, on contracts in restraint of trade; 69 A. S. R. 165, on limitations as to time in contracts in restraint of trade.

Cited in notes in 22 L. ed. U. S. 316; 59 A. R. 687,—on agreements in restraint of trade; 6 E. R. C. 451; 92 A. D. 753,—on validity of contracts in restraint of trade; 92 A. D. 754, 755, on restraint as to time in contracts in restraint of trade; 92 A. D. 760, on restraint as to space in contracts in restraint of trade; 1 L.R.A. 457, on sustaining valid part of divisible contracts in restraint of trade; 4 L.R.A. 155, on validity of contracts in partial restraint of trade; 24 L.R.A.(N.S.) 918, 926, 928, on validity of agreement in restraint of trade, ancillary to sale of business or profession, as affected by territorial scope.

Limited in *Rakestraw v. Lanier*, 104 Ga. 188, 69 A. S. R. 154, 30 S. E. 735, holding contract not to engage in practice of medicine, surgery or obstetrics in certain territory, unlimited as to time, unenforceable.

—Remedy by injunction.

Cited in *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590, holding contract not to practice profession in named territory enforceable by injunction.

Cited in reference note in 50 A. R. 242, on right to restrain violation of agreement by physician not to practice in a certain locality.

Restrictions operative within radius of town as including town itself.

Cited in *Jennings v. Russell*, 92 Ala. 603, 9 So. 421, holding statute prohibits such sale within limits of town itself.

36 AM. REP. 67, McMAHON v. SMITH, 47 CONN. 221.

Contracts void as trafficking in justice.

Cited in *Goodrich v. Tenney*, 144 Ill. 422, 36 A. S. R. 459, 10 L.R.A. 371, 33 N. E. 44, holding contract to obtain testimony of absconding debtor and others that conveyance of debtor to certain person was fraudulent, consideration for contract being percentage of amount realized out of creditors claims against such debtor, is illegal; *Crowder v. Reed*, 80 Ind. 1, holding individual cannot, for his own gain or benefit, make contract which may thwart or obstruct prosecution of offenders.

Cited in notes in 37 A. R. 204, on validity of contract founded on considera-

tion contra bonos mores; 117 A. S. R. 523, on enforceability of contracts compounding criminal prosecutions; 16 L.R.A.(N.S.) 975, on effect of agreement to stifle prosecution upon contract to pay existing indebtedness or the value of property or money feloniously obtained; 6 E. R. C. 392, on validity of agreements to stifle criminal prosecutions.

Avoidance of contract on ground of duress of threats to imprison relative.

Cited with special approval in *Watson v. Supplee*, 15 W. N. C. 12, discharging rule for judgment for want of sufficient affidavit of defense, where defense was that note sued on was given by mother to prevent threatened prosecution of her son on charge of obtaining goods by false pretenses.

Cited in *Mills v. Swords Lumber Co.* 63 Conn. 103, 26 Atl. 689, holding where contract, especially if one of suretyship, is obtained from one under such pressure as to be deprived of free agency, equity will not only refuse to aid party in whose favor it is made, but will declare same void; *Gorringe v. Reed*, 23 Utah, 120, 90 A. S. R. 692, 63 Pac. 902, holding in relation to husband and wife or parent and child each may avoid contract induced and obtained by threats of imprisonment of other, whether threat be of lawful or unlawful imprisonment; *City Nat. Bank v. Kusworm*, 88 Wis. 188, 43 A. S. R. 880, 26 L.R.A. 48, 59 N. W. 564, holding note obtained from wife by threats to prosecute her husband void.

Cited in reference note in 56 A. S. R. 480, on agreement not to prosecute as consideration for negotiable instruments.

Cited in notes in 26 L.R.A. 49, 51, on contracts procured by threats to prosecute relative as contrary to public policy; 26 L.R.A. 60, 61, on contracts procured by threats to prosecute husband or wife.

36 AM. REP. 70, SEELEY v. WESTPORT, 47 CONN. 294.

Injunction to restrain collection of tax.

Cited in *Oregon & W. M. Sav. Bank v. Jordan*, 16 Or. 113, 17 Pac. 621, holding unless case can be brought under some one of heads of equity jurisprudence, equity will not ordinarily interfere unless tax be illegal.

Cited in notes in 69 A. D. 201, on grounds for equitable interference to restrain collection of taxes; 10 L.R.A. 295, on injunction against tax sales; 22 L.R.A. 706, on injunction against collection of illegal taxes.

Recovery of money paid for illegal tax.

Cited in *State ex rel. McCurdy v. Nelson*, 41 Minn. 25, 4 L.R.A. 300, 42 N. W. 548, holding that payment under protest, of illegal tax or demand, to avoid imprisonment or seizure and sale of property, is not voluntary, and may be recovered back, and that principle applies also where real property is involved; *Montgomery v. Cowlitz County*, 14 Wash. 230, 44 Pac. 259, holding payment of taxes under protest to prevent cloud upon title to realty does not constitute voluntary payment.

36 AM. REP. 75, WARD v. DICK, 47 CONN. 300.

Repetitions and other libels as evidence of malice.

Cited in *Cribble v. Pioneer Press Co.* 34 Minn. 342, 25 N. W. 710, holding other publications by defendant, containing substantially same imputations and that sued on admissible to prove actual malice.

Cited in reference note in 43 A. R. 392, on malice in libel as shown by previous publications barred by statute of limitations.

Distinguished in *Paxton v. Woodward*, 31 Mont. 195, 107 A. S. R. 416, 73 Pac. 215, 3 A. & E. Ann. Cas. 546, holding instruction to jury that they must find for defendant if damage to plaintiff was caused partly by other libel or false charges, notwithstanding they found also damage was partly caused by publication set out in complaint is erroneous.

Necessity of proof of libelous words as pleaded.

Cited in *Haub v. Friermuth*, 1 Cal. App. 556, 82 Pac. 571, holding plaintiff not entitled to recovery upon proof of words not set forth in complaint, or upon failure to prove slanderous words alleged.

Failure to sustain plea of justification of libel or slander as aggravation.

Cited in *Yager v. Bruce*, 116 Mo. App. 473, 93 S. W. 307, holding for plea of truth of charge against plaintiff to be considered for purpose of awarding punitive damages it is essential that jury find, not only that it was improved but that it was filed in bad faith; *Upton v. Hume*, 24 Or. 420, 41 A. S. R. 863, 21 L.R.A. 493, 33 Pac. 810, holding it was error to instruct jury unqualifiedly that if defendant failed to sustain plea of justification they might consider it in aggravation of damages, where defendant gave evidence tending to support plea.

Cited in note in 91 A. S. R. 302, on effect of plea of justification for libel or slander in aggravating damages or as evidence of malice.

Malice in libel as jury question.

Cited in *Browning v. Powers*, — Mo. —, 38 S. W. 943, holding whether there was good faith in uttering falsely defamatory charges is usually question for jury.

36 AM. REP. 79, BURRETT v. BELFY, 47 CONN. 323.

Rule prohibiting severance of cause of action.

Cited in *Clafin v. Mather Electric Co.* 39 C. C. A. 241, 98 Fed. 699, holding as rule is for benefit of defendant he may waive it and consent to division; *Hall v. Paine*, 47 Conn. 429, holding one judgment, though for part only of cause of action, is bar to another, and satisfaction for whole; *Wildman v. Wildman*, 70 Conn. 700, 41 Atl. 1, holding single cause of action cannot be split in two; *Law v. McDonald*, 62 How. Pr. 340, holding damages for single wrongful act can be awarded but once, and in one suit only; *Jarrett v. Self*, 90 N. C. 478, holding when all breaches of which contract is susceptible have occurred all which can be must be included in one action; *Bullard v. Thorpe*, 66 Vt. 599, 14 A. S. R. 867, 25 L.R.A. 605, 30 Atl. 36, holding judgment or part of one entire demand is bar to any other suit for another part.

Cited in note in 11 L.R.A. 222, on necessity for joining separate causes of action.

Entire or divisible causes of action.

Cited in *Peurrung v. Carter-Crume Co.* 110 Fed. 107, holding rule does not cover instalments not due; *Hallack v. Gagnow*, 4 Colo. App. 360, 36 Pac. 70, holding that if contract is entire there is but one action allowed, but if contract is divisible, each obligation as it becomes due is subject of independent action, and that if plaintiff has waited until all demands are due he has but one action for whole, while if he sues upon a portion of the obligations he must include all then due.

Accrual of right to sue before claim is fully matured.

Cited in *Cole v. Fowler*, 68 Conn. 450, 36 Atl. 807, holding when amount for which one is entitled to sue is not ascertained and he can sue only by treating certain outstanding claims as credits statute of limitations does not begin to run against him from date of transaction out of which his claim arises if he does not elect so to treat such outstanding claims and bring suit.

Right of demandant to prove and recover past and future damages.

Cited in *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852, holding tenant sued for rent who sets up counterclaim sounding both in contract and in tort has right and is bound to prove his entire damages; *Sax v. Detroit*, G. H. & M. R. Co. 125 Mich. 252, 84 A. S. R. 572, 84 N. W. 314, holding where theory is that plaintiff had contracted for employment for life and defendant wrongfully refused further employment, jury may take into consideration probable period of his ability to perform service and probable duration of his life would be element in problem.

Prior judgment as bar.

Cited in reference note in 12 A. S. R. 676, on prior judgment as bar to maintenance of another cause of action.

36 AM. REP. 86, KENYON v. FARRIS, 47 CONN. 510.**Liability of husband for money furnished distressed or deserted wife for necessities.**

Cited with special approval and distinguished in *Leuppie v. Osborn*, 52 N. J. Eq. 637, 29 Atl. 433, holding where wife borrowed money for support of family because husband was so sick, weak and helpless he was incapable of doing business, husband's estate was not liable, for loan.

Cited in *Reed v. Crissey*, 63 Mo. App. 184, holding equity allows one who has lent money to distressed wife, with which to procure necessities, to stand instead of persons supplying same, and recover of husband amount actually paid by wife out of money loaned.

Cited in reference note in 2 A. S. R. 664, on liability of husband for wife's necessities.

Cited in notes in 64 A. S. R. 864, on effect of desertion of wife on her property rights and power to contract, etc; 98 A. S. R. 645, on loaning money to wife to buy necessities; 23 L.R.A. 132, on effect of payment of debt by creditor of wife.

Disapproved in *Skinner v. Tirrell*, 159 Mass. 474, 38 A. S. R. 447, 21 L.R.A. 673, 34 N. E. 692, holding where one advances money to wife living apart from husband which she expends for necessities equity has no jurisdiction of suit to recover same from husband.

36 AM. REP. 89, STATE v. HOYT, 47 CONN. 518.**Right to have jury polled or examined under oath.**

Cited in *State v. Lee*, 69 Conn. 186, 37 Atl. 75, holding accused not entitled, as matter of strict right, to have jurors examined under oath the matter being left largely to discretion of court; *White v. Archbald* School Dist. 2 Pa. Co. Ct. 1, on right to poll jury in criminal cases.

Power of court to restrict argument.

Cited in *Wingo v. State*, 62 Miss. 311, holding that limiting counsel to one

hour for summing up, in arson case was error where evidence was circumstantial.

Cited in reference note in 46 A. S. R. 24, 27, on limitations upon argument of counsel.

Cited in note in 25 L.R.A.(N.S.) 1028, 1031, on right to limit time of argument of counsel for accused.

Power of court to limit number of counsel, who may address jury.

Cited in *Lewandowski v. State*, 70 Wis. 458, 36 N. W. 21, holding action of court in limiting number of counsel who might address jury was not error.

Right of prisoner to be asked why sentence should not be pronounced.

Cited in *Gannon v. People*, 127 Ill. 507, 11 A. S. R. 147, 21 N. E. 525, holding omission to call upon defendant to say why he should not be sentenced is no ground for reversal in any case; *People v. Palmer*, 105 Mich. 568, 63 N. W. 656, holding that failure to ask accused if he has anything to say before pronouncement of sentence is not ground for reversal.

Cited in reference notes in 47 A. R. 840, on effect of court's failure to ask one convicted of murder why judgment should not be pronounced; 44 A. S. R. 424, on inquiry as to whether accused has anything to say.

Right of peremptory challenge.

Cited in *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811, sustaining constitutionality of statute authorizing trial of criminal cases by struck jury.

Cited in note in 31 L.R.A.(N.S.) 820, on statute affecting challenges to jury as *ex post facto*.

Necessity of exhausting peremptory challenges as basis for error in ruling on challenge for cause.

Cited in *State v. Smith*, 49 Conn. 376, holding where prisoner has failed to exhaust right of peremptory challenge overruling of challenge for cause is not ground for new trial; *State v. Fourchy*, 41 La. Ann. 228, 25 So. 109, holding error in overruling challenge for cause ground for reversal where accused has been obliged to exhaust all his peremptory challenges, though seating of juror obnoxious to accused did not result; *State v. Reddington*, 7 S. D. 368, 64 N. W. 170, holding where defendant makes no attempt to use his unexhausted peremptory challenges, it must be presumed jurors by whom he was tried were unobjectionable to him; *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075, holding party undertaking to same objections to overruling challenges for cause for review on appeal must show in his record that when he finally accepted jury he has no peremptory challenge remaining.

Challenge of juror for expression of opinion.

Cited in *State v. Smith*, 49 Conn. 376, holding removable hypothetical opinion not a disqualification; *State v. Sawtelle*, 66 N. W. 488, 32 Atl. 831, holding such challenge of juror is challenge to favor only.

What constitutes actual rendition of verdict by jury.

Cited in *Rookey v. State*, 70 Conn. 104, 38 Atl. 911, holding assent of jury to statement by clerk, as to their verdict of guilty as recorded by court and said upon their oaths constitutes actual rendering of the verdict.

Evidence of intent or purpose.

Cited in *Mead v. Husted*, 49 Conn. 336, holding in action of trespass and trespass on case for burning at different times of several of plaintiffs' barns evidence of defendant having been seen in neighborhood of one barn while it

was on fire and of threats to burn, though not referring to specific barn, was admissible; *State v. Cochran*, 147 Mo. 504, 49 S. W. 558, holding general remarks of defendant in trial for murder as to his desire, to kill some person, admissible against defendant as threat and as tending to show malicious and revengeful spirit.

Cited in notes in 88 A. D. 524, on admissibility of evidence of prisoner's threats to show malicious intent in murder case; 89 A. S. R. 694, on admissibility of indefinite threats by defendant in homicide case.

General reputation as evidence of insanity.

Cited in *Snell v. United States*, 16 App. D. C. 501, holding evidence of general reputation as to mental condition not admissible to prove insanity; *Walker v. State*, 102 Ind. 502, 1 N. E. 856, holding insanity cannot be proved by reputation.

Cited in note in 97 A. D. 175, on evidence of hereditary insanity.

Burden of proof of insanity in criminal case.

Cited in *State v. Lee*, 69 Conn. 186, 37 Atl. 75, holding on obligation of state in first instance and as part of its case to produce evidence of sanity of accused.

Cited in reference note in 86 A. D. 123, on burden and sufficiency of proof where insanity is set up as defense to crime.

Cited in notes in 97 A. D. 176, 179, on burden of proof when insanity set up as defense to crime; 36 L.R.A. 727, 728, on burden of proving insanity in criminal prosecution; 39 L.R.A. 744, on reasonable doubt of insanity in criminal cases.

Privileged communications between husband and wife.

Cited in *Lloyd v. Pennie*, 50 Fed. 4, holding communications between husband and wife not privileged in hands of third persons; *Hammons v. State*, 73 Ark. 495, 108 A. S. R. 66, 68 L.R.A. 234, 84 S. W. 718, 3 A. & E. Ann. Cas. 912, holding incriminatory letter written by one accused of murder to his wife admissible in evidence when offered by third person; *O'Toole v. Ohio German F. Ins. Co.* 159 Mich. 187, 24 L.R.A.(N.S.) 802, 123 N. W. 795, on privileged communications between husband and wife; *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656, holding letters of husband to wife inadmissible where produced by wife and in her custody; *People v. Hayes*, 140 N. Y. 484, 37 A. S. R. 572, 23 L.R.A. 830, 35 N. E. 951, 9 N. Y. Crim. Rep. 24 (affirming 70 Hun, 111, 24 N. Y. Supp. 194, 10 N. Y. Crim. Rep. 476), holding letters from wife to husband admissible where husband had given them to his mistress; *State v. Nelson*, 39 Wash. 221, 81 Pac. 721, holding letter from wife to husband had lost its character as privileged communication where offered in evidence by officers of state; *Richards v. State*, 55 Tex. Crim. Rep. 278, 116 S. W. 587, holding communications made between husband and wife in presence of others not privileged.

Cited in note in 29 A. S. R. 415, on letter from one spouse to other found in possession of third person as a privileged communication.

Distinguished in *Brown v. Brown*, 53 Mo. App. 453, holding letters from wife to husband produced by him in suit for divorce inadmissible.

36 AM. REP. 98, STATE v. THOMAS, 47 CONN. 546.

Criminality of keeping place where intoxicating liquors are "reputed" to be sold without license.

Cited in *State v. Moriarity*, 50 Conn. 415, holding acquittal of charge of

keeping liquors for purpose of sale and conviction for keeping place reputed to be one where liquors were kept for sale both charges covering same time may stand together; *State v. Anderson*, 82 Conn. 111, 72 Atl. 648, holding that person cannot be convicted of keeping house merely reputed to be disorderly, but which was not such in fact.

Disapproved in *State v. Kartz*, 13 R. I. 528, holding statute imposing fine or imprisonment upon person keeping place in which it is reputed liquors are kept for sale, without having license is unconstitutional.

Power of legislature to declare place for sale of liquor unlawful.

Cited in *Hartley v. Henretta*, 35 W. Va. 222, 13 S. E. 375 (dissenting opinion), on right of legislature to declare it a nuisance.

Cited in note in 28 L. ed. U. S. 696, on constitutionality of laws regulating sale of liquor.

Validity of statutes declaring presumptions arising from certain facts.

Cited in *Voght v. State*, 124 Ind. 358, 24 N. E. 680, holding statutes undertaking to make proof of certain facts conclusive of guilt are unconstitutional while those which merely declare statutory presumptions affecting burden of proof are valid; *State v. Bingham*, 42 W. Va. 234, 24 S. E. 883, holding statute construed as making presumption that when several persons unite in violence to another it is in pursuance of conspiracy conclusive would be unconstitutional while if construed as making such presumption rebuttable it is valid; *Rose v. State*, 171 Ind. 662, 87 N. E. 103, 17 A. & E. Ann. Cas. 228, holding that legislature has power to prescribe what shall constitute prima facie evidence of certain facts in cases.

Cited in reference note in 2 A. S. R. 843, on constitutionality of act making evidence of sale of liquor prima facie evidence of its illegality.

Cited in notes in 36 A. S. R. 684, on validity of statutes creating presumptions in prosecution for unlawful sale of liquor; 1 L.R.A.(N.S.) 627, on power of legislature to pass statute making possession of liquor prima facie evidence of illegal intent to violate law.

Distinguished in *People v. Lyon*, 27 Hun, 180, denying constitutionality of law making fact person was seen to drink liquors or wines on premises prima facie evidence that occupant sold them with intent they should be drank on the premises.

Jury as judges of law in criminal cases.

Distinguished in *State v. Main*, 69 Conn. 123, 61 A. S. R. 30, 36 L.R.A. 623, 37 Atl. 80, holding statute requiring submission of law and facts to jury does not mean it is rightful promise of jury to determine true construction of constitution, in criminal cases.

Cited as overruled in *State v. Gannon*, 75 Conn. 206, 52 Atl. 727, holding jury cannot lawfully disregard law as stated to them by court.

**36 AM. REP. 104, BARTON v. BARBOUR, 3 MacARTHUR, 212,
Affirmed in 104 U. S. 126, 26 L. ed. 672.**

Powers and duties of receiver.

Cited in note in 21 L. ed. U. S. 448, on powers and duties of receiver.

Necessity of obtaining leave of court to sue receiver.

Cited in *Keen v. Breckenridge*, 96 Ind. 69, holding complaint in action to reach or disturb property in possession of one as receiver, not containing aver-

ment that leave to bring action had been granted by proper court is demurrable.

Cited in note in 5 A. S. R. 316, on whether leave to sue receiver of railroad necessary.

36 AM. REP. 106, HOILES v. UNITED STATES, 3 MacARTH. 370.

Separate violations of law by single act.

Cited in *United States v. Scott*, 74 Fed. 213, holding counts of indictment for soliciting or receiving contributions in violation of civil service law from more persons than one not bad for duplicity.

Single or multiple larcenies.

Cited in *State v. Clark*, 46 Or. 140, 80 Pac. 101; *Furnace v. State*, 153 Ind. 93, 54 N. E. 441,—holding larceny of goods of several persons at same time and place constitutes but one offense; *State v. Mjelde*, 29 Mont. 490, 75 Pac. 87, holding taking of several articles of property belonging either to one or several owners at same time and place constitutes but one larceny; *Dalton v. State*, 91 Miss. 162, 124 A. S. R. 637, 44 So. 802, holding that indictment for larceny of several pieces of property belonging to different owners, is not demurrable for duplicity, where taking and asportation are shown to be single.

Cited in note in 58 A. D. 539, on question that same offense cannot be split and prosecuted twice.

36 AM. REP. 110, HUBER v. TEUBER, 3 MacARTH. 484.

Primitive damages in action for assault and battery.

Cited in *Johnston v. Johnston*, 8 Mackey, 525, holding punitive damages not recoverable.

Cited in reference note in 44 A. R. 152, on right to exemplary damages for assault and battery without showing actual malice.

Cited in notes in 8 E. R. C. 379; 50 A. D. 770,—on exemplary damages for acts punishable criminally.

36 AM. REP. 113, VINSON v. BEVERIDGE, 3 MacARTH. 597.

When partnership relation exists.

Cited in notes in 18 L.R.A.(N.S.) 969, on what is a partnership; 18 L.R.A.(N.S.) 986, on distinction between partnerships *inter sese* and partnerships in respect to third persons; 18 L.R.A.(N.S.) 991, on partnership liability by estoppel.

Participation in profits as evidence of partnership.

Cited in *Gibson v. Smith*, 31 Neb. 354, 47 N. W. 1052, holding participation does not per se make person partner.

Cited in reference note in 51 A. R. 65, on sharing profits as constituting partnership.

Cited in notes in 49 A. R. 255, on participation in profits as rendering the participator a partner; 18 L.R.A.(N.S.) 1032, 1036, on creation of partnership liability by taking profits as compensation for work and labor of agents and servants.

36 AM. REP. 117, HARRIMAN v. FIRST BRYAN BAPTIST CHURCH, 63 GA. 186.

Ultra vires contracts of corporation.

Cited in reference note in 41 A. R. 221, as to what contracts of corporation are ultra vires.

Rights of parties on contract ultra vires but partly performed.

Cited in *Day v. Spiral Springs Buggy Co.* 57 Mich. 146, 58 A. R. 352, 23 N. W. 628, holding party who delivers property in part performance of contract of purchase made by corporation without power to do so may recover value of property delivered and corporation cannot recoup damages for non-performance; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390 (dissenting opinion), on compelling party who has received value under contract ultra vires but not malum prohibition to refund after rescission by other party.

Liability of railroad, acting without charter, for injuries.

Cited in note in 52 A. R. 358, on railroad's liability for injuries though acting without charter.

Variance as to joint or several nature of contract.

Cited in *Cox v. Henry*, 113 Ga. 259, 38 S. E. 856, holding where several are sued by attachment on alleged joint contract, evidence must establish joint liability or plaintiff cannot recover.

36 AM. REP. 120, HILL v. STATE, 63 GA. 578.

Followed without discussion in *Cox v. State*, 105 Ga. 610, 31 S. E. 650.

Capacity of infant to commit crime.

Cited in reference note in 4 A. S. R. 210, on infant's capacity to commit crime.

Cited in notes in 70 A. D. 497, on infant's responsibility for crime between ages of seven and fourteen; 36 L.R.A. 206, on presumption as to criminal liability of children for assault and battery.

Invasion of province of jury by instructions as to presumption to be drawn from facts.

Cited in *Kinnebrew v. State*, 80 Ga. 232, 5 S. E. 56, as to when opinion is intimated by court in instructing jury; *Griffin v. State*, 86 Ga. 257, 12 S. E. 406, holding it error to instruct that if stolen goods were found in possession of prisoner presumption of prisoner's guilt would be raised under law; *Cuthbert v. State*, 3 Ga. App. 600, 60 S. E. 322, holding any presumption that may be drawn from unexplained possession of fruits of crime which has been recently committed is one of fact merely.

Cited in note in 101 A. S. R. 488, on presumption of guilt from possession of stolen property.

Harmless error in charge to jury.

Cited in *Luby v. State*, 102 Ga. 633, 29 S. E. 494, holding new trial would not be granted where finding of jury was correct under the evidence.

Definition of battery.

Cited in *State v. Robertson*, 48 La. Ann. 1067, 20 So. 296, holding battery includes every touching or laying hold, however trifling, of another person or his clothes in an angry, revengeful, rude, insolent or hostile manner.

Form of indictment for assault and battery.

Cited in *Sims v. State*, 118 Ga. 761, 45 S. E. 621, holding indictment for assault and battery sufficient.

36 AM. REP. 126, HARRIS v. TYSON, 63 GA. 629.**Survival of action for tort.**

Cited in notes in 63 A. D. 548; 3 L.R.A. 213; 9 L.R.A. (N.S.) 1023,—on abatement of action or cause of action for breach of promise of marriage; 2 E. R. C. 17, on survival of actions of tort and contract.

36 AM. REP. 128, MELSON v. DICKSON, 63 GA. 682.**Disqualification of judge or juror by relationship to counsel.**

Cited in *Crockett v. McLendon*, 73 Ga. 85, on competency of juror who is second cousin of attorney for plaintiff having fee conditional on recovery; *Roberts v. Roberts*, 115 Ga. 259, 90 A. S. R. 108, 41 S. E. 616, holding that judge related within fourth degree of consanguinity or affinity to counsel for application for alimony and counsel fees is disqualified.

Cited in note in 9 A. S. R. 755, on disqualification of juror by affinity.

Right of litigant to impartial jury.

Cited in *Pearcy v. Michigan Mut. L. Ins. Co.* 111 Ind. 59, 60 A. R. 673, 12 N. E. 98, holding it is of high importance to litigant that the triers of his cause should be impartial and disinterested men; *Atlantic Coast Line R. Co. v. Bunn*, 2 Ga. App. 305, 58 S. E. 538, holding refusal of proper request that disqualified jurors be excused is ground for new trial.

Challenge to jurors.

Cited in notes in 20 L. ed. U. S. 660, on causes of challenge of jurors and their qualifications; 41 L. ed. U. S. 105, on challenges to jurors and to the array.

Malice and want of probable cause as essentials of malicious prosecution.

Cited in *Wilcox v. McKenzie*, 75 Ga. 73, holding action to recover damages for suing out and levying an attachment, and for instituting proceedings to obtain, and serving summons of garnishment, not maintainable without proof of malice and want of probable cause; *Lanier v. Kelly*, 6 Ka. App. 738, 65 S. E. 692, to the point that if eviction is accomplished by legal process tenant cannot sue in trespass, but might sue in malicious prosecution by showing malice and want of probable cause.

"False" imprisonment.

Cited in *Joiner v. Ocean S. S. Co.* 86 Ga. 238, 12 S. E. 361, holding where arrest is by valid process regularly sued out, action for malicious prosecution is only remedy; *Page v. Citizens' Bkg. Co.* 11 Ga. 73, 78 A. S. R. 144, 51 L.R.A. 463, 36 S. E. 418, holding imprisonment resulting under valid warrant is not false imprisonment; *Michael v. Bacon*, 5 Ga. App. 331, 63 S. E. 228, holding that imprisonment from arrest under valid warrant cannot be false imprisonment.

Equitable ground of set-off in proceeding at law.

Cited in *Hecht v. Snook & A. Furniture Co.* 114 Ga. 921, 41 S. E. 74, on right of defendant to set up to proceeding at law any equitable ground of set-off he may have by reason of insolvency.

Am. Rep. Vol. XVII.—67.

36 AM. REP. 129, HOFFMAN v. BARTHELMMESS, 63 GA. 759.

Detective's right to lien on property obtained from wrongful holder.

Cited in Jones' Liens, 2d ed. § 495, on detective officer's right to lien on property of which he obtains possession by compelling the wrongful holder by arrest, to recall it before delivery to the owner to whom he has sent it.

36 AM. REP. 132, ANGELO v. PEOPLE, 96 ILL. 209.

Criminal liability of children.

Cited in reference notes in 40 A. R. 750; 4 A. S. R. 210,—on infant's capacity to commit crime.

Cited in notes in 70 A. D. 497, on infant's responsibility for crime between ages of seven and fourteen; 36 L.R.A. 197, on criminal liability of children; 36 L.R.A. 200, on prima facie presumption as to nonliability of children criminally.

Presumption of incapacity to commit crime in infants between seven and fourteen.

Cited in Singleton v. State, 124 Ga. 136, holding determination of capacity of infant defendant to commit crime taken from jury by unqualified instruction they ought to find him guilty if he was ten years of age and they believed him guilty as charged; Lammert v. Chicago & A. R. Co. 9 Ill. App. 388, holding under statute, infant ten years old is presumably both incapable of crime and ignorant of the law; State v. Adams, 76 Mo. 355, holding presumption of incapacity of infant between ages of seven and fourteen years to commit crime must be overcome by evidence strong and clear beyond all doubt and contradiction; People v. Domenico, 45 Misc. 309, 92 N. Y. Supp. 390, 19 N. Y. Crim. Rep. 8; People v. Squazza, 40 Misc. 71, 81 N. Y. Supp. 254, holding under statute, presumption of incapacity of infants between ages of seven and twelve to commit crime can only be overcome by affirmative proof of capacity to understand act complained of and to know its wrongfulness; State v. Fisk, 15 N. D. 589, 108 N. W. 485, 11 A. & E. Ann. Cas. 1061, holding under statute presumption of incapacity cannot be overcome without clear proof accused knew wrongfulness of act at time of its commission.

Misconduct of counsel in argument of criminal case.

Cited in State v. Martel, 103 Me. 63, 68 Atl. 454, holding defendant's case not prejudiced where defendant's counsel interrupted remarks complained of and his criticisms and objections were sustained by court, and holding also new trial in such case should be sought by motion, not by exceptions; United States v. Musser, 4 Utah, 153, 7 Pac. 389 (dissenting opinion), on duty of counsel to refrain in argument from reference to matters in nature of evidence not in proof before jury.

— Comment on failure of accused to testify.

Cited in Quinn v. People, 123 Ill. 333, 15 N. E. 46; Jackson v. People, 18 Ill. App. 508; Gilmore v. People, 87 Ill. App. 128; People v. Morris, 3 Cal. App. 1, 84 Pac. 463,—holding judgment reversible on ground counsel for prosecution remarked to jury upon failure of defendant to testify; State v. Baldoser, 88 Iowa, 55, 55 N. W. 97, holding under statute new trial must be granted on ground counsel for state stated to court in presence of jury that defense had right to put defendant on stand; Reg. v. Corby, 30 N. S. 330, holding defendant in trial for larceny entitled to new trial because prosecutor commented on fact that his wife did not testify in his behalf.

Distinguished in *Petite v. People*, 8 Colo. 518, 9 Pac. 622, holding judgment of conviction not reversible on ground of comment to jury by attorney for prosecution on fact defendant did not testify; *Bradshaw v. People*, 153 Ill. 156, 38 N. E. 652, holding judgment of conviction of abduction not reversible because prosecutor in his opening argument to jury said: "The enticing and taking away of the prosecuting witness is not denied by the defendant."

Comment by court on failure of accused to testify.

Cited in *Miller v. People*, 216 Ill. 309, 74 N. E. 743, holding it is reversible error for court to say to jury concerning defendant: "He is here and can answer for himself."

Cited in reference note in 62 A. S. R. 772, on instructions to jury.

Presumption from failure to examine witness.

Cited in reference note in 80 A. S. R. 811, on presumption from failure to examine witness.

36 AM. REP. 135, PEOPLE EX REL. BRANSOM v. WALSH, 96 ILL. 232.

Legislative control of streets, parks, and other public property.

Cited in *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 68 A. S. R. 155, 42 L.R.A. 696, 51 N. E. 758, holding legislature has authority to confer upon municipality power to limit use of street to particular purpose benefiting entire public such as its use for pleasure driveway; *Harder's Fire Proof Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245, 14 A. & E. Ann Cas. 536, holding legislature may authorize municipalities to exact license fee for use of their streets; *Chicago v. Illinois Steel Co.* 66 Ill. App. 561, on power of legislature concerning use of streets.

Cited in reference notes in 35 A. S. R. 536, on state control over property held by municipality for public purposes; 68 A. S. R. 168, on legislative control over streets.

— Transfers of power from one body to another.

Cited in *McCormick v. South Park*, 150 Ill. 516, 37 N. E. 1075, holding legislature has power to change possession and control of public trust in streets, regardless of where fee is lodged; *Ward v. Field Museum*, 241 Ill. 496, 89 N. E. 731, holding that park boards are creatures of legislature for purpose of administering certain functions and legislature may transfer their powers; *Chicago v. Pittsburg, C. C. & St. L. R. Co.* 242 Ill. 30, 89 N. E. 648, holding that legislature may transfer to park board jurisdiction over streets leading to park; *Simon v. Northrup*, 27 Or. 487, 30 L.R.A. 171, 40 Pac. 560, holding legislature may grant control of city highways to some governmental agency other than city; *Spring Water Co. v. Monroe*, 55 Wash. 195, 104 Pac. 202, to the point that legislature may transfer control of streets to body foreign to corporation and moneys to repair same.

Cited in reference note in 62 A. S. R. 98, on delegation of control of highways to municipal corporations.

Cited in note in 16 L.R.A. 695, on authority of legislature to remove municipality from trusteeship.

— Establishment of parks and park commissions.

Cited in *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207, sustaining constitutionality of law authorizing establishment of parks by cities of designated class and levy of tax by park commissioners for park purposes; *West Chicago*

Park v. McMullen, 134 Ill. 170, 10 L.R.A. 215, 25 N. E. 676, sustaining constitutionality of statute giving cities power to vest control of streets in park commissioners for park and boulevard purposes.

Local control of streets and parkways.

Cited in *Chicago v. Carpenter*, 201 Ill. 402, 66 N. E. 362, holding under statute jurisdiction over and right to improve street running longitudinally along and adjoining park rests in park commissioners and not in city; *Park v. Adams County*, 3 Ind. App. 536, 30 N. E. 147, holding where duty of caring for streets is placed by legislature upon independent public agencies to be exercised within municipality but independent of control by it, corporation is not chargeable with their action, or negligence, in performance of their duty.

Legislative control over political subdivisions.

Cited in *McLean County v. Bloomington*, 106 Ill. 209, holding legislature may authorize levy of special assessment by city upon county property for improvement of adjacent streets; *Richland County v. Richland Center*, 59 Wis. 591, 18 N. W. 497, holding fund derived from liquor licenses in village, even if granted to county absolutely by legislature may be taken from it by legislature.

Capacity in which city holds fee of street.

Cited in *Holm v. Windsor*, 38 Ill. App. 650; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 A. R. 598,—holding city holds fee of streets for use of entire public, not for use of citizens of city alone; *Smith v. McDowell*, 148 Ill. 51, 22 L.R.A. 393, 35 N. E. 141, holding statutory power of municipal corporations to vacate streets is not absolute to be exercised in discretion of municipal authorities, without regard to public necessity of such action.

Status of park commissioners.

Cited in *West Chicago Park v. Western U. Teleg. Co.* 103 Ill. 33, holding park commissioners are corporate authorities and have power to condemn land for purpose of connecting their own park district with that of another board of commissioners.

Distinguished in *West Chicago Park v. Chicago*, 152 Ill. 392, 38 N. E. 697, holding park commissioners are municipal, not quasi municipal corporations.

Change in uses of public lands.

Cited in *Clingman v. Worlds' Columbian Exposition*, 3 Ill. C. C. 452, holding that legislature has power to divert use of park land to other than park purposes.

Distinguished in *Davis v. Nichols*, 39 Ill. App. 610, holding land in use as public square of village cannot be appropriated for school house site.

Questioning legality of acts of public officers.

Cited in *Hogue v. Corbit*, 156 Ill. 540, 47 A. S. R. 232, 41 N. E. 219, on presumption that public officer has done his duty, when legality of his acts is questioned collaterally; *Aldis v. South Park*, 171 Ill. 424, 49 N. E. 565, holding legality of action under which park commissioners acquire street may be tested by quo warranto.

36 AM. REP. 143, CRAW v. TOLONO, 96 ILL. 255.

Distinction between special taxation and special assessments.

Cited in *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293 (affirming 126 Ill. 92, 1 L.R.A. 613, 18 N. E. 315), holding

whether called special taxes or special assessments costs laid upon contiguous property for grading and paving streets are charges for local improvement cast upon contiguous property upon assumption it has received benefits and they are not taxes proper; *Enos v. Springfield*, 113 Ill. 65, holding statutory provisions for ascertaining benefits on special assessment proceedings, have no bearing in proceeding by special taxation; *Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471, holding special assessment cannot exceed benefits property will derive from improvement, and owner has right to have this question passed on by jury, and, if dissatisfied, to have their decision reviewed by appellate tribunal, while, in case of special taxation, jury have nothing to do with amount assessed upon contiguous property; *Davis v. Litchfield*, 145 Ill. 313, 21 L.R.A. 563, 33 N. E. 888, holding special taxation differs from assessment for special benefits only, that in the one benefits are ascertained in mode prescribed by law; in the other, they are determined by municipal authority; *Davis v. Litchfield*, 155 Ill. 384, 40 N. E. 354, holding where local improvement is to be made by special assessment owners of property assessed have right to have question of benefits passed on by jury, but such right does not exist where proceeding is by special taxation of contiguous property.

Cited in notes in 3 L.R.A. 472, on special taxation and special assessment; 35 L.R.A. 34, on distinction in meaning between the phrases "local assessment" and "taxation."

Enforcement of special tax or assessment in personam.

Cited in *Virginia v. Hall*, 96 Ill. 278, holding cost of sidewalk constructed by municipality cannot be made personal charge against abutting property owners; *Owners of Lands v. People*, 113 Ill. 296, holding special assessment upon property specially benefited by proposed improvement, is not charge against person, but only against property specially assessed; *Shepherd v. Sullivan*, 166 Ill. 78, 47 N. E. 720, holding action of debt will not lie against abutting property owner by city to collect cost of constructing sidewalk; *Job v. Alton*, 189 Ill. 256, 82 A. S. R. 448, 59 N. E. 622; *Illinois C. R. Co. v. People*, 170 Ill. 224, 48 N. E. 215,—holding statute, providing modes of determining cost of sidewalks and of collecting special taxes therefor, constitutional except in regard to provisions making lot owner personally liable; *Hoover v. People*, 171 Ill. 182, 49 N. E. 367, holding judgments for special taxes are in rem; *Lemont v. Jenks*, 197 Ill. 363, 90 A. S. R. 172, 64 N. E. 362, holding neither special tax nor special assessment is personal charge; *Marshall v. People*, 219 Ill. 99, 76 N. E. 70, holding special tax warrant void in so far as it authorizes an execution; *Louisville N. A. & C. R. Co. v. State*, 8 Ind. App. 377, 35 N. E. 916, holding tax levied for making public improvements such as roads, streets, sidewalks, alleys, drains, sewers, etc., contiguous to, or of special benefit to particular lands, is not personal; *Edward C. Jones Co. v. Perry*, 26 Ind. App. 554, 57 N. E. 583 (dissenting opinion), on constitutionality of statutes authorizing personal judgment against property owners for street improvement; *Raleigh v. Peace*, 110 N. C. 32, 17 L.R.A. 330, 14 S. E. 521, holding that statute authorizing personal judgment for special assessments for local improvements is unconstitutional.

Cited in notes in 42 A. S. R. 660, on personal liability for assessments; 133 Am. St. R. 936, as to whether a personal liability may be created for an assessment; 35 L.R.A. 62, on power to create personal liability for local-improvement assessments.

Distinguished in *Colfax Highway Comrs. v. East Lake Fork Special Drainage*

Dist. 127 Ill. 581, 21 N. E. 206, holding benefits of drainage assessed against public roads, though assessed because of ownership of the property are not charge against that or any other specific property, but simply charge against municipality in which roads lie, to be paid from its revenues; *Dewey v. Des Moines*, 101 Iowa, 416, 70 N. W. 605, sustaining constitutionality of statute authorizing personal judgment against property owner for amount of special assessment for street improvements; *Storrie v. Cortes*, 90 Tex. 283, 35 L.R.A. 666, 38 S. W. 154, holding cost of street improvement may be made personal charge against person of property owner.

Limited in Illinois *C. R. Co. v. East Lake Fork Special Drainage Dist.* 129 Ill. 417, 21 N. E. 925, holding personal judgment could not be levied against corporation for amount of special assessment for drainage.

Limitation of special tax or assessment to benefits accruing.

Cited in *Bloomington v. Chicago & A. R. Co.* 134 Ill. 451, 26 N. E. 366, holding special taxes for local improvements like special assessments are justified on ground that subject of tax receives an equivalent; *Kuehner v. Freeport*, 143 Ill. 92, 17 L.R.A. 774, 32 N. E. 372, holding special taxation is justifiable only upon basis of benefits to property taxed by making of improvement for which levied; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69, holding imposition of special tax to defray cost of improvement is, of itself a determination that benefits to contiguous property will be as great as imposed burden; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255, holding in making special assessments for local improvements measure of benefits assessed is to be determined by increased market value of res against which assessment is made; *Gauen v. Moredock & I. L. Drainage Dist. No. 1*, 131 Ill. 446, 23 N. E. 633, on limitation of assessments by drainage districts to property benefited.

Cited in notes in 14 L.R.A. 759, on right to charge burden of street improvements on abutting lot directly; 17 L.R.A. 330, on constitutionality of frontage rule of assessment; 28 L.R.A.(N.S.) 1153, 1169, 1196, on assessments for improvements by front-foot rule.

Limitations on power of municipality to tax or assess for local improvements.

Cited in *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871; *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261,—holding ordinance requiring assessment upon abutting property of cost of improving street or sidewalk according to proportional frontage not unconstitutional where cost is to be raised by special taxation; *Bloomington v. Chicago & A. R. Co.* 134 Ill. 451, 26 N. E. 366, holding power of city council to declare what shall be a local improvement is an implied power and ordinance exercising it must be reasonable, otherwise it is void; *Bloomington v. Latham*, 142 Ill. 462, 18 L.R.A. 487, 32 N. E. 506, holding ordinance requiring judgment in condemnation for land taken, and damages for land not taken to be assessed back by special taxation upon abutting property in proportion to frontage is unreasonable; *People ex rel. Gleason v. Yancey*, 167 Ill. 255, 47 N. E. 521, on power of cities to impose special taxation upon contiguous property for local improvements; *Job v. Alton*, 189 Ill. 256, 82 A. S. R. 448, 59 N. E. 622, holding property owner protected against abuse of power of cities and villages to impose special taxation upon contiguous property for local improvements by requirement that ordinances must be reasonable to be valid.

Cited in note in 35 L.R.A. 38, on liability to local assessment for benefits, of public property exempt from taxation.

Limited in *McLean County v. Bloomington*, 106 Ill. 209, holding city may levy special assessment upon county property for improvement of adjacent streets.

Conclusiveness of amounts of special tax or assessment.

Cited in *Hull v. People*, 170 Ill. 246, 48 N. E. 984, holding prior to amendment of 1895, to City and Village Act, question whether special tax was based on benefits equivalent thereto could be conclusively determined by city council; *Piereson v. People*, 204 Ill. 456, 68 N. E. 383, holding determination by city council that sidewalk should be constructed by special taxation is determination that property specially taxed is benefited to extent of special tax; *Harris v. People*, 218 Ill. 439, 75 N. E. 1012, holding same as to same determination by village board; *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067, holding validity of ordinance levying tax for local improvement, also of proceedings thereunder, subject to attack in and review by courts; *East St. Louis v. Illinois C. R. Co.* 238 Ill. 296, 87 N. E. 407, holding that courts can review apportionment of special assessments for local improvements.

Reassessment of special assessment.

Cited in note in 6 L.R.A. 803, on reassessment of special assessment for local improvement.

What constitutes tax.

Cited in *East St. Louis v. Trustees of Schools*, 102 Ill. 489, 40 A. R. 606, holding license is not a tax within meaning of constitution and statutes.

36 AM. REP. 147, COMPTON v. BUNKER HILL BANK, 96 ILL. 301.

Duress by threat of imprisonment or arrest.

Cited in *Loan & Protection Asso. v. Holland*, 63 Ill. App. 58, holding threat must be of unlawful use of process in order to be coercion; *Sanford v. Sornborger*, 26 Neb. 295, 41 N. W. 1102, holding contracts made under fear of unlawful imprisonment can be avoided for duress while those made under fear of lawful imprisonment cannot be; *Phillips v. Henry*, 160 Pa. 24, 40 A. S. R. 706, 28 Atl. 477, as to whether threat of lawful arrest constitutes duress.

Cited in reference note in 15 A. S. R. 463, on essentials of duress.

Cited in notes in 26 L.R.A. 52, on relief in equity against contracts procured by threats to prosecute relative; 26 L.R.A. 60, on contracts procured by threats to prosecute husband or wife.

Duress by third person.

Cited in *Schultz v. McLean*, 93 Cal. 329, 28 Pac. 1053, holding equity will not relieve a partaker in wrong doing as against a third person; *Cason v. Cason*, 116 Tenn. 173, 93 S. W. 89, holding duress by third party will not avoid deed as to grantee having no knowledge of the duress; *Rock v. Mathews*, 35 W. Va. 531, 14 L.R.A. 508, 14 S. E. 137, on validity of security taken by a surety when obtained by duress by party not acting for surety.

Cited in reference note in 30 A. S. R. 338, on duress per minas.

Distinguished in *Thompson v. Niggle*, 53 Kan. 664, 26 L.R.A. 803, 35 Pac. 290, holding one has no right to enforce civil demand by threats of prosecution for offenses in no wise connected with such demand.

Validity of deed given in consideration of stay of prosecution.

Cited in *Gregor v. Hyde*, 10 C. C. A. 290, 27 U. S. App. 75, 62 Fed. 107,

holding under local statutes deed could not be set aside on ground of threat to prosecute grantor's son, where threat was of lawful prosecution if made as alleged; *Shattuck v. Watson*, 53 Ark. 147, 7 L.R.A. 551, 13 S. W. 516, holding relief cannot be granted to father against notes and mortgage executed by him in consideration that his son, who was guilty of felony, would not be prosecuted; *Burton v. McMillan*, 52 Fla. 228, 11 L.R.A. (N.S.) 159, 42 So. 879, holding neither party can assert any right under deed illegal because given in consideration of compounding a felony; *Turley v. Edwards*, 18 Mo. App. 676, holding if mother knowingly, and without compulsion executes notes and deed of trust in consideration that her son be not prosecuted, she can have no standing in equity for affirmative relief.

— Deed by wife to save husband.

Cited in *Barhyt v. Clark*, 12 Ill. App. 646, on execution of deed of her separate property by wife to save her husband from arrest or prosecution.

Cited in note in 38 A. R. 624, on avoidance of deed executed by married woman in consequence of threats.

Distinguished in *Burton v. McMillan*, 52 Fla. 469, 120 A. S. R. 220, 8 L.R.A. (N.S.) 991, 42 So. 849, 11 A. & E. Ann. Cas. 380, holding maxim "in pari delicto" inapplicable to case of married woman who sues to set aside deed of her separate property made by her under threats to prosecute her husband, whether lawfully or unlawfully, when she was sick and nervous and did not have abundant opportunity to consider and take advice.

Denial of relief to wrong doer.

Cited in *Fast v. McPherson*, 98 Ill. 496, holding neither party allowed to base right upon allegation of his or her participation in unlawful or fraudulent act.

Cited in note in 113 A. S. R. 726, on rule of *pari delicto*.

Liability for misrepresentations.

Cited in notes in 85 A. S. R. 370, on liability for misrepresentations indirectly made to complaining party; 85 A. S. R. 374, on liability of vendor for misrepresentations indirectly made to vendee.

36 AM. REP. 151, *ROY v. GOINGS*, 96 ILL. 361.

Right to take possession under insecurity clause of chattel mortgage.

Cited in *Feller v. McKillip*, 109 Mo. App. 61, 81 S. W. 641; *Sills v. Hawes*, 14 Colo. App. 157, 59 Pac. 422,—holding right of mortgagee to decide for himself whether he is unsafe in his security is subject to limitation that his judgment must be exercised in good faith upon reasonable grounds or probable cause; *Hogan v. Akin*, 181 Ill. 448, 55 N. E. 137, holding discretion given to mortgagee is not arbitrary, but he must exercise his judgment in good faith, and have grounds for feeling himself insecure which amount to probable cause; *Grady v. Smith*, 14 Ill. App. 305, holding taking by mortgagee justified where mortgagor was of doubtful responsibility, part of mortgaged property was in possession of third person claiming same, part had been removed to another county and mortgagor was about to remove and take the remainder; *Ley v. Reitz*, 25 Ill. App. 615, holding mortgagee must have had reasonable and probable ground for feeling insecure; *Slingo v. Steele-Weddes Co.* 82 Ill. App. 139, holding seizure not justified where only change between time of giving mortgage and seizure was release of attachment levy on part of mortgaged property on ground of its exemption; *Tanton v. Boomgaarden*, 111 Ill. App. 37, hold-

ing mortgagee must feel insecure from some reasonable or probable cause even though mortgage provides he may foreclose before maturity if he feels insecure "with or without apparent cause;" *Watson v. Cudney*, 144 Ill. App. 624, holding that in order to foreclose chattel mortgage under insecurity clause facts must be stated showing reasons; *Meyer v. Michaels*, 69 Neb. 138, 95 N. W. 63, holding grounds must be such as did not exist or were not known to mortgagee at time of taking mortgage; *Allen v. Vose*, 34 Hun, 57, holding where evidence established that mortgagee in good faith believed himself insecure he had right to take possession; *Barrett v. Hart*, 42 Ohio St. 42, 51 A. R. 801, holding mortgagee should act in good faith, and his judgment should be controlled by facts arising after making of mortgage, and in regard to condition of property mortgaged; *Schouweiler v. Hough*, 7 S. D. 163, 63 N. W. 776, holding mortgagees under mortgage giving right of foreclosure at any time property mortgaged depreciated in value or they deemed themselves insecure, entitled to relief in foreclosure proceedings upon proof of material depreciation or of other facts sufficient to justify feeling of insecurity.

Cited in reference notes in 54 A. R. 718, on effect of chattel mortgage allowing mortgagee to take possession when he deems himself insecure; 3 A. S. R. 289, on effect of chattel mortgage authorizing mortgagees to take possession whenever he may "deem himself in danger of losing said debt."

Cited in notes in 17 L.R.A. 210; 51 A. R. 805, 806,—on effect of chattel mortgage allowing mortgagee to take possession if he shall deem himself unsafe; 23 L.R.A. 783, on effect of taking possession under "danger," "safety," or "insecurity" clause in chattel mortgage.

Rights of mortgagee on taking property under terms of mortgage.

Cited in *Aultman v. Silvia*, 39 Ill. App. 164, holding where mortgage provides that if property is seized on meane or final process during life of mortgage, mortgagee may declare whole debt due and immediately take property, by acts of mortgagee in doing so, his right to immediate possession becomes absolute.

Contract rights determinable at discretion of party.

Cited in *Bush v. Koll*, 2 Colo. App. 48, 29 Pac. 919 (dissenting opinion), on rule that law will say contracting party is satisfied with that which it says he in reason ought to be satisfied with.

Effect of mortgage on after acquired property.

Cited in notes in 76 A. D. 723, on effect of mortgage on after-acquired personal property; 76 A. D. 729, on effect of mortgagor's new act after acquisition of subsequently acquired property; 5 E. R. C. 138, as to what personal property may be mortgaged.

36 AM. REP. 157, OTIS v. GROSS, 96 ILL. 612.

Rights of general depositor in case of bank's insolvency.

Cited in *Mutual Acci. Asso. v. Jacobs*, 141 Ill. 261, 33 A. S. R. 302, 16 L.R.A. 516, 31 N. E. 414 (affirming 43 Ill. App. 346), holding relation of debtor and creditor is created by general deposit; *Bayor v. American Trust & Sav. Bank*, 157 Ill. 62, 41 N. E. 622, holding depositor whose deposit is evidenced by certificate of deposit cannot in case of insolvency of bank recover full amount from assignee of bank on ground of unperformed agreement of bank to create specific fund; *Shute v. Hinman*, 34 Or. 578, 47 L.R.A. 265, 58 Pac. 882, holding

general deposit cannot be impressed with trust after bank in which it is placed has made general assignment.

Cited in note in 5 L.R.A.(N.S.) 889, on right to preference in respect of public funds deposited in bank which subsequently becomes insolvent.

Nature of deposit when made by officer of court.

Cited in *Retan v. Union Trust Co.* 134 Mich. 1, 95 N. W. 1006, holding money deposited by register in chancery not special deposit.

Following trust funds.

Cited in *Seiter v. Mowe*, 182 Ill. 351, 55 N. E. 526, holding where trust funds have been so mingled with other moneys of trustee as to be indistinguishable, cestui que trust cannot, in case of trustee's insolvency, enforce it as preferred claim against trustee's assignee; *Kneisley v. Weir*, 81 Ill. App. 251, holding when identity of trust fund is lost by intermingling priority is lost.

What constitutes special deposit.

Cited in notes in 86 A. S. R. 779, on what constitutes a special deposit; 16 L.R.A. 516, on when deposit in bank is special so that title remains in depositor.

36 AM. REP. 162, FISHER v. VON BEHREN, 70 IND. 19.

Negligence of illiterate person signing notes.

Cited in *First Nat. Bank v. Hall*, 129 Mo. App. 286, 108 S. W. 633, holding party guilty of gross carelessness who, being unable to read, signed note without having it read by members of his family present, believing it was contract of different nature.

Liability on commercial paper negligently signed.

Cited in *Pape v. Hartwig*, 23 Ind. App. 333, 55 N. E. 271, holding one who negligently signs negotiable note cannot defend against it in hands of bona fide purchaser; *First State Bank v. Borchers*, 83 Neb. 530, 120 N. W. 142, holding that person who signs negotiable paper without reading same or having it read to him is liable to third person who is bona fide holder; *Brown v. Feldwert*, 46 Or. 363, 80 Pac. 414, holding fraud not available as defense to maker, as against bona fide holder where maker was negligent in signing.

Cited in reference note in 37 A. R. 177, on effect of signed paper without reading.

Cited in notes in 37 A. S. R. 459, on effect of negotiable instrument signed without knowledge that it was such; 41 A. R. 608, on liability of one signing instrument in ignorance of its contents; 36 L.R.A. 437, on what constitutes negligence in execution of note precluding defense of fraud in procuring.

Rights of bona fide holder of negotiable note.

Cited in *First Nat. Bank v. Johns*, 22 W. Va. 520, 46 A. R. 506, holding bona fide holder entitled to recover thereon, though it is of no validity between antecedent parties.

Cited in note in 11 A. S. R. 320, on rights of bona fide holder of negotiable instrument mistakenly executed under false representations.

Right to rely upon representations.

Cited in note in 37 L.R.A. 599, on right to rely on representations made to effect contract as basis for charge of fraud where defrauded person had means of knowing the truth.

36 AM. REP. 166, LOGANSFORT v. DICK, 70 IND. 65.

Obligation of city or county to keep highway safe.

Cited in *Glantz v. South Bend*, 106 Ind. 305, 6 N. E. 632; *Bedford v. Neal*, 143 Ind. 425, 41 N. E. 1029; *Nappanee v. Ruckman*, 7 Ind. App. 361, 34 N. E. 609; *Crawfordsville v. Smith*, 79 Ind. 308, 41 A. R. 612,—holding municipal corporation is charged with duty of maintaining its streets and highways in reasonably safe condition for persons using them; *Turner v. Indianapolis*, 96 Ind. 51, holding municipal corporations are under duty to keep streets in safe condition for travel in usual mode and liable for special injuries resulting from neglect to perform such duty; *Patterson v. Austin*, 15 Tex. Civ. App. 201, 39 S. W. 976, holding it is duty of municipality placing material for repairs in street which is calculated to frighten horses of ordinary gentleness to place it where such animals cannot see it or temporarily to close street.

Cited in note in 100 A. D. 360; 20 L.R.A.(N.S.) 547, 548, 599, 601,—on liability of municipality for defects or obstructions in streets.

—Primary and absolute nature of the obligation.

Cited in *Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381; *Southwell v. Detroit*, 74 Mich. 438, 42 N. W. 118; *Omaha v. Jensen*, 35 Neb. 68, 37 A. S. R. 432, 52 N. W. 833; *Brusso v. Buffalo*, 90 N. Y. 679; *Circleville v. Neuding*, 41 Ohio St. 465; *McAllister v. Albany*, 18 Or. 426, 23 Pac. 845; *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630,—holding city under duty of keeping its streets in safe condition for public cannot escape liability by letting out work to contractor; *Jacksonville v. Drew*, 19 Fla. 106, 45 A. R. 5, holding municipal corporation is liable in damages to parties receiving special injuries by reason of its non-observance of duty, though work of repairs is let by contract to another person; *Indianapolis v. Doherty*, 71 Ind. 5, holding liability cannot be escaped on ground that persons misusing part of street for building purposes may themselves be liable to persons injured by obstructions; *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 A. R. 82, 7 N. E. 743, holding municipal corporation having it in its power to secure its rights and protect property owners from injury which will probably result from construction of sewer will be liable if failure to do its duty results from wrongful surrender of its authority; *Park v. Adams Co.* 3 Ind. App. 536, 30 N. E. 147, holding county liable for injury due to negligence of contractor in repairing bridge.

Liability of employer for acts of independent contractor.

Cited in *Martin v. St. Louis*, 1 M. & S. R. Co. 55 Ark. 510, 19 S. W. 314, holding if thing in itself is unlawful, a nuisance per se or probably cannot be done without necessarily doing damage, person causing it to be done by independent contractor is liable for injuries due to it; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 A. R. 696, 12 N. E. 296, holding if during progress of work which does not necessarily create nuisance, third person sustains injury by negligent use of means employed and controlled by independent contractor, employer is not liable; *Evansville v. Senhenn*, 151 Ind. 42, 68 A. S. R. 218, 41 L.R.A. 728, 47 N. E. 634, holding same and that the rule is especially applicable where relation between person having work done and person doing it is that of buyer and seller; *Anderson v. Fleming*, 160 Ind. 597, 66 L.R.A. 119, 67 N. E. 443, holding general rule that employer is not liable for acts of independent contractor, does not apply where work to be done under contract is intrinsically dangerous; *Bloomington v. Wilson*, 14

Ind. App. 476, 43 N. E. 37, holding in absence of negligence in plans of the improvement, city is not liable for act of contractor who, in making slope for grade, allowed dirt to roll and remain on adjoining lot; *Bohrer v. Dienhart Harness Co.* 19 Ind. App. 489, 49 N. E. 296 (dissenting opinion), on liability of employer; *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 14 A. S. R. 427. 4 L.R.A. 213, 21 N. E. 482, holding party made personally responsible for prevention of cause of damage complained of is liable notwithstanding intervention of independent contractor; *Luce v. Holloway*, 156 Cal. 162, 103 Pac. 886, to the point that city is answerable for improperly guarded excavation made by contractor in building sewer.

Cited in reference notes in 60 A. R. 701, on liability of employer for act of contractor claimed to be nuisance; 76 A. S. R. 385, on nonliability for negligence and other torts of independent contractors; 14 L.R.A. 830; 65 L.R.A. 645; 76 A. S. R. 421,—on liability for negligence of independent contractors in blasting; 65 L.R.A. 638, on extent of employer's duty with respect to supervision and direction of work of independent contractor; 65 L.R.A. 651, on nonliability of employer for negligence of independent contractor in work performed on streets and highways.

Distinguished in *Park v. Adams County*, 3 Ind. App. 536, 30 N. E. 147, holding employer is liable for injury done by party exercising independent employment when work contracted for is intrinsically dangerous; *Symons v. Allegany County*, 105 Md. 254, 65 Atl. 1067, holding corporation of county road directors not liable for injury caused by contractor in blasting rock at distance from road to be used in road repairs.

Criticised in *Blumb v. Kansas*, 84 Mo. 112, 54 A. R. 87, holding city not liable for personal injury resulting from blasting done by contractor in street while constructing sewer.

— Liability of municipality.

Cited in reference notes in 42 A. R. 780; 2 A. S. R. 613,—on liability of municipal corporation for acts of contractor employed by it; 36 A. R. 395. on liability of city for negligence of contractor in repairing street.

Cited in notes in 30 A. S. R. 412, on municipal liability for negligence or misconduct of contractors; 76 A. S. R. 419, on liability for negligence of independent contractors in performing work for cities; 66 L.R.A. 131, on liability of municipality for acts of independent contractor employed on municipal duties resulting from municipality's nonperformance of absolute duties.

Liability of city for negligence in connection with water works.

Cited in *Aschoff v. Evansville*, 34 Ind. App. 325, 72 N. E. 279, holding city supplying water to its citizens and charging therefor acts in private capacity, though water-works system is also used for extinguishment of fires; *Mendel v. Wheeling*, 28 W. Va. 233, 57 A. R. 664, on liability of municipal corporation for injury due to improper performance of work authorized by charter.

Cited in note in 61 L.R.A. 59, on liability for injuries resulting from purchase or construction of municipal water plant.

Judicial knowledge of statute under which corporation is organized.

Cited in *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 104 Ind. 97, 2 N. E. 243, as not overruling cases holding complaint or information against corporation must state under what statute corporation was organized.

Duty to exercise official powers.

Cited in *State v. Wood*, 110 Ind. 82, 10 N. E. 639, holding board of equaliza-

tion having certain powers in regard to assessment of omitted property, is under duty to exercise them in proper cases.

Duty of persons engaged in blasting.

Cited in *Probst v. Hinesley*, 133 Ky. 64, 117 S. W. 389, to the point that blasting is inherently dangerous and person doing so is liable for injury to adjoining property.

Cited in note in 17 L.R.A. 729, on duty of those engaged in blasting as to safety of others.

Jury question whether structure obstructs highway.

Cited in *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1057; *Bybee v. State*, 94 Ind. 443, 48 A. R. 175,—holding question is for jury.

Cited in note in 36 L.R.A. 594, on question of nuisances declared such by municipality as one of fact.

Liability of municipality for nuisances.

Cited in reference note in 52 A. R. 643, on liability of town or city for maintaining nuisance.

Power of municipality regarding nuisances.

Cited in note in 39 L.R.A. 662, on municipal power over buildings and fences as nuisances affecting highways.

36 AM. REP. 178, MOYNIHAN v. STATE, 70 IND. 126.

Degree of murder in case of killing during commission of felony.

Cited in *Morgan v. State*, 51 Neb. 672, 71 N. W. 788, holding conviction for murder in first degree authorized where killing was done in perpetration of rape; *Henry v. State*, 51 Neb. 149, 66 A. S. R. 450, 70 N. W. 924, holding killing need not amount to murder as distinguished from manslaughter in order to constitute murder in first degree; *Rhea v. State*, 63 Neb. 461, 88 N. W. 789 (dissenting opinion 64 Neb. 889, 97 Nev. 1070), holding killing in perpetration or attempted perpetration of robbery is murder in first degree, purpose to kill being conclusively presumed.

Cited in reference note in 8 A. S. R. 426, on accidental killing of another while attempting to commit suicide.

Cited in notes in 90 A. S. R. 579, on unintentional homicide in perpetrating robbery; 63 L.R.A. 355, 358, on homicide in commission of felony.

Criminality of killing by poison.

Cited in *People v. Milton*, 145 Cal. 169, 78 Pac. 549, on necessity in cases of killing by poison, to prove unlawful intent in giving it in order to establish murder.

Criticized in *State v. Wells*, 61 Iowa, 629, 47 A. R. 822, 17 N. W. 90, holding prisoners who administered chloroform to prison guard in order to escape from penitentiary guilty of murder in first degree.

36 AM. REP. 182, LIEBSCHUTZ v. MOORE, 70 IND. 142.

Effect of assignment of sublease.

Cited in note in 10 A. S. R. 561, on effects of assignment of sublease.

36 AM. REP. 186, FERGUSON v. SMETHERS, 70 IND. 519.

What constitutes seduction.

Cited in note in 44 A. D. 163, on what constitutes seduction.

Action by husband for wife's seduction.

Cited in note in 44 A. D. 168, on husband's right to sue for wife's seduction.

Measure of damages for seduction.

Cited in note in 44 A. D. 178, on measure of damages in action for seduction.

Mitigation of damages for criminal conversation.

Cited in *Simpson v. Grayson*, 54 Ark. 404, 26 A. S. R. 52, 16 S. W. 4, on mitigation of damages by proof of wife's former unchastity.

Cited in notes in 44 A. D. 177; 13 A. S. R. 615,—on evidence in mitigation of damages in action for seduction; 16 L.R.A.(N.S.) 743, on effect of fact that the husband or wife of plaintiff in an action for alienation of affections or criminal conversation was an active or aggressive party.

36 AM. REP. 188, PENNSYLVANIA CO. v. HENSIL, 70 IND. 569.**Predication of negligence upon breach of ordinance or statute.**

Cited in *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117, holding violation of factory act by employment of child under fourteen in mill is negligence per se.

Cited in note in 5 L.R.A.(N.S.) 220, 222, on violation of police ordinance as to speed of street car as ground for private action; 9 L.R.A.(N.S.) 339, on disobedience of statute as actionable negligence.

— On breach of regulations as to railroad trains and signals.

Cited in *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141, 4 So. 142, holding failure to comply with city ordinance is negligence per se on part of railroad company; *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121, holding it is negligence per se to disregard obligation imposed by statute, said rule having peculiar application to management of railroads and railroad trains; *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218; *Jackson v. Kansas City, Ft. S. & M. R. Co.* 157 Mo. 621, 80 A. S. R. 650, 58 S. W. 32; *Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. 45,—holding it is negligence per se to violate ordinance relative to management of railroad locomotives and cars; *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. 790, holding omission to give statutory signals at highway crossings is conclusive evidence of negligence upon part of railroad company; *Louisville, N. A. & C. R. Co. v. Ousler*, 15 Ind. App. 232, 36 N. E. 290; *Pittsburg, C. C. & St. L. R. Co. v. Shaw*, 15 Ind. App. 173, 43 N. E. 957,—holding such omission is negligence per se; *Louisville, N. A. & C. R. Co. v. Davis*, 7 Ind. App. 222, 33 N. E. 451, holding failure to comply with ordinance requiring ringing of locomotive bell constitutes conclusive negligence on part of railroad company; *Sluder v. St. Louis Transit Co.* 189 Mo. 107, 5 L.R.A.(N.S.) 186, 88 S. W. 648 (dissenting opinion), on liability of railroad company for injury due to its violation of city ordinance.

Duty of railroad company at crossing.

Cited in reference notes in 90 A. D. 63, on duty of railroad company to give statutory signals at crossing; 90 A. D. 65, on duty of railroad company to maintain flagman at crossing; 1 A. S. R. 683, on duty to give warning signals at railway crossing.

Cited in note in 9 L.R.A. 160, on statutory provisions requiring railroad companies to ring bell or blow whistle.

Necessity of causal relation between wrong and actionable injury.

Cited in *Spicer v. Hockman*, 72 Ind. 120, holding party seeking to have final settlement of an estate set aside on ground of fraud or mistake must have such

interest therein as causes him to be injured by such fraud or mistake; *Pittsburg, C. & St. L. R. Co. v. Conn*, 104 Ind. 64, 3 N. E. 636; *Louisville, N. A. & C. R. Co. v. Thompson*, 107 Ind. 442, 57 A. R. 120, 8 N. E. 18; *Alexander v. New Castle*, 115 Ind. 51, 17 N. E. 200; *Logansport v. Kihm*, 159 Ind. 68, 64 N. E. 595; *Chicago, R. I. & P. R. Co. v. Kennedy*, 2 Kan. App. 693, 43 Pac. 802; *Philadelphia, W. & B. R. Co. v. Stebbing*, 62 Md. 504; *Greencastle v. Martin*, 74 Ind. 449, 39 A. R. 93,—holding negligence must be connected with injury in relation of proximate cause to effect in order to give right of recovery; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, holding there must be a connection between the negligence and the injury; *Southern R. Co. v. Sittasen*, 166 Ind. 257, 76 N. E. 973, on right to recover for injury of which defendant's negligence was proximate cause; *Louisville, E. & St. L. Consol. R. Co. v. Berry*, 9 Ind. App. 63, 35 N. E. 565 (dissenting opinion), on necessity of showing that negligence was proximate cause of injury complained of; *Toledo, St. L. & W. R. Co. v. Berry*, 31 Ind. App. 556, 68 N. E. 702, holding complaint which simply charges that while car load of horses was standing on side track in charge of railroad company they were injured, does not show proximate cause of injury was railroad's neglect of duty to place car earlier at chute.

Cited in note in 36 A. S. R. 817, on necessary connection between defendant's act and plaintiff's injury in case of breach of statutory duty.

—Failure to give signal at railroad crossing.

Cited in *Leavitt v. Terre Haute & I. R. Co.* 5 Ind. App. 513, 31 N. E. 860, holding mere failure to give signal at crossing as engine approaches will not make railroad liable for injury sustained at crossing, unless such failure is cause of injury; *Sullivan v. Missouri P. R. Co.* 117 Mo. 214, 23 S. W. 149, on necessity of showing negligent breach of duty imposed by ordinance was proximate cause of injury.

Scope and validity of ordinance of municipal corporation.

Cited in *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 10 A. S. R. 136, 20 N. E. 843, holding ordinance is local law, and binds persons within jurisdiction of the corporation.

Distinguished in *Katzenberger v. Lawo*, 90 Tenn. 235, 25 A. S. R. 681, 13 L.R.A. 185, 16 S. W. 611, holding taking of statutory precautions to prevent railroad accidents is not excused in city by reason of ordinance which conflicts with statute.

Manner of pleading negligence.

Cited in *Duffy v. Howard*, 77 Ind. 182, holding general statement of act complained of as negligent is permissible, particular facts constituting negligence not being required to be averred.

Right of court to decide question of negligence.

Cited in *Albion v. Hetrick*, 90 Ind. 545, 46 A. R. 230, holding it is only when standard of duty is fixed and certain, or where measure of duty is defined by law, and is same under all circumstances, or when negligence is so clear and palpable no verdict could make it otherwise, that question of negligence becomes one of law and not of fact; *Hoggart v. Evansville & T. H. R. Co.* 3 Ind. App. 437, 29 N. E. 941; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 A. R. 168,—holding question of contributory negligence is generally for jury, and courts interfere with verdict only in clear cases; *Indiana Car Co. v. Parker*, 100 Ind. 181, holding appellate court cannot interfere where it would have been error for trial court to have instructed jury to find for appellant; *Conner*

v. Citizens' Street R. Co. 146 Ind. 430, 45 N. E. 662, holding it not error to instruct jury it was for them to determine whether act of driver in management of street car, under all the circumstances, amounted to negligence; *Anderson v. Citizens' Street R. Co.* 12 Ind. App. 194, 38 N. E. 1109, holding whenever an instruction undertakes to declare negligence or no negligence as matter of law, it should enumerate all facts which may have had some relation to the injury.

Cited in reference note in 2 A. S. R. 546, on negligence as question of fact for jury.

36 AM. REP. 193, ZANN v. HALLER, 71 IND. 136.

Identification of party deficiently named in contract.

Cited in *Sayers v. First Nat. Bank*, 89 Ind. 230, holding variance between name and indorsement thereof on note would not warrant reversal of judgment where defect might have been remedied below by amendment; *Taylor v. Petersburg*, 33 Ind. App. 675, 72 N. E. 159, holding identity of party referred to in contract is legitimate subject of averment and proof.

Sufficiency of signature.

Cited in *Levy v. Bloch*, 88 Ala. 290, 6 So. 833, holding note subscribed with name of maker by promisee will be presumed to have been executed by authority of maker until maker repudiates its binding efficacy, where it purports or is averred to have been executed by maker.

36 AM. REP. 196, SHOCKEY v. MILLS, 71 IND. 288.

Moral obligation as consideration for promise.

Cited in *Wills v. Ross*, 77 Ind. 1, 40 A. R. 279, holding written guaranty based on previous oral guaranty under which credit was given is supported by obligation arising out of consideration for such oral guaranty.

Cited in note in 39 A. S. R. 737, 738, on moral obligation as consideration of promise to pay after debt is released.

New promise reviving debt discharged by bankruptcy.

Cited in *Carey v. Hess*, 112 Ind. 398, 14 N. E. 235, holding judgment discharged by bankruptcy may be sued upon and to plea of discharge new promise may be replied.

Cited in reference notes in 39 A. R. 692, on sufficiency of promise to renew debt discharged by bankruptcy; 53 A. R. 542, on revival of liability discharged in bankruptcy by new promise.

Cited in note in 135 Am. St. R. 383, on revival of debt discharged in bankruptcy.

Sufficiency of new promise.

Cited in *Hubbard v. Farrell*, 87 Ind. 215, upholding finding of new promise where debtor sent another to his creditor with message that he intended to pay; *Meech v. Lamon*, 103 Ind. 515, 53 A. R. 540, 3 N. E. 159, holding promise in this language: "I do not intend you shall lose it; I will make it all right." is insufficient to revive debt discharged by bankruptcy; *Post v. Losey*, 111 Ind. 74, 60 A. R. 677, 12 N. E. 121, holding moral obligation to pay debt discharged by bankruptcy is sufficient consideration for subsequent promise by debtor to pay it; *Farmers' & M. Bank v. Richards*, 119 Mo. App. 18, 95 S. W. 296, holding same and that promise to be enforceable must be express, positive and unconditional.

Cited in reference notes in 24 A. S. R. 496, on what acknowledgment by debtor

will remove bar of statute of limitations; 51 A. S. R. 746, on acknowledgment of debt as new promise affecting statute of limitations.

Admissibility of testimony of party concerning his own belief or intention.

Cited in *Parrish v. Thurston*, 87 Ind. 437, holding party correctly allowed to testify he believed note delivered to him in exchange for his property was that of certain person, though in fact it was that of another person having same name; *Sedgwick v. Tucker*, 90 Ind. 271, holding husband may be allowed to testify he had no intention of defrauding creditors when having his wife's name inserted in partition deed; *Over v. Schiffing*, 102 Ind. 191, 28 N. E. 91, holding where intent with which act is done becomes material, it is proper to ask what it was; *Short v. Acton*, 33 Ind. App. 361, 71 N. E. 505; *Heap v. Parrish*, 104 Ind. 36, 3 N. E. 549,—holding where character of transaction depends upon intent of party, it is competent when party is witness, to inquire of him what his intention was; *Stratton v. Lockhart*, 1 Ind. App. 380, 27 N. E. 715, holding one having right to show quality or nature of what he did, can testify as to his intention; *Majenica Teleph. Co. v. Rogers*, 43 Ind. App. 306, 87 N. E. 165, holding that testimony showing intention of party without showing any acts supporting it, is inadmissible; *City Nat. Bank v. Jordan*, 139 Iowa, 499, 117 N. W. 758, holding that one induced to purchase horse by false representations may state that he was so induced; *Com. v. Scouten*, 25 Pa. Co. Ct. 138, holding defendant in criminal action for libel may be asked whether in publication of libel there was malice or ill will.

Cited in notes in 23 L.R.A.(N.S.) 387, 394; 21 A. S. R. 316,—on right of party to testify to his belief, motive, or intent.

Difference between expressed intention and absolute undertaking to do a thing.

Cited in *Joyce v. Hamilton*, 111 Ind. 163, 12 N. E. 294, holding there is an essential difference.

Discretion to allow leading questions.

Cited in *Weik v. Pugh*, 92 Ind. 382; *Hilton v. Mason*, 92 Ind. 157,—holding allowance of leading questions is largely in discretion of trial court, and judgment will not be reversed unless discretion is clearly abused and injury results; *Indianapolis & E. R. Co. v. Bennett*, 39 Ind. App. 141, 79 N. E. 389, holding permission to propound leading questions is much in discretion of trial court; *Knickerbocker Ice Co. v. Gray*, 171 Ind. 395, 84 N. E. 341, holding that question will not be stricken from record because leading unless other party is injured thereby.

36 AM. REP. 198, NEIDEFER v. CHASTAIN, 71 IND. 363.

Manner of pleading breach of warranty.

Cited in *Johnston Harvester Co. v. Bartley*, 81 Ind. 406, holding it is insufficient to allege that articles "are worthless to the plaintiff;" *McClamrock v. Flint*, 101 Ind. 278, holding averment that machine will not work well, without showing how it was tested or wherein it was defective is insufficient in pleading; *Flint v. Cook*, 102 Ind. 391, 1 N. E. 633, holding pleading insufficient which averred machine "never did work, never was of any use or value to defendant, because it would not pump water for stock, nor do any other thing for which it was intended;" *Aultman M. & Co. v. Seichting*, 126 Ind. 137, 25 N. E. 894, holding breach of warranty that machine would do good work, not sufficiently

Am. Rep. Vol. XVII.—68.

pleaded unless it is alleged wherein machine fails to comply with warranty, or particular defects are given; *Osborne v. Hanlin*, 158 Ind. 325, 63 N. E. 572, holding pleading to be good as showing breach of express warranty must show (1) warranty, (2) breach thereof, (3) damages resulting from such breach; *Brower v. Nellis*, 6 Ind. App. 323, 33 N. E. 672, holding where warranty relates to working of machinery, test must be alleged; *Aermotor Co. v. Earl*, 18 Ind. App. 181, 47 N. E. 685, holding bare general allegation that machine was without value, pleading being bad without it, will not make pleading good; *Woodruff v. Hensley*, 26 Ind. App. 592, 60 N. E. 312, holding paragraph of answer counting upon breach of warranty is insufficient if it contains no averments as to particulars of breach.

Distinguished in *Warman-Black-Chamberlain Co. v. Indianapolis Mortar & Fuel Co.* 36 Ind. App. 259, 75 N. E. 672, holding where warranty is general in character or nature, breach or failure may be shown by general negation of such warranty.

Representations amounting to fraud.

Cited in *Lawrence v. Gayetty*, 78 Cal. 126, 12 A. S. R. 29, 20 Pac. 382, holding in absence of statute representations to constitute sufficient ground for setting aside deed for fraud must be as to existing, material fact, or affirmation of a matter in future as a fact; *Marshall-McCartney Co. v. Halloran*, 15 N. D. 71, 106 N. W. 293, holding that averment that one was deceived by false representations is of no avail if misrepresentations were not of such nature as to justify belief.

Cited in notes in 37 L.R.A. 604, on right to rely on opinions expressed to effect contract as basis for charge of fraud; 6 E. R. C. 501, as to what will constitute a warranty in sense of condition on failure of which other party may repudiate contract in toto; 12 E. R. C. 297, on what constitutes fraud; 40 L. ed. U. S. 546, on fraud and false representations and their effect.

— Opinions, valuations, etc.

Cited in *White v. Butler University*, 78 Ind. 585, holding commendations of value or quality of thing are not fraudulent representations; *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516, 101 N. W. 903; *Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250,—holding commendation is not fraudulent representation; *Timmis v. Wade*, 5 Ind. App. 139, 31 N. E. 827, holding ordinarily, mere expressions of opinion concerning value, utility, future use and the like do not constitute actionable fraud; *Gaar v. Halverson*, 128 Iowa, 603, 105 N. W. 106, holding mere expression of opinion, or "trade talk," cannot be construed into false representation.

Cited in reference note in 43 A. R. 166, on false representation of value as fraud.

Cited in notes in 35 L.R.A. 418, on statements as to value as fraud; 35 L.R.A. 437, on matters of quality or value as expressions of fact or of opinion.

Distinguished in *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74, holding false representations as to required services and their value by attorney to ignorant client rest upon same ground as representations of facts.

Controlling force to be allowed general scope of pleading.

Cited in *Johnston v. Griest*, 85 Ind. 503, holding where it is evident from general scope of pleading, it was intended to rest solely upon written instrument, pleader cannot change front and assert it is sufficient for different purpose and upon different cause of action; *Western U. Teleg. Co. v. Young*, 93

Ind. 118; *State ex rel. Padgett v. Foulkes*, 94 Ind. 493; *Petty v. Church of Christ*, 95 Ind. 278; *Over v. Schiffing*, 102 Ind. 191, 26 N. E. 91; *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821; *Henry v. Stevens*, 108 Ind. 281, 9 N. E. 356; *Lane v. Schlemmer*, 114 Ind. 296, 5 A. S. R. 621, 15 N. E. 454; *Racer v. State*, 131 Ind. 393, 31 N. E. 81; *Platter v. Seymour*, 86 Ind. 323,—holding pleading is to be considered according to its general scope and is not to be controlled by detached and isolated statements; *Fleetwood v. Dorsey Mach. Co.* 95 Ind. 491, holding pleading is to be construed according to general scope and mere general conclusions from facts specifically pleaded cannot control; *Western U. Teleg. Co. v. Reed*, 96 Ind. 195, holding pleading must proceed on definite theory, be good on that theory, and be judged by its general tenor and scope; *Louisville, N. A. & C. R. Co. v. Schmidt*, 106 Ind. 73, 5 N. E. 684, holding complaint when bad because contributory negligence is not denied is not aided by characterization of the negligence.

Controlling effect of facts specifically pleaded.

Cited in *Stack v. Beach*, 74 Ind. 571, 39 A. R. 113, holding substantive traversable facts are to be looked to in determining sufficiency of pleading, and not mere conclusion; *State v. Wenzel*, 77 Ind. 428; *Lawrence v. Beecher*, 116 Ind. 312, 19 N. E. 143; *Murphy v. Hill*, 77 Ind. 129,—holding mere conclusion cannot control effect of facts pleaded; *McComas v. Haas*, 93 Ind. 276, holding pleading in which facts in relation to fraud are not stated is not aided by characterizing representations as fraudulent.

Uniting denial and confession and avoidance in one paragraph.

Cited in *Bowlus v. Phenix Ins. Co.* 133 Ind. 106, 20 L.R.A. 400, 32 N. E. 319; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355,—holding same paragraph of answer cannot be good both in confession and avoidance, and in denial.

Adequacy of stipulated consideration.

Cited in *Wolford v. Powers*, 85 Ind. 294, 44 A. R. 16; *Shade v. Creviston*, 93 Ind. 591; *Mullen v. Hawkins*, 141 Ind. 363, 40 N. E. 797; *Adams v. Vanderbeck*, 148 Ind. 92, 62 A. S. R. 497, 47 N. E. 24; *Cates v. Bales*, 78 Ind. 285,—holding party who gets all the contracts for will not be allowed to complain of want or inadequacy of consideration; *Fleetwood v. Dorsey Mach. Co.* 95 Ind. 491, holding where parties fix consideration, and one party gets all he contracted for, courts will sustain contract; *Vigo Agri. Soc. v. Brumfiel*, 102 Ind. 146, 52 A. R. 657, 1 N. E. 382, holding where consideration of indeterminate value is agreed upon by parties, courts will not undertake to determine its adequacy, but will enforce contract of parties.

Cited in note in 39 A. S. R. 744, on sufficiency of consideration.

36 AM. REP. 202, HEIZER v. HEIZER, 71 IND. 526.

Definition of annuity.

Cited in *Nehls v. Sauer*, 119 Iowa, 440, 93 N. W. 346, holding agreement to pay fixed sum on first day of each year to promisee during promisee's lifetime and that such payment should be lien on land conveyed in return for such agreement, is annuity.

Apportionment of annuity.

Cited in *Nading v. Elliott*, 137 Ind. 261, 36 N. E. 695, holding where annuity is payable on fixed days during life, and annuitant dies before the day, personal representative is not entitled to proportionable part of annuity; *Henry v. Henderson*, 81 Miss. 743, 63 L.R.A. 616, 33 So. 960, holding annuity not apportion-

able; *Lynch v. Houston*, 138 Mo. App. 167, 119 S. W. 994; *Brown v. Keech*, 112 Md. 398, 136 A. S. R. 395, 29 L.R.A.(N.S.) 775, 76 Atl. 846,—holding that if annuitant dies before day fixed for payment his personal representative is not entitled to proportionate part of annuity.

Cited in reference notes in 64 A. S. R. 350, on apportionment of annuities; 100 A. S. R. 1011, on apportionability of annuities on death of annuitant before time of payment.

Cited in note in 63 L.R.A. 627, on apportionment of annuity in absence of statute where consideration passes for annuity.

Distinguished in *Reed v. Cruinkshank*, 46 Hun, 219, holding annuity apportionable where no time for payment is mentioned.

36 AM. REP. 206, WILLIAMSON v. CHICAGO, R. I. & P. R. CO. 53 IOWA, 126, 4 N. W. 870.

Contracts against public policy.

Cited in *Jay County v. Taylor*, 123 Ind. 148, 7 L.R.A. 160, 23 N. E. 752, holding that contract by county commissioners for employment of attorney for period extending beyond their term of office is against public policy and void; *Harvey v. Tama County*, 53 Iowa, 228, 5 N. W. 130, holding that court will not set aside a release of claims against the county at the instance of a party thereto on the ground that it was made contrary to public policy.

Cited in reference note in 27 A. S. R. 277, on contracts against public policy.

—Nonactionability of breach.

Cited in *Stover v. Flower*, 120 Iowa, 514, 94 N. W. 1100, holding that rent paid to agent for lease of property for immoral purposes cannot be recovered from principal upon his disaffirmance of the lease; *Glass v. Basin & B. S. Min. Co.* 31 Mont. 21, 77 Pac. 302, denying right of recovery on contract under which stock was deposited with corporation upon agreement that depositors thereof should be officers of the corporation.

—Contracts as to location of public places or offices.

Cited in *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 A. R. 746, holding contract and notes void where given to persons for using their influence to secure location of postoffice at certain place for period of ten years.

Distinguished in *Pepin County v. Prindle*, 61 Wis. 301, 21 N. W. 254, sustaining validity of condition in deed of land to county, that the county court house should be maintained thereon for period of ten years.

—Contracts as to location of railroad depots or crossings.

Cited in *McGuffin v. Coyle*, 16 Okla. 648, 6 L.R.A.(N.S.) 524, 85 Pac. 954, holding note given to individual officer of railway company void where given upon condition that railroad should be built to a certain point; *Livingston v. Chicago & N. W. R. Co.* 142 Iowa, 404, 120 N. W. 1040, on validity of agreement to construct and maintain open railroad crossing for passage of stock untended; *McCowen v. Pew*, 153 Cal. 735, 21 L.R.A.(N.S.) 800, 96 Pac. 893, 15 A. & E. Ann. Cas. 630; *Farrington v. Stucky*, 91 C. C. A. 311, 165 Fed. 325,—holding agreement by railroad not to establish station between two given points void; *Cole v. Brown-Hurley Hardware Co.* 139 Iowa, 487, 18 L.R.A.(N.S.) 1161, 117 N. W. 746, 16 A. & E. Ann. Cas. 846, to point that agreement to locate station only at certain point in city is invalid.

Cited in reference notes in 30 A. S. R. 607, on location and maintenance of stations; 34 A. S. R. 40, on power of railroads to bind themselves by contract to maintain stations; 54 A. R. 97; 55 A. R. 719; 22 A. S. R. 563; 124 A. S. R.

157,—on validity of contract to locate railway depot at particular place; 41 A. R. 779; 45 A. R. 512,—on validity of agreement whereby railroad company agrees to maintain station in certain place only.

Cited in note in 15 L.R.A. (N.S.) 596, on validity of contract of railroad to establish and maintain station.

Distinguished in *McCowen v. Pew*, 153 Cal. 735, 96 Pac. 893, holding that contract of railroad to locate its road in certain place for consideration paid directly to it is not per se void; *Atlanta & W. P. R. Co. v. Camp*, 130 Ga. 1, 124 A. S. R. 151, 15 L.R.A. (N.S.) 594, 60 S. E. 177, 14 A. & E. Ann. Cas. 439; *Lyman v. Suburban R. Co.* 190 Ill. 320, 52 L.R.A. 645, 60 N. E. 515; *Louisville, N. A. & C. R. Co. v. Sumner*, 106 Ind. 55, 55 A. R. 719, 5 N. E. 404,—holding agreement by railroad to maintain depot at a certain place valid where it did not include restriction as to maintaining depots at other places.

36 AM. REP. 216, VANDERPOEL v. O'HANLON, 53 IOWA, 246, 5 N. W. 119.

Right of student attending college to vote at college town.

Cited in *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700; *Sanders v. Getchell*, 76 Me. 158, 49 A. R. 606,—holding student at college, having no other home, entitled to vote there if he intends to make it his home for an indefinite period regardless of the termination of his college course; *Powell v. Spackman*, 7 Idaho, 692, 54 L.R.A. 378, 65 Pac. 503 (dissenting opinion), on right of one attending college to vote where college is located depending on his intention as to residence.

Cited in reference note in 48 A. S. R. 717, on residence of students and others.

Cited in note in 23 L.R.A. 215, on acquiring residence as voters while students.

Disapproved in *Berry v. Wilcox*, 44 Neb. 82, 48 A. S. R. 706, 62 N. W. 249, holding that persons attending a university for purpose of obtaining an education and who are not dependent upon parents for support and who have no other home, are entitled to vote there, though they may not have any intention of making it their permanent residence.

What constitutes change of domicile.

Cited in *Bradley v. Fraser*, 54 Iowa, 289, 6 N. W. 293; *State ex rel. Killpack v. Hemsworth*, 112 Iowa, 1, 83 N. W. 728,—holding that residence in township is not lost by removal with family for temporary purpose with intent to return when such purpose was accomplished; *Schlawig v. De Peyster*, 83 Iowa, 323, 32 A. S. R. 308, 13 L.R.A. 785, 49 N. W. 843, holding that where one removed to another state with intent to establish new residence, went into business, and voted there, he had abandoned his former residence though he had not as yet removed his family to the new domicile; *Botna Valley State Bank v. Silver City Bank*, 87 Iowa, 479, 54 N. W. 472, holding that an established residence is presumed to continue until actual change of habitation with intent to require new residence; *Re Titterington*, 130 Iowa, 356, 106 N. W. 761, holding that actual residence and intent must concur to effect change of domicile; *Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153, to the point that residence once gained continues until another is acquired.

Distinguished in *Ludlow v. Szold*, 90 Iowa, 175, 57 N. W. 676, holding that the acquiring of a new residence is not the only evidence by which abandonment of the old may be shown.

Meaning of "residence."

Cited in *People v. Platt*, 50 Hun, 454, 3 N. Y. Supp. 367, holding that "residence" as used in statute regarding qualification of officer is equivalent to "domicil;" *State v. Savre*, 129 Iowa, 122, 113 A. S. R. 452, 3 L.R.A.(N.S.) 455, 105 N. W. 387, holding that "residence" in election statutes is synonymous with "domicil" and means a fixed or permanent place of abode.

Cited in note in 19 L.R.A.(N.S.) 760, as to whether "residence" as qualification of voters, means "domicil."

Right to damages for being prevented from voting.

Cited in note in 31 L.R.A.(N.S.) 1107, on right to damages for being prevented from voting.

36 AM. REP. 218, BURGESS v. POLLOCK, 53 IOWA, 273, 5 N. W. 179.**Validity of deed or contract executed by one mentally unsound.**

Cited in *Swartwood v. Chance*, 131 Iowa, 714, 109 N. W. 297; *Tichy v. Siamecek*, 4 Neb. (Unof.) 597, 95 N. W. 629,—holding that imbecility or weakness of mind will not avoid a contract unless it is of such character as to prevent a reasonable perception and understanding of the nature of the contract; *Elwood v. O'Brien*, 105 Iowa, 239, 74 N. W. 740, on same point.

Distinguished in *Paulus v. Reed*, 121 Iowa, 224, 96 N. W. 757, holding that where husband, mentally weak, conveys his land to his wife, a trust in his favor will be declared upon her death as against her heirs.

—Monomania or delusion.

Cited in *Seawel v. Dirst*, 70 Ark. 166, 66 S. W. 1058; *Reese v. Shutte*, 133 Iowa, 681, 108 N. W. 525,—holding that an insane delusion does not render a person incompetent to execute a deed, where such delusion has no connection with the subject of the conveyance.

36 AM. REP. 221, BONCE v. DUBUQUE STREET R. CO. 53 IOWA, 278, 5 N. W. 177.**Care required of common carrier of passengers.**

Cited in *Moore v. Des Moines & Ft. D. R. Co.* 69 Iowa, 491, 30 N. W. 51, holding that common carrier is bound to exercise the highest degree of care and skill for the safety of passengers; *Kellow v. Central Iowa R. Co.* 68 Iowa, 470, 56 A. R. 858, 23 N. W. 740, on same point; *Spellman v. Lincoln Rapid Transit Co.* 36 Neb. 890, 38 A. S. R. 753, 20 L.R.A. 316, 55 N. W. 270, holding that common carrier of passengers is bound to exercise extraordinary care, skill, diligence and foresight for the protection of passengers; *Hutcheis v. Cedar Rapids & M. C. R. Co.* 128 Iowa, 279, 103 N. W. 779, holding that street railway is bound to use the highest degree of care reasonably consistent with the practical conduct of their business; *Pershing v. Chicago, B. & O. R. Co.* 71 Iowa, 561, 32 N. W. 488, holding same as to other railroads in carrying passengers; *Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co.* 1 L.R.A.(N.S.) 533, 71 C. C. A. 316, 139 Fed. 528, on what constitutes prima facie case of negligence against common carrier.

Cited in notes in 61 A. D. 146, on liability of carrier of passengers; 5 L.R.A.(N.S.) 1070, on duty and liability of proprietor of public hack or cab.

Burden of proving negligence and absence of contributory negligence.

Cited in *Gamble v. Mullins*, 74 Iowa, 99, 36 N. W. 909, holding that plaintiff

alleging negligence must prove it and also show himself free from contributory negligence, though this was alleged in the answer.

Cited in reference note in 62 A. D. 687, on burden of proof as to contributory negligence of injured passenger.

36 AM. REP. 222, CARROTHERS v. RUSSELL, 53 IOWA, 346, 5 N. W. 499.

Effect of offer of money or property to county to affect election.

Cited in *State ex rel. Kercheval v. Nashville*, 15 Lea, 697, 54 A. R. 427, holding that officer can collect his salary though he may have stated prior to his election that he would serve without compensation; *Rettinghouse v. Ashland*, 106 Wis. 595, 82 N. W. 555, holding that agreement with mayor to accept less than salary fixed is invalid, where charter provides that salary shall be neither increased nor diminished during year; *State ex rel. Clements v. Humphries*, 74 Tex. 406, 5 L.R.A. 217, 12 S. W. 99, on offer of candidate for office to turn part of compensation back into treasury as bribery; *Bush v. Head*, 154 Cal. 277, 97 Pac. 512, holding that promise by candidate for office not to qualify if elected, for purpose of creating vacancy does not render candidate ineligible.

Cited in reference note in 37 A. R. 422, on validity of agreement by candidate to serve for less than legal fees.

Cited in note in 90 A. S. R. 88, on effect of bribery on validity of election.

Distinguished in *Hawes v. Miller*, 56 Iowa, 395, 9 N. W. 307; *State ex rel. Bill v. Elting*, 29 Kan. 397,—holding votes for location of county seat not vitiated because town desiring its location offered to donate money or property if located in such town.

36 AM. REP. 226, KEOKUK v. INDEPENDENT DIST. 53 IOWA, 352, 5 N. W. 503.

Liability of city and of lot owner for injuries from defects in streets and sidewalks.

Cited in *Wilhelm v. Defiance*, 58 Ohio St. 56, 65 A. S. R. 745, 40 L.R.A. 294, 50 N. E. 18, holding lot owner not liable to city for injury caused by defective condition of sidewalk in front of his lot, for which the city has been held liable; *St. Louis v. Connecticut Mut. L. Ins. Co.* 107 Mo. 92, 28 A. S. R. 402, 17 S. W. 637; *Rochester v. Campbell*, 123 N. Y. 405, 20 A. S. R. 760, 10 L.R.A. 393, 25 N. E. 937,—holding the same where injury was caused by failure to remove ice and snow from walk; *Law v. Kingsley*, 82 Hun, 76, 31 N. Y. Supp. 88, holding lot owner not liable for injury caused by his neglect to keep sidewalk along his lot in proper repair; *Ford v. Kansas City*, 181 Mo. 137, 79 S. W. 923, holding that in action against city for injury caused by defective side walk, it is no defense to set up that plaintiff occupied the premises adjoining and ordinance required him to keep it in repair.

Cited in reference notes in 74 A. D. 685, on liability of owner or occupant of abutting premises for failure to repair street; 40 A. R. 189, on right of municipality paying judgment for injuries on sidewalk to recover over against abutter; 1 A. S. R. 433, on liability of landowner for defective or dangerous condition of sidewalk; 28 A. S. R. 405, on recovery by municipal corporation against wrongdoer.

Cited in notes in 63 A. D. 355, 356, on abutter's liability for failure to repair streets; 115 A. S. R. 995, on interpretation and effect of statutes imposing

liability on property owners to persons injured by nonrepair of streets; 3 L.R.A. (N.S.) 84, on effect of imposition of duty of keeping sidewalk in repair on abutting owner to impose upon him liability for injuries; 12 L.R.A. (N.S.) 950, on right of municipality which has been held liable for injuries from unsafe condition of street to recover over against owner or occupant of abutting property; 40 L. ed. U. S. 713, on remedy over by municipality against wrongdoer after payment of damages by it to person injured.

Distinguished in *Wickwire v. Angola*, 4 Ind. App. 253, 30 N. E. 917, holding city entitled to indemnity from lot owner for damages paid for injury caused by area in sidewalk maintained for benefit of said lot owner; *Calder v. Smalley*, 66 Iowa, 219, 55 A. R. 270, 23 N. W. 638, holding lot owner liable for injury caused by improper construction of scuttlehole in sidewalk, maintained there for his own convenience; *Thompson v. West Bay City*, 137 Mich. 94, 100 N. W. 280, holding city not liable for injury from negligence in building sidewalk where statute places duty of constructing walks upon lot owners; *Robinson v. Mills*, 25 Mont. 291, 65 Pac. 114, holding water company liable for injury caused by excavation in street being left in dangerous condition.

36 AM. REP. 230, CRITCHETT v. AMERICAN INS. CO. 53 IOWA, 464, 5 N. W. 543.

Authority of insurance agent.

Cited in *Armstrong v. State Ins. Co.* 61 Iowa, 212, 16 N. W. 94, holding that agent with authority to take applications and receive and forward premiums, has no power to bind the company by contract of insurance; *Firemen's Ins. Co. v. Kuessner*, 59 Ill. App. 432, holding that such agent has no power to reinstate or change policies issued by the company; *Long Creek Bldg. Asso. v. State Ins. Co.* 29 Or. 569, 46 Pac. 366, holding that authority of agent to receive applications for insurance and to receive payment of premiums does not, of itself, confer authority to receive payment on note in his possession and payable at home office.

Cited in reference notes in 39 A. R. 277, on power of agent soliciting applications for insurance to bind company as to time risk takes effect; 4 A. S. R. 751, on authority of insurance agent to receive and forward applications, deliver policies, and collect premiums.

— Power to grant extension on premiums.

Cited in *Metropolitan L. Ins. Co. v. Hall*, 104 Va. 572, 52 S. E. 345, holding that agent to collect premiums has no power to extend time of payment of overdue premium; *Weidert v. State Ins. Co.* 19 Or. 261, 20 A. S. R. 809, 24 Pac. 242, on same point.

Validity of condition in policy as to nonpayment of premium.

Cited in *Continental Ins. Co. v. Daly*, 33 Kan. 601, 7 Pac. 158, sustaining validity of condition in policy for forfeiture in case premium note is not paid when due.

What constitutes doing business in state by insurance company.

Cited in *Hacheny v. Leary*, 12 Or. 40, 7 Pac. 329, holding that taking application of insurance and forwarding it to home office in another state where it is accepted and policy issued is not doing business within state where application was taken.

Waiver of conditions in insurance policy.

Cited in reference note in 65 A. D. 571, on waiver by insurance company of conditions in policy for its benefit.

Cited in note in 107 A. S. R. 145, on waiver of delay in paying premiums falling due after delivery of policy.

36 AM. REP. 236, KINCAID v. HARDIN COUNTY, 53 IOWA, 430, 5 N. W. 589.**Liability of state for injuries.**

Cited in *Moody v. State Prison*, 128 N. C. 12, 53 L.R.A. 855, 38 S. E. 131, holding state not liable, in absence of statute permitting suit to employee of state prison injured by breaking of defective ladder.

Cited in reference note in 41 A. R. 442, on liability of state or municipality for neglect of public duty.

Liability of public corporation for injuries.

Cited in *Hughes v. Monroe County*, 79 Hun, 120, 29 N. Y. Supp. 495, denying counties' liability to asylum employees injured by reason of failure of person in charge to give proper instructions in machine handling; *Danaher v. Brooklyn*, 51 Hun, 563, 4 N. Y. Supp. 312, denying cities' liability for death caused by drinking of water from well sunk and maintained by city.

Cited in notes in 59 A. D. 738, on liability of municipal corporation for injuries from defective premises; 68 A. D. 294, on liability of counties for torts.

— Due to defects in highways and bridges.

Cited in *El Paso County v. Bish*, 18 Colo. 474, 33 Pac. 184, declaring counties not liable for personal injuries occasioned by negligent repair of county road; *Heigel v. Wichita County*, 84 Tex. 392, 31 A. S. R. 63, 19 S. W. 562, denying counties' liability for injuries caused by defective bridge; *Bailey v. Lawrence County*, 5 S. D. 303, 49 A. S. R. 881, 59 N. W. 219, holding county not liable for failure to keep bridge in repair, unless statute gives right of action; *Wilson v. Wapello County*, 129 Iowa, 77, 105 N. W. 363, 6 A. & E. Ann. Cas. 958, holding county not liable for injury from defect in highway, though liable for defect in bridge or approach thereto; *James v. Wellston Twp.* 18 Okla. 56, 13 L.R.A. (N.S.) 1219, 90 Pac. 100, 11 A. & E. Ann. Cas. 938, holding town not liable for injury from failure to keep highways in safe and proper condition; *Packard v. Voltz*, 94 Iowa, 277, 58 A. S. R. 396, 62 N. W. 757, holding county not liable for negligent construction of highway drain.

Cited in reference note in 39 L.R.A. 44, on implied liability of counties for injuries to travelers and vehicles by bridges and approaches being out of repair.

Cited in note in 12 E. R. C. 716, on duty to repair streets and bridges.

— Due to defects in public ditch.

Cited in *Green v. Harrison County*, 61 Iowa, 311, 16 N. W. 136; *Mutt v. Mills County*, 61 Iowa, 754, 16 N. W. 536; *Dashner v. Mills County*, 88 Iowa, 401, 55 N. W. 468,—holding county not liable for damages done by overflow of public ditch; *Wenck v. Carroll County*, 140 Iowa, 558, 118 N. W. 900, holding county not liable for unlawful act of supervisors in extending drainage ditch beyond boundary of district to injury of land outside.

— Due to condition of jail or lockup.

Cited in *Greene County v. Boswell*, 4 Ind. App. 133, 30 N. E. 534; *White v.*

Sullivan County, 129 Ind. 396, 28 N. E. 846; Webster v. Hillsdale County, 99 Mich. 259, 58 N. W. 317; Lindley v. Polk County, 84 Iowa, 308, 50 N. W. 975,—holding county not liable for failure of commissioners to keep jail in healthy condition; Lahner v. Williams, 112 Iowa, 428, 84 N. W. 507, holding municipal corporation not liable in damages for disease contracted by prisoner on account of unhealthy condition of lock-up; Downing v. Mason County, 87 Ky. 208, 12 A. S. R. 473, 8 S. W. 264, denying counties' liability for flooding adjacent premises by reason of careless construction of county jail.

—In respect to school buildings.

Cited in Freel v. Crawfordsville, 142 Ind. 27, 37 L.R.A. 301, 41 N. E. 312, denying school corporation's liability for personal injuries sustained by employee in making repairs, in absence of statute giving right of action; Lane v. Woodbury, 58 Iowa, 462, 12 N. W. 478, denying school district's liability for failure to keep school building in repair.

Cited in reference note in 43 A. R. 35, on municipal liability for injury to child by defect in schoolhouse.

36 AM. REP. 240, WHEELER v. WHEELER, 53 IOWA, 511, 5 N. W. 689.

Cruel and inhuman treatment as ground for divorce.

Cited in Day v. Day, 84 Iowa, 221, 50 N. W. 979; Owen v. Owen, 90 Iowa, 365, 57 N. W. 887; Garvey v. Hauck, 85 Mo. App. 6; Gleason v. Gleason, 16 Neb. 15, 19 N. W. 784,—on what constitutes such cruel and inhuman treatment as will justify a divorce.

Cited in notes in 73 A. D. 625, on necessity of executing threats of violence to right to divorce for cruelty; 73 A. D. 626, on injury to health as cruelty entitling one to divorce; 40 A. R. 464, on what constitutes cruelty within divorce law.

—Insults and accusations with or without physical hurt.

Cited in Sylvis v. Sylvis, 11 Colo. 319, 17 Pac. 912; Doolittle v. Doolittle, 78 Iowa, 691, 6 L.R.A. 187, 43 N. W. 616,—holding that long continued course of ill treatment which affected wife's mind and endangered her health will justify divorce though no physical violence is used; Berry v. Berry, 115 Iowa, 543, 88 N. W. 1075, holding that profane and abusive language and accusations of unchastity publicly made, may constitute such cruel and inhuman treatment as will justify a divorce; Luick v. Luick, 132 Iowa, 302, 109 N. W. 783, sustaining decree of divorce for cruel and inhuman treatment where husband habitually threatened and assaulted wife, called her vile names, cursed her, and accused her of unchastity; Gleason v. Gleason, 2 Del. Co. Rep. 244, holding that use of vile and abusive language, accompanied by manifestations of passion does not amount to legal cruelty.

Cited in notes in 65 A. S. R. 80, on charges of adultery or unchastity as cruelty justifying divorce; 18 L.R.A.(N.S.) 304, on making charges of adultery as ground for divorce.

—Justification for accusations.

Cited in Walton v. Walton, 57 Neb. 102, 77 N. W. 392, on provocation or excuse to justify husband in publicly accusing wife of unchastity.

— Drunkenness as element in cruelty.

Cited in reference note in 81 A. D. 93, on habitual intemperance as ground for divorce.

Cited in notes in 6 L.R.A. 187, on cruelty and inhuman treatment as ground for divorce; 34 L.R.A. 456, on decree of drunkenness authorizing divorce.

Distinguished in Anonymous, 17 Abb. N. C. 231, holding that drunkenness by itself is insufficient to justify a divorce upon ground of cruel and inhuman treatment.

Habitual drunkenness.

Cited in Bizer v. Bizer, 110 Iowa, 248, 81 N. W. 465, on definition of "habitual drunkenness."

Cited in note in 38 A. R. 616, defining "intemperate habits."

36 AM. REP. 243, BRANN v. CHICAGO, R. I. & P. R. CO. 53 IOWA, 595, 6 N. W. 5.**Duty of master as to inspection and repair of appliances.**

Cited in Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016; Indiana Car Co. v. Parker, 100 Ind. 181; Stockwell v. Chicago & N. W. R. Co. 106 Iowa, 63, 75 N. W. 665; Shebeck v. National Cracker Co. 120 Iowa, 414, 94 N. W. 930; Solomon R. Co. v. Jones, 30 Kan. 601, 2 Pac. 657,—holding that duty of master to furnish safe appliances is a continuing one including inspection in order to keep them in safe condition; Houston v. Brush, 66 Vt. 331, 29 Atl. 380, holding that it is the duty of master to inspect appliances used and to see that they are in safe condition; Riley v. Cudahy Packing Co. 82 Neb. 319, 117 N. W. 765; Northern P. R. Co. v. Altimus, 102 C. C. A. 631, 179 Fed. 275,—holding master liable for injury to servant resulting from failure to inspect machinery and place to work.

Cited in reference note in 98 A. S. R. 297, on master's duty to repair defective machinery and appliances.

Cited in notes in 77 A. D. 219, 220, on liability of master for injuries to servant from defective machinery or material; 92 A. D. 220, on employer's duty to provide safe machinery and appliances; 59 A. R. 75, 79, on master's duty to furnish safe appliances; 41 L.R.A. 74, on master's duty to actively inspect instrumentalities while in use; 41 L.R.A. 77, 78, on degree of care required in inspection of instrumentalities by master; 41 L.R.A. 81, 82, on master's duty as to active inspection of instrumentalities while in use as affected by length of time used.

— Railroads and railroad equipment.

Cited in Goodman v. Richmond & D. R. Co. 81 Va. 576, holding railroad company liable for injury to employee resulting from its failure to properly inspect and repair its appliances; Richmond & D. R. Co. v. Burnett, 88 Va. 538, 14 S. E. 372, holding railroad liable for injury to brakeman from nonrepair of brake chain which would have been known to company upon proper inspection; Cooper v. Pittsburgh, C. & St. L. R. Co. 24 W. Va. 37, holding brakeman entitled to recover from railroad for injury from nonrepair of car, through negligence of car inspector.

Cited in notes in 41 L.R.A. 90, on extent of master's duty of active inspection of cars and their appurtenances while in use; 41 L.R.A. 105, on degree of care required in inspection of foreign cars by employer.

Delegability of master's duty.

Cited in notes in 41 L.R.A. 117, 120, on nonassignability of employer's duty as to inspection; 54 L.R.A. 51, on doctrine of nondelegable duties of master applicable to artificial persons; 54 L.R.A. 103, 104, on nondelegability of master's duty to inspect instrumentalities during the time they are kept in use.

Negligence in inspection and repair as question of fact.

Cited in *Pacheco v. Judson Mfg. Co.* 113 Cal. 541, 45 Pac. 833, holding that where inference of negligence might be drawn from the evidence it should be submitted to the jury; *Larkin v. Chicago & G. W. R. Co.* 118 Iowa, 652, 92 N. W. 891, holding it to be for jury to decide whether railroad company had shown due care sufficient to overcome prima facie case of negligence; *Crawford v. United R. & Electric Co.* 101 Md. 402, 70 L.R.A. 489, 61 Atl. 287, holding that where defective appliance caused the injury, it was for the jury to decide whether such defect was caused by the master's negligence; *Oglesby v. Missouri P. R. Co.* 177 Mo. 272, 76 S. W. 623 (dissenting opinion), on question of proper inspection being one for the jury.

Cited in note in 13 L.R.A. 728, on negligence, a question for jury.

Defective appliance as evidence of negligence.

Cited in *McCarty v. St. Louis & S. R. Co.* 105 Mo. App. 596, 80 S. W. 77, holding that where hand rail gives way when used for its proper purpose, it is prima facie evidence of negligence.

Liability of master where his duty is delegated to servant.

Cited in *Hendrickson v. United States Gypsum Co.* 133 Iowa, 89, 9 L.R.A. (N.S.) 555, 110 N. W. 322, 12 A. & E. Ann. Cas. 246, holding that where it is master's duty to give warning of danger he is liable for failure of servant to whom such duty is delegated to give such warning; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Denver & R. G. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093; *Tierney v. Minneapolis & St. L. R. Co.* 33 Minn. 311, 53 A. R. 35, 23 N. W. 229; *Rodney v. St. Louis S. W. R. Co.* 127 Mo. 676, 28 S. W. 887; *Gunter v. Graniteville Mfg. Co.* 18 S. C. 262, 44 A. R. 575,—holding that where servant is employed to inspect appliances used his negligence is imputed to the master in case of injury to other servants; *Theleman v. Moeller*, 73 Iowa, 108, 5 A. S. R. 663, 34 N. W. 765, on same point.

Distinguished in *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 97 N. W. 1030, holding that where duty of inspection devolves upon employee, the master is not liable to him for an injury from defect which he could have discovered upon reasonable inspection.

Who are fellow servants.

Cited in *Taylor v. Evansville & T. H. R. Co.* 121 Ind. 124, 16 A. S. R. 372, 6 L.R.A. 584, 22 N. E. 876, holding that one who has authority to command and enforce obedience in a distinct department, is not a fellow servant with those employed in the department.

Cited in notes in 36 A. D. 289, on who are fellow servants; 75 A. S. R. 606, on persons performing master's duties as vice principals; 75 A. S. R. 621-623, on machinist inspectors and repairers as vice principals; 54 L.R.A. 38, on vice principalship as determined with reference to the character of the act which caused the injury.

—Trainmen and car inspectors.

Cited in *Little Rock & M. R. Co. v. Moseley*, 6 C. C. A. 225, 12 U. S. App.

514, 56 Fed. 1009, holding that car inspector and switchman are not fellow servants; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 10 A. S. R. 67, 20 N. E. 287, holding that car inspector is not a fellow servant with trainmen.

36 AM. REP. 246, ERICKSON v. BELL, 53 IOWA, 627, 6 N. W. 19.

Usury where loan is made through agent.

Cited in *Glick v. Bramer*, 78 Iowa, 568, 43 N. W. 531, holding that where agent for undisclosed principal took notes which were usurious as to him, they are usurious as to principal where maker supposed agent to be principal; *Trimble v. Thorson*, 80 Iowa, 246, 45 N. W. 742, on loan being usurious where made by agent in his own name who exacts a commission beyond the legal rate the borrower believing him to be the principal.

Cited in note in 46 A. S. R. 200, on usury by exactions of lender's agent acting in his own name.

Distinguished in *Ammerman v. Ross*, 84 Iowa, 359, 51 N. W. 6, holding that fact that broker's commission is included in note given by the borrower is not of itself sufficient to charge lender with notice that usurious interest has been charged.

Estoppel of maker of note to deny knowledge of its contracts.

Cited in *Trimble v. Thorson*, 80 Iowa, 246, 45 N. W. 742, holding that maker of note with opportunity to inspect it will not be heard to say that he did not know to whom it was made payable.

36 AM. REP. 248, ARNOLD v. WALTZ, 53 IOWA, 706, 6 N. W. 40.

What constitutes a "family" under homestead and exemption laws.

Cited in *Re Rafferty*, 112 Fed. 512, holding that where children after death of parents continue to reside together they constitute a family; *Adams v. Clark*, 48 Fla. 205, 37 So. 734, holding that adopted granddaughter is member of her grandfather's family; *Holloway v. Holloway*, 86 Ga. 576, 22 A. S. R. 484, 11 L.R.A. 518, 12 S. E. 943, holding that widow, keeping together and caring for her step-children who are minors, becomes the head of a family; *Menefee v. Chesley*, 98 Iowa, 55, 66 N. W. 1038; *Goode v. State*, 16 Tex. App. 411,—holding that "family" means the collective body of persons who live in one house under one head; *Fox v. Waterloo Nat. Bank*, 126 Iowa, 481, 102 N. W. 424, holding that divorced man and his daughter living with and dependent upon him constituted a family; *Rolator v. King*, 13 Okla. 37, 73 Pac. 291, holding that one living with, and supporting his mother and sisters who are wholly dependent upon him, is the head of a family; *Moyer v. Drummond*, 32 S. C. 165, 17 A. S. R. 850, 7 L.R.A. 747, 10 S. E. 952, holding that where a brother and sister live in a house owned by the sister, and the brother maintains the house and supports her, he is the head of a family; *Fullerton v. Sherrill*, 114 Iowa, 511, 87 N. W. 419, on widow and her daughters residing with her as a family; *Cross v. Benson*, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558, holding that minor child residing with grandparents is "member of their family;" *Floyd County v. Wolfe*, 138 Iowa, 749, 117 N. W. 32, holding that woman confined in insane asylum, and without issue, whose marriage was annulled has no homestead interest in divorced husband's property which is exempt from execution.

Cited in reference notes in 77 A. D. 137, as to when unmarried woman is head of family and entitled to homestead; 29 A. S. R. 405, on who entitled to exemption of homestead as head of family.

Cited in notes in 61 A. D. 591, on unmarried person as head of family; 70 A. S. R. 113, on widow or unmarried woman as head of family within homestead law; 6 L.R.A. 813, on what constitutes a family and who is its head; 4 L.R.A. (N.S.) 385, on single persons as family under homestead and exemption laws.

Distinguished in *Linton v. Crosby*, 56 Iowa, 386, 41 A. R. 107, 9 N. W. 311, holding that where husband and wife lived apart for seven years prior to his death, he boarding with others and contributing nothing to her support, he was not the head of a family.

36 AM. REP. 250, GRAUL v. STRUTZEL, 53 IOWA, 712, 6 N. W. 119.
Liability of indorser of note after maturity.

Cited in *Rosson v. Carroll*, 90 Tenn. 90, 12 L.R.A. 727, 16 S. W. 66, holding that indorser of note after maturity is not liable on his endorsement unless note is presented for payment within reasonable time and notice of nonpayment be given such indorser.

Cited in reference note in 35 A. S. R. 175, on indorsement of negotiable instruments after maturity.

Cited in notes in 3 L.R.A. 759, on effect of transfer of note after maturity; 46 L.R.A. 804, 805 on demand and notice to charge indorser of negotiable paper after maturity.

Presentment of joint note.

Cited in note in 36 L.R.A. 704, on presentment to joint makers to hold indorsers of note.

Demand of payment by mail.

Cited in *Closz v. Miracle*, 103 Iowa, 198, 72 N. W. 502, holding that mailing letter demanding payment is not such demand of maker as will charge an indorser of the note.

Evidence to prove fact of agency.

Cited in *Heusinkweld v. St. Paul F. & M. Ins. Co.* 106 Iowa, 229, 76 N. W. 696; *Burke v. Frye*, 44 Neb. 223, 62 N. W. 476,—holding that fact of agency cannot be established by declarations of one assuming to act as agent, without other proof; *O'Leary v. German-American Ins. Co.* 100 Iowa, 390, 69 N. W. 686; *Nostrom v. Halliday*, 39 Neb. 828, 58 N. W. 429,—holding the same but that the testimony of such agent is admissible to prove fact of agency.

Implied authority of agent.

Cited in *Stoll v. Sheldon*, 13 Neb. 207, 13 N. W. 201, holding that agent employed to make collections has no implied authority to release surety on note without payment thereof.

36 AM. REP. 251, TURNER v. WEBSTER, 24 KAN. 38.

Recovery for services where contract fails on account of mutual misunderstanding.

Cited in *Farrell v. Dooley*, 17 Ill. App. 66; *Russell v. Clough*, 71 N. H. 177, 93 A. S. R. 507, 51 Atl. 632,—holding that one who performs services under such contract may recover reasonable compensation; *Union Hosiery Co. v. Hodgson*, 72 N. H. 427, 57 Atl. 384, on same point; *United States Coal Co. v. Pinkerton*, 95 C. C. A. 34, 169 Fed. 536, holding that modification of contract cannot be made without mutuality of consent; *Wright v. Broome*, 67 Mo. App. 32, holding that

person is entitled to recover quantum meruit where they were performed under misunderstanding as to price.

Cited in note in 26 L.R.A. (N.S.) 811, on quantum meruit for services performed or material furnished under contract invalid because minds of parties did not meet as to terms.

36 AM. REP. 254, SMITH v. ROGERS, 24 KAN. 140.

Relation existing between stepfather and stepchild admitted into his family.

Cited in *Livingston v. Hammond*, 162 Mass. 375, 38 N. E. 968, denying right of stepfather to recover for maintenance of stepchild taken into his family; *State v. Kavanaugh*, 133 Mo. 452, 33 S. W. 33; *Hennessey v. Bavarian Brewing Co.* 63 Mo. App. 111,—on relation existing between stepfather and stepchild admitted into his family.

Cited in note in 53 A. D. 346, on stepparents' right to compensation for support, etc., of stepchildren.

Parent's duty to support child.

Cited in note in 57 L.R.A. 729, on parent's duty to support child as affected by child's interest in trust estate.

36 AM. REP. 257, STATE v. WILSON, 24 KAN. 189.

Dying declarations as evidence.

Cited in *State v. Phillips*, 118 Iowa, 660, 92 N. W. 876, holding declarations not admissible as "dying declarations" in the absence of evidence to show belief in impending death; *State v. Knoll*, 69 Kan. 767, 77 Pac. 880, holding dying declarations admissible as such only where made under sense of impending death with no hope of recovery at time when made; *Foley v. State*, 11 Wyo. 464, 72 Pac. 627, on inadmissibility of written memorandum of statements made as dying declarations, when written down by physician in attendance and sworn to by him; *State v. Roberts*, 28 Nev. 350, 82 Pac. 100, holding that declarations may be admissible as dying declarations, though declarant may not have said that he was without hope of recovery.

Cited in reference notes in 25 A. S. R. 726; 40 A. S. R. 414,—on admissibility of dying declarations; 61 A. S. R. 889, on admissibility in criminal trial of evidence of deceased witness.

Cited in notes in 11 E. R. C. 307, 308, on admissibility of dying declarations; 56 L.R.A. 424, on necessity of writing to admissibility of dying declarations; 56 L.R.A. 433, on dying declarations when there is other evidence of same facts; 56 L.R.A. 416, on sending for priest, etc., as evidence of mental and physical condition of one whose dying declarations are offered in evidence; 40 L. ed. U. S. 533, 534, on dying declarations.

—Evidence as to sense of impending death.

Cited in *People v. Buettner*, 233 Ill. 272, 84 N. E. 218, holding that fact that declarant has called for and received the last sacrament is strong evidence of belief in impending death.

Admissibility of evidence of testimony at former trial.

Cited in *State v. Nelson*, 68 Kan. 566, 75 Pac. 505, 1 A. & E. Ann. Cas. 468, holding evidence of testimony given by witness who has since left the state, admissible in criminal prosecution; *Atchison, T. & S. F. R. Co. v. Osborn*, 64 Kan.

187, 91 A. S. R. 189, 67 Pac. 547, holding same in civil case; *Gilmore v. Butts*, 61 Kan. 315, 59 Pac. 645, on same point; *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337; *State v. Cushing*, 17 Wash. 544, 50 Pac. 512,—holding evidence of testimony given by deceased witness at a former trial admissible in criminal prosecution; *Cline v. State*, 36 Tex. Crim. Rep. 320, 61 A. S. R. 850, 37 S. W. 722 (dissenting opinion), on same point.

Cited in note in 25 L.R.A.(N.S.) 872, on admissibility in criminal trial of testimony given upon preliminary examination by witnesses not available at trial.

Distinguished in *State v. Conway*, 56 Kan. 682, 44 Pac. 627, holding evidence of testimony of witness at former trial, who has since been sent to prison for a term of years, not admissible.

Right to have counsel to assist county attorney in criminal prosecution.

Cited in *Thalheim v. State*, 38 Fla. 169, 20 So. 938; *State v. Lighe*, 27 Mont. 327, 71 Pac. 3; *Polin v. State*, 14 Neb. 540, 16 N. W. 898,—holding that counsel employed and paid by private parties may assist county attorney in prosecution of criminal case; *Eldridge v. State*, 27 Fla. 162, 9 So. 448, on same point; *State v. Smith*, 50 Kan. 69, 31 Pac. 784, holding it not to be error to permit private counsel to make closing argument for state in criminal prosecution; *State v. Wells*, 54 Kan. 161, 37 Pac. 1005, holding it not to be error for county attorney to permit counsel employed by private parties to make opening statement to jury in criminal prosecution; *State v. Kent*, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631, holding it not error to allow nonresident attorney employed by private parties to assist in prosecution of criminal case; *Wood v. State*, 92 Ind. 269; *Tull v. State*, 99 Ind. 238; *State v. Tyler*, 122 Iowa, 125, 97 N. W. 983,—holding that court may appoint attorney to assist in prosecution of criminal case.

Cited in note in 24 L.R.A.(N.S.) 565, on right to complain because prosecution is conducted or assisted by unofficial member of bar.

Disapproved in *Biemel v. State*, 71 Wis. 444, 37 N. W. 244, holding that counsel paid by private parties should not be permitted to aid the county attorney in prosecution of criminal offense.

36 AM. REP. 259, SWITZER v. WILVERS, 24 KAN. 384.

Implied authority of agent appointed to buy or sell.

Cited in *Morris v. Ewing*, 8 N. D. 99, 76 N. W. 1047, holding that power of attorney to sell and convey land does not include power to mortgage; *Campbell v. Foster*, 163 Pa. 609, 43 A. S. R. 818, 26 L.R.A. 117, 30 Atl. 222, on same point; *Kiefer v. Klinsick*, 144 Ind. 46, 42 N. E. 447 (affirming 13 Ind. App. 253, 37 N. E. 1048), holding that general agent with power to buy goods on credit and retail the same has no implied power to mortgage the entire stock of goods; *Cleveland, C. C. & St. L. R. Co. v. Moline Plow Co.* 13 Ind. App. 225, 41 N. E. 480, holding that agent for transfer and storage of goods has no power to sell.

Cited in reference note in 25 A. S. R. 619, on power to sell not including power to mortgage.

Cited in note in 50 A. R. 548, on power of executor to mortgage estate under authority to sell, exchange, and dispose of it.

Execution of power of sale.

Cited in *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303, holding that power of sale under will must be strictly pursued and executed according to the manifest intent of testator; *Brown v. Farmers' Loan & T. Co.* 51

Hun, 386, 4 N. Y. Supp. 422, on right to mortgage property held under devise with power to sell.

36 AM. REP. 261, HERRIMAN v. SHOMON, 24 KAN. 287.

Power of attorney at law to bind his client.

Cited in *Southern Kansas R. Co. v. Pavey*, 57 Kan. 521, 46 Pac. 969, holding client bound by stipulation of his attorney for a continuance upon certain conditions.

Distinguished in *Bonnifield v. Thorp*, 71 Fed. 924, holding that stipulation as to time of answering made by plaintiff himself with attorneys of defendant may be disregarded where plaintiff is represented by attorney.

— **As to release or discharge of claims.**

Cited in *Rounsaville v. Hazen*, 33 Kan. 71, 5 Pac. 422, holding that attorney has no power to release judgment in favor of his client before it is satisfied; *Barr v. Rader*, 31 Or. 225, 49 Pac. 962, holding that attorney at law has no power to accept anything other than money in satisfaction of a judgment in favor of his client.

Cited in note in 76 A. D. 260, on effect of payment to attorney.

Power of collecting agent.

Cited in *Bank of Kansas City v. Mills*, 24 Kan. 604, holding that agent for collection of draft has no power to accept anything other than money in payment.

36 AM. REP. 262, FRAKER v. LITTLE, 24 KAN. 598.

Recovery of money voluntarily paid under mistake.

Cited in *Lyle v. Shinnebarger*, 17 Mo. App. 66, holding that money voluntarily paid under mistake may be recovered back though payer may have been negligent is not inquiring into the facts before making payment; *Douglas County v. Keller*, 43 Neb. 635, 62 N. W. 60, holding that in suit for recovery of money voluntarily paid under mistake, plaintiff is not chargeable with notice though he had knowledge of facts from which they might have obtained notice.

— **Payment of altered note in ignorance.**

Cited in reference note in 36 A. R. 506, on right of accommodation maker to recover money paid on altered note.

Distinguished in *First National Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473, holding that money paid upon note void for material alteration cannot be recovered back where note was given for a valid debt.

36 AM. REP. 264, CUMMINS v. HEALD, 24 KAN. 600.

Liability of one holding a note for collection for acts of subagents.

Cited in *First Nat. Bank v. Craig*, 3 Kan. App. 166, 42 Pac. 830, holding that bank taking note for collection is liable for money collected thereon by agent employed by bank to collect it.

Cited in notes in 50 A. S. R. 115, on liability of attorney on claim forwarded to another for collection; 34 A. D. 315, on liability of collecting bank for negligence of notaries, correspondents, etc; 50 A. S. R. 124, as to whom sub-agent is accountable.

Am. Rep. Vol. XVII.—69.

Liability of attorney to client.

Cited in note in 22 L. ed. U. S. 484, on attorney's liability to client for negligence.

36 AM. REP. 267, THIELMAN v. GUEBLE, 32 LA. ANN. 260.**Time for presentment and demand of demand note.**

Cited in *Turner v. Iron Chief Min. Co.* 74 Wis. 355, 17 A. S. R. 168, 5 L.R.A. 533, 43 N. W. 149, holding demand and protest within reasonable time necessary to hold accommodation indorser of interest bearing demand note and that delay of ten months is unreasonable; *Home Sav. Bank v. Hosie*, 119 Mich. 116, 77 N. W. 625; *Harrisburg Nat. Bank v. Reily*, 24 Pa. Co. Ct. 113, 3 Dauph. Co. Rep. 75, 10 Pa. Dist. R. 25,—holding the same and that delay of thirty three months was unreasonable; *Leonard v. Olsen*, 99 Iowa, 162, 61 A. S. R. 230, 35 L.R.A. 381, 68 N. W. 677, holding the same and that ten years is not a reasonable time.

Cited in reference notes in 42 A. R. 250, on laches in presenting note: 7 A. S. R. 648, on effect of laches in presenting negotiable instrument.

Cited in note in 28 L. ed. U. S. 1045, as to when notes payable on demand must be presented to hold indorser.

Effect of indorsement by stranger to note.

Cited in *Redden v. Lambert*, 112 La. 740, 36 So. 668, on presumption that stranger indorsing commercial paper thereby becomes a surety.

Nature of demand notes payable with interest.

Cited in note in 80 A. D. 252, on nature of notes payable on demand with interest.

36 AM. REP. 272, STATE v. WILLIAMS, 32 LA. ANN. 335.**Sufficiency of indictment in words synonymous with statute.**

Cited in *State v. Brown*, 41 La. Ann. 345, 6 So. 541, holding that an indictment is sufficient though a word not in the statute is substituted for one in the statute where word substituted is equivalent to, or includes word in statute; *State v. Hauser*, 112 La. 313, 36 So. 396, on same point; *State v. Rohan*, 140 Iowa, 640, 119 N. W. 88, holding that indictment charging assault upon female is not defective because word "violently" was used instead of "forcibly."

Cited in reference note in 83 A. S. R. 785, on sufficiency of indictment for rape.

36 AM. REP. 274, STATE v. WRIGHT, 32 LA. ANN. 1017.**Forfeiture of right of appeal by escape and flight of accused.**

Cited in *Warwick v. State*, 73 Ala. 486, 49 A. R. 59; *State v. Murrell*, 33 S. C. 83, 11 S. E. 682,—holding that a fugitive from justice can not maintain an appeal from his conviction; *State v. Port Royal & A. R. Co.* 45 S. C. 413, 23 S. E. 363 (dissenting opinion), on the same point.

Cited in notes in 41 A. D. 273, on right to appeal while a fugitive from justice; 44 A. R. 88, on right of escaped convicted prisoner, not on bail, to be heard in appeal; 26 L.R.A.(N.S.) 922, on effect of escape on appeal from conviction.

—Dismissal of appeal.

Cited in *Allen v. Georgia*, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525.

holding that dismissal by state court of appeal from conviction by one who has escaped and is a fugitive from justice is not a denial of due process of law under constitution; *State v. Edwards*, 36 La. Ann. 863; *State v. Porter*, 41 La. Ann. 402, 6 So. 337; *State v. Craighead*, 44 La. Ann. 968, 11 So. 629,—dismissing appeal where appellant had broken jail and escaped while appeal was pending.

36 AM. REP. 276, SCHNEIDER v. ÆTNA L. INS. CO. 32 LA. ANN. 1049.

Return day of commission to take evidence as controlling date of trial.

Cited in *Wetta v. New Orleans & C. R. Co.* 107 La. 383, 31 So. 775, holding that fixing return day of commission to take evidence does not of itself necessitate the continuance of the case until the return day fixed.

36 AM. REP. 278, KINGSBURY v. WHITAKER, 32 LA. ANN. 1055.

Mental unsoundness as affecting wills and deeds.

Cited in *Seawel v. Dirst*, 70 Ark. 166, 66 S. W. 1058, holding that to invalidate conveyance for insanity of grantor it must be shown that insanity was such as to prevent intelligent comprehension of matters relating thereto; *Re Ayers*, 84 Neb. 16, 120 N. W. 491, holding that partial insanity does not necessarily disqualify testator from making valid will.

Cited in reference notes in 36 A. R. 428, on belief in spiritualism as affecting testamentary capacity; 44 A. S. R. 687, on effect of partial insanity on testamentary capacity.

Cited in notes in 61 A. D. 85, on belief in witchcraft as evidence of testamentary incapacity; 44 A. S. R. 687, on effect of insane delusions on testamentary capacity; 37 L.R.A. 265, on necessity that insane delusions be connected with act in question; 37 L.R.A. 278, on insane delusions as to misconduct of heirs; 61 A. D. 84; 27 L.R.A. (N.S.) 56, 69, 86,—on what is testamentary capacity.

—Intermittent insanity.

Cited in *Wood v. Salter*, 118 La. 695, 43 So. 281, holding that where will is drawn by testator himself and shows no indication of unsoundness of mind, the presumption is that it was made during a lucid interval; *Jacobs's Succession*, 109 La. 1012, 34 So. 59; *Jones's Succession*, 120 La. 986, 45 So. 965,—sustaining will though testatrix may have been insane at times but testimony showed at least lucid intervals; *Bey's Succession*, 46 La. Ann. 773, 24 L.R.A. 577, 15 So. 297, holding that test as to making a will is whether testator at the time was of sufficiently sane mind to fully understand the nature and effect of the testamentary act; *Godden v. Burke*, 35 La. Ann. 160, on same point.

Presumption and burden of proof of testator's insanity.

Cited in reference note in 52 A. R. 322, on burden of proving testator's sanity.

Cited in note in 41 A. R. 686, on presumptions as to sanity of testator.

36 AM. REP. 293, STATE v. TRIVAS, 32 LA. ANN. 1086.

Dying declarations as evidence.

Cited in *State v. Daniels*, 115 La. 59, 38 So. 894, holding dying declaration not admissible unless made under sense of impending death with no hope of recovery; *State v. Keenan*, 38 La. Ann. 660, holding dying declarations admissible if made under sense of impending dissolution which soon after tran-

spires; *State v. Molisse*, 36 La. Ann. 920, on same point; *State v. Newhouse*, 39 La. Ann. 862, 2 So. 799; *State v. Sadler*, 51 La. Ann. 1397, 26 So. 390,—holding dying declarations admissible when made under sense of approaching death, though it does not appear that declarant expected he would die immediately; *State v. Jones*, 47 La. Ann. 1524, 18 So. 515, holding that as foundation for admission of dying declarations it need only be shown that they were made under a sense of impending death which took place soon after; *State v. Peace*, 121 La. 1071, 47 So. 28; *State v. Black*, 42 La. Ann. 861, 8 So. 594,—holding that a dying declaration must go to the jury in its entirety; *State v. Burt*, 41 La. Ann. 787, 6 L.R.A. 79, 6 So. 631, on dying declarations as evidence; *People v. Buettner*, 233 Ill. 272, 84 N. E. 218, on desire for last rites of church as evidence of belief in impending death as affecting admissibility of dying declarations.

Cited in reference note in 40 A. S. R. 414, on admissibility of dying declarations question for court.

Cited in notes in 56 L.R.A. 382, on sense of impending death or reaffirmance as condition of admissibility of dying declarations; 56 L.R.A. 416, on sending for priest, etc., as evidence of mental and physical condition of one whose dying declarations are offered in evidence; 56 L.R.A. 417, on arranging business as evidence of mental and physical condition of one whose dying declarations are offered in evidence; 56 L.R.A. 441, on question for court or jury as to dying declarations; 40 L. ed. U. S. 534, on dying declarations.

—Manner and form of making.

Cited in *State v. Carter*, 106 La. 407, 30 So. 895, holding dying declarations admissible though sworn to, and though some of the statements standing alone would be inadmissible; *State v. Somnier*, 33 La. Ann. 237, holding parol evidence of dying declarations admissible; *State v. Parham*, 48 La. Ann. 1309, 20 So. 727, holding dying declaration made to and written down by attending physician, signed by declarant and signature attested by justice of the peace, admissible in evidence.

Cited in notes in 86 A. S. R. 645, on form of dying declaration as determining admissibility; 56 L.R.A. 429, on dying declarations made in answer to questions.

Presumption of malice in homicide.

Cited in *State v. Wright*, 46 La. Ann. 1403, 16 So. 366, on presumption of malice in homicide.

Evidence admissible as defense in prosecution for homicide.

Cited in *Leonard v. Territory*, 2 Wash. Terr. 381, 7 Pac. 872, holding evidence tending to fix the crime on some one else admissible in defense in prosecution for homicide.

—Intoxication as defense.

Cited in *State v. Hogan*, 117 La. 863, 42 So. 352, on drunkenness as defense to prosecution for homicide; *State v. Wilson*, 124 La. 82, 49 So. 986, to point that instruction as to intoxication as defense to crime must state on account of what particular feature of case that defense is admissible.

Intoxication as defense to crime generally.

Cited in notes in 40 A. R. 560, on drunkenness as excuse for crime; 36 L.R.A. 468, as to when intoxication may be shown in excuse for crime; 8 E. R. C. 56, on intoxication as defense to crime.

Review of findings of trial court in criminal prosecution.

Cited in *State v. Briggs*, 34 La. Ann. 69; *State v. Nash*, 40 La. Ann. 1137, 13 So. 732; *State v. Martin*, 50 La. Ann. 1157, 24 So. 590; *State v. Harper*, 51 La. Ann. 163, 72 A. S. R. 454, 24 So. 796,—holding that appellate court has power to review rulings of trial judge on question of law mixed with fact when testimony upon which such rulings are based is made part of the record upon appeal; *State ex rel. Haab v. Moise*, 104 La. 63, 28 So. 902, holding that only such evidence as is included in the transcript can be considered upon appeal; *State v. Seiley*, 41 La. Ann. 143, 6 So. 571, holding that accused has right to have testimony on collateral issue reduced to writing so as to have it annexed to bill of exceptions upon appeal from ruling of trial court.

New trial for erroneous instructions.

Cited in note in 52 A. D. 603, on right to new trial for erroneous instructions.

36 AM. REP. 299, MURPHY v. ADAMS, 71 ME. 113.**Assignability of liens and priorities.**

Cited in *Duncan v. Hawn*, 104 Cal. 10, 37 Pac. 626; *Kent v. Muscatine*, N. & S. R. Co. 115 Iowa, 383, 88 N. W. 935; *Falconio v. Larsen*, 31 Or. 137, 37 L.R.A. 254, 48 Pac. 703,—holding the preferential claim for wages of laborers given by statute is assignable; *Midland R. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506; *Wiley v. Connelly*, 179 Mass. 360, 60 N. E. 784; *McDonald v. Kelly*, 14 R. I. 335,—holding a mechanics' lien assignable; *Sibley v. Pine County*, 31 Minn. 201, 17 N. W. 337, holding same in case of lien of attorney for compensation upon a judgment; *Union Slate Co. v. Tilton*, 73 Me. 207, on the assignability of mechanics' lien.

Cited in notes in 49 A. S. R. 531, on assignability of perfected mechanics' lien; 21 L. ed. U. S. 969, as to when a lien or right to a lien is assignable.

Right to maintain action in name of assignor of lien.

Cited in *Phillips v. Vose*, 81 Me. 134, 16 Atl. 463; *Brogan v. McEachern*, 103 Me. 198, 68 Atl. 822; *McDonald v. Kelly*, 14 R. I. 335,—holding assignee of mechanics' lien might properly maintain action on in name of assignor.

When trover is maintainable.

Cited in note in 66 A. D. 274, on what is necessary to maintain trover.

36 AM. REP. 303, WYMAN v. LEAVITT, 71 ME. 227.**Mental anguish as an element of damages.**

Cited in *Linn v. Duquesne*, 204 Pa. 551, 93 A. S. R. 800, 54 Atl. 341, holding mental suffering could not be allowed as an element of damages in an action for personal injury where not part of actual injury but arising afterwards from regret, disappointment or anxiety; *St. Louis, I. M. & S. R. Co. v. Taylor*, 84 Ark. 42, 13 L.R.A. (N.S.) 159, 104 S. W. 551; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 202, 63 A. S. R. 343, 47 N. E. 694; *Lewis v. Western U. Teleg. Co.* 57 S. C. 325, 35 S. E. 556,—holding damages could not be recovered for mental suffering disconnected with and in absence of physical suffering; *Chase v. Western U. Teleg. Co.* 10 L.R.A. 464, 44 Fed. 554; *Western U. Teleg. Co. v. Wood*, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148; *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 30 A. S. R.

183, 17 L.R.A. 430, 15 S. E. 901; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 24 A. S. R. 300, 13 L.R.A. 859, 9 So. 823; *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 38 A. S. R. 575, 20 L.R.A. 172, 22 S. W. 345; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 434,—holding same where caused by non-delivery of telegram, there being no physical damage; *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 281, 126 Fed. 295; *Western U. Teleg. Co. v. Wilson*, 93 Ala. 32, 30 A. S. R. 23, 9 So. 414; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674; *Butner v. Western U. Teleg. Co.* 2 Okla. 234. 4 Inters. Com. Rep. 770, 37 Pac. 1087,—holding same where telegraph company failed to deliver telegram announcing death of relative; *Pullman Palace Car Co. v. Trimble*, 8 Tex. Civ. App. 335, 28 S. W. 96, holding mental anguish resulting from another's suffering could not be considered as an element of damages; *Woodstock Iron Works v. Stockdale*, 143 Ala. 550, 39 So. 335, 5 A. & E. Ann. Cas. 578, on mental suffering as not being an element of damage; *Braun v. Craven*, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657; *Minneapolis Street R. Co. v. Ray*, 167 Ind. 236, 78 N. E. 978; *Dorrah v. Illinois C. R. Co.* 65 Miss. 14, 7 A. S. R. 629, 3 So. 36; *Shellabarger v. Morris*, 115 Mo. App. 566, 91 S. W. 1005; *Gosa v. Southern R. Co.* 67 S. C. 347, 45 S. E. 810 (dissenting opinion); *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695, 6 A. S. R. 804, 8 S. W. 574 (dissenting opinion); *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 412. 40 A. S. R. 866, 25 S. W. 419,—considering mental anguish as grounds for damages.

Annotation cited in *Kline v. Kline*, 158 Ind. 602, 58 L.R.A. 397, 64 N. E. 9, on mental suffering as an element of damages.

Cited in reference notes in 36 A. R. 454; 30 A. S. R. 711, 712; 31 A. S. R. 529; 27 A. S. R. 852; 77 A. S. R. 859,—on mental anguish as an element of damages; 38 A. R. 59, on mental anguish and fear for safety of family as elements of damage for blasting; 40 A. R. 805, on liability of telegraph company for injury to feelings; 43 A. S. R. 670, on damages for trespass in execution of writ.

Cited in notes in 7 A. S. R. 536, on mental anguish as element of damages; 12 L.R.A. 699, on pain and suffering as element of damages for personal injury; 13 L.R.A. 859, on right to damages for mental suffering alone; 53 L.R.A. 633, on extent of trespasser's liability for mental suffering resulting from the trespass; 25 L.R.A.(N.S.) 977, on right to recover for mental suffering caused by assault where no bodily injury inflicted.

Acts causing fright as giving rise to cause of action.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 134; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 30 A. S. R. 709, 14 L.R.A. 666. 23 Atl. 340,—holding mere fright producing permanent nervous disorders is a result too remote to be actionable; *Spade v. Lynn & B. R. Co.* 168 Mass. 285. 60 A. S. R. 393, 38 L.R.A. 512, 47 N. E. 88; *Ward v. West Jersey & S. R. Co.* 65 N. J. L. 383, 47 Atl. 561,—holding same though the fright produced subsequent physical injury; *Nelson v. Crawford*, 122 Mich. 466. 80 A. S. R. 577, 81 N. W. 335; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 56 A. S. R. 604, 34 L.R.A. 781. 45 N. E. 354,—holding same where no immediate physical injury was suffered; *Miller v. Baltimore & O. S. W. R. Co.* 78 Ohio St. 309, 125 A. S. R. 699, 18 L.R.A.(N.S.) 949, 85 N. E. 499, holding same though the fright produced subsequent illness; *Huston v. Freemansburg*, 9 North. Co. Rep. 358.

holding that negligent blasting producing fright resulting in mental suffering, unless accompanied by physical injury is not subject of right of action.

Cited in reference note in 40 A. S. R. 869, on right to damages for fright.

Cited in notes in 77 A. S. R. 860, 863, on fright as an element of damages; 77 A. S. R. 872, on resulting fright as an element of damages for injury to property; 14 L.R.A. 667, on fright as basis for cause of action; 8 E. R. C. 415, 417, on right to recover damages for fright or mental suffering.

Distinguished in *Mitchell v. Rochester* R. Co. 4 Misc. 575, 30 Abb. N. C. 302, 25 N. Y. Supp. 744; *Watkins v. Kaolin Mfg. Co.* 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983; *Simone v. Rhode Island Co.* 28 R. I. 186, 9 L.R.A.(N.S.) 740, 66 Atl. 202,—holding damages might be recovered for fright without physical injury at time when such fright gives rise to physical troubles.

36 AM. REP. 308, MOULTON v. SCARBOROUGH, 71 ME. 267.

Liability of municipality for damages.

Cited in reference notes in 37 A. R. 393, on liability of municipal corporation for negligence in performance of statutory duty; 41 A. R. 185, on liability of town for injuries from dangerous animal owned by it; 52 A. R. 643, on liability of town or city for maintaining nuisance.

Cited in notes in 35 A. R. 160, on liability of municipality for injury by unsafe conditions in public places; 16 A. S. R. 631, on liability for injuries by vicious animals; 27 L.R.A. 728, on municipal liability for permitting animals in streets; 3 E. R. C. 118, on liability for keeping mischievous animal with knowledge of its propensities.

—For negligent acts of its agents.

Cited in *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487, holding city liable for the negligent death of plaintiff's intestate while aiding in construction of water reservoir for city it selling water for profit; *Keeley v. Portland*, 100 Me. 260, 61 Atl. 180, holding municipal corporation not liable for damages resulting from fault in plan of construction of a sewer; *Mendel v. Wheeling*, 28 W. Va. 233, 57 A. R. 664, holding city not liable for negligence on part of employees in the management of waterworks system whereby a loss results to plaintiff; *Cunningham v. Seattle*, 40 Wash. 59, 4 L.R.A.(N.S.) 629, 82 Pac. 143 (dissenting opinion), on liability of city for negligence on part of its employees; *Libby v. Portland*, 105 Me. 370, 26 L.R.A.(N.S.) 141, 74 Atl. 805, 18 A. & E. Ann. Cas. 547, holding that municipality holding property for its profits is liable for negligence in management thereof.

Cited in note in 1 L.R.A. 608, as to when city becomes liable for employee's wrongful acts.

Distinguished in *Ulrich v. St. Louis*, 112 Mo. 138, 34 A. S. R. 372, 20 S. W. 460, holding city not liable for injuries resulting through the negligence of an officer in the discharge of his official duties; *Pfefferle v. Lyon County*, 39 Kan. 432, 18 Pac. 506, holding a county not liable to inmates of county jail for negligently permitting such jail to become and remain in such a bad condition that its inmates become sick and diseased.

—Damages resulting from the exercise of governmental functions.

Cited in *Bulger v. Eden*, 82 Me. 352, 9 L.R.A. 205, 19 Atl. 829; *Sibley v. Penobscot Lumbering Asso.* 93 Me. 399, 45 Atl. 293; *Lane v. Minnesota State Agri. Soc.* 62 Minn. 175, 29 L.R.A. 708, 64 N. W. 382,—on public corporation as liable for negligence in the performance of functions not governmental.

36 AM. REP. 310, DUNN v. WESTON, 71 ME. 270.**Liability of maker of accommodation paper.**

Cited in *Evans v. Speer Hardware Co.* 65 Ark. 204, 67 A. S. R. 919, 45 S. W. 370; *Moreland v. Citizens' Sav. Bank*, 97 Ky. 211, 30 S. W. 637,—holding maker of an accommodation note without restriction to its use cannot set up that payee misapplied proceeds; *First Nat. Bank v. Grant*, 71 Me. 374, 36 A. R. 334, holding party who lends his note without limitation as to time of its use cannot in law be presumed to have limited such time to that before its maturity; *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109, 2 A. & E. Ann. Cas. 254, on right of maker of accommodation note to set up want of consideration; *Miller v. Larned*, 103 Ill. 562; *Schloeter v. Fisher*, 37 Mo. App. 352, 8 L.R.A. 147,—on the liability of the maker of an accommodation note.

Cited in reference note in 59 A. D. 730, on effect of accommodation paper as loan of maker's credit.

Cited in note in 31 A. S. R. 747, on pledge of accommodation paper as collateral security or in payment.

Sufficiency of consideration for the renewal note.

Cited in *Mathias v. Kirsch*, 87 Me. 523, 33 Atl. 19, holding the surrender of an old note is sufficient consideration for a new note similar in form.

Sufficiency of indorsement for corporation.

Cited in *Russell v. Folsom*, 72 Me. 436, holding an indorsement by treasurer of a corporation is sufficient to pass title to a note; *Lay v. Austin*, 25 Fla. 933, 7 So. 143, on sufficiency of indorsement by officials of corporation to pass title.

36 AM. REP. 315, MONK v. PACKARD, 71 ME. 309.**Right to prohibit use of cemetery.**

Cited in *Hume v. Laurel Hill Cemetery*, 142 Fed. 552, holding it not within the constitutional power of municipality to prohibit use of land as cemetery where it will not constitute a nuisance and is not dangerous to life or public health.

Cited in notes in 39 A. R. 16, on right to enjoin location of private burial ground near residence; 19 E. R. C. 305, on injunctive relief against public nuisance.

What is a nuisance per se.

Cited in *Gowen v. O'Hara*, 15 Pa. Dist. Rep. 753, holding the maintenance of open air hospital for treatment of consumptives in a closely settled neighborhood of an exclusively residential character not a nuisance per se; *Lambert v. Norfolk*, 108 Va. 259, 128 A. S. R. 945, 17 L.R.A.(N.S.) 1061, 61 S. E. 776, holding that no damages are recoverable by land owner, under statute, because of location of cemetery on adjacent land unless done to corpus of property or to right enjoyed in connection therewith.

Cited in notes in 107 A. S. R. 233, on erection of unsightly buildings, hospitals, pesthouses, cemeteries, billboards, or places of entertainment in strictly residence districts as public nuisances; 31 L.R.A.(N.S.) 945, 946, on burial ground or cemetery as nuisance.

36 AM. REP. 318, MINOR v. STAPLES, 71 ME. 316.**Liability of innkeeper.**

Cited in notes in 69 A. D. 224, on kind of goods for which innkeeper is liable;

99 A. S. R. 584, on difference between boarders and guests within rule as to innkeeper's liability for loss of property of guests; 12 L.R.A. 382, on liability of innkeeper for goods stolen from guest; 13 E. R. C. 129, on liability of innkeeper for goods brought to inn.

—Enterprises not strictly pertinent to inn.

Cited in *Walpert v. Bohan*, 126 Ga. 532, 115 A. S. R. 114, 6 L.R.A. (N.S.) 828, 55 S. E. 181, 8 A. & E. Ann. Cas. 89, holding innkeeper maintaining a bathhouse on sea shore not liable as such for loss of property of parties making use of bath house; *Amey v. Winchester*, 68 N. H. 447, 73 A. S. R. 614, 39 L.R.A. 760, 39 Atl. 487, holding innkeeper not liable for loss of hats of parties attending by invitation a banquet given at the inn by a club of which they were not members.

Who are guests of inn.

Cited in note in 62 A. D. 590, as to who are not guests of inn.

36 AM. REP. 320, McCARTHY v. SECOND PARISH OF PORTLAND, 71 ME. 318.

Independent contractors.

Cited in *Bennett v. Truebody*, 66 Cal. 509, 56 A. R. 117, 6 Pac. 329, holding a plumber employed to repair water pipes in house is an independant contractor; *State v. Emerson*, 72 Me. 455, holding a person operating a shingle machine to manufacture shingles by the thousand for the owners of the mill is a contractor and not an employee; *Anderson v. Tug River Coal & Coke Co.* 59 W. Va. 301, 53 S. E. 713, holding party contracting with mine owner to procure suitable timbers for use in their mine, they exercising no authority over him is an independant contractor; *Mayhew v. Sullivan Min. Co.* 76 Me. 100, holding same in case of one who contracts to break down rock and ore for a certain distance at certain price per foot; *Arasmith v. Temple*, 11 Ill. App. 39, on whether party to be regarded as contractor or employee; *Keyes v. Second Baptist Church*, 99 Me. 308, 59 Atl. 446; *Bibb v. Norfolk & W. R. Co.* 87 Va. 711, 14 S. E. 163,—considering when party an independent contractor; *Caldwell v. Atlantic, B. & A. R. Co.* 161 Ala. 395, 49 So. 674, holding that independent contractor is one who renders service to another in independent occupation, representing will of employer only as to result of work and not as to means.

Cited in notes in 65 L.R.A. 448, on distinction between independent contractors and servants or agents; 65 L.R.A. 458, on testing character of contract as that of an independent contractor by existence or absence of right of control on employer's part; 65 L.R.A. 467, on inference of independence of contracts by master tradesmen and craftsmen.

Liability of employer for acts of independent contractor.

Cited in *Boardman v. Creighton*, 95 Me. 154, 49 Atl. 663, holding owner of a quarry not liable for the death of a laborer, employed by independent contractor, through the negligence of the latter; *Leavitt v. Bangor & A. R. Co.* 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998, on employer as not liable for acts of independent contractor.

Cited in reference note in 42 A. R. 572, on liability of owner of dam for injury to another by contractor employed to deliver logs.

Cited in notes in 76 A. S. R. 389, on employer's nonliability where independent contractor has control; 9 L.R.A. 604, on railroad's liability for independent

contractor's negligence; 65 L.R.A. 649, on nonliability of employer for negligence of independent contractor in repairing or reconstruction of buildings.

Relation of master and servant.

Cited in *Holmes v. Halde*, 74 Me. 28, 43 A. R. 567, on when relation of master and servant may be said to exist.

Cited in reference note in 4 A. S. R. 264, on test as to whether relation of master and servant or contractor and contractee exists.

Cited in note in 22 A. S. R. 463, on when relation of master and servant exists.

36 AM. REP. 325, PRINCE v. SKILLIN, 71 ME. 361.

Power in courts to determine title to office.

Cited in *Re Speakership*, 15 Colo. 520, 11 L.R.A. 241, 25 Pac. 707, on right of court to pass on claims of contestants for office.

—As between contesting legislative bodies.

Cited in *Re Gunn*, 50 Kan. 155, 19 L.R.A. 519, 32 Pac. 470, on courts as having power to determine which of contesting bodies is the house of representatives; *State ex rel. Werts v. Rogers*, 56 N. J. L. 480, 23 L.R.A. 354, 29 Atl. 173 (dissenting opinion), on power of court to try the question of determining which of two contending bodies is the senate of the state.

Legislative control over elections.

Cited in *Eastman v. McCarten*, 70 N. H. 23, 45 Atl. 1081, holding an act of legislature legalizing and confirming votes and proceedings of an election, is valid.

Nature of right in an office.

Cited in *Goud v. Portland*, 96 Me. 125, 51 Atl. 820, holding an incumbent of a public office could not recover any salary that was not established by the creating body; *Mial v. Ellington*, 134 N. C. 131, 65 L.R.A. 697, 46 S. E. 961, holding an officer appointed for a definite time to a legislative office has no vested property therein of which the legislature cannot deprive him; *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890; *Moore v. Strickling*, 46 W. Va. 515, 50 L.R.A. 279, 33 S. E. 274,—on interest of an official in the public office he fills.

Cited in notes in 63 A. S. R. 185, on sovereign power as source of office; 8 E. R. C. 267, on public office as property.

Creation of office.

Cited in note in 63 A. S. R. 185, 186, as to how office is created.

Legislative power over office and incidents thereof.

Cited in *Lane v. Kolb*, 92 Ala. 636, 9 So. 873; *Harwood v. Perrin*, 7 Ariz. 114, 60 Pac. 891,—on right to office as subject to the will of the legislature; *State ex rel. Crow v. Evans*, 166 Mo. 347, 66 S. W. 355, on statute changing the term and compensation of officers as not impairing a vested right; *State ex rel. Maxwell v. Crumbaugh*, 26 Tex. Civ. App. 521, 63 S. W. 925, holding an office not property within meaning of constitutional provision against depriving persons of property without due process of law.

Limitations on powers and authority of canvassing board.

Cited in *Robertson v. State*, 109 Ind. 79, 10 N. E. 582, on force of decisions of boards of canvassers; *Rounds v. Smart*, 71 Me. 380; *State ex rel. Benton v.*

Elder, 31 Neb. 169, 10 L.R.A. 796, 47 N. W. 710,—on canvassing boards as limited and restricted to what appears by the return.

Election to office.

Cited in *Atty. Gen. v. Colburn*, 62 N. H. 70; holding party entitled to an office, for whom the evidence shows a majority of the legal votes were intended.

Cited in note in 84 A. D. 268, on judicial proceedings to determine right to elective office as raising question of who received highest number of votes.

Misconduct in conducting the election as affecting the votes of the electors.

Cited in *Atty. Gen. ex rel. Pearson v. Folsom*, 69 N. H. 556, 45 Atl. 410, on right to set election aside because of illegal votes being cast; *Fowler v. State*, 68 Tex. 30, 3 S. W. 255, on misconduct of election officials as affecting the votes of the electors.

Cited in note in 83 A. D. 750, on conduct of elections.

Proceedings to determine who entitled to office.

Cited in *French v. Cowan*, 79 Me. 426, 10 Atl. 335, holding quo warranto the appropriate remedy to try title to public office as against one in possession under color of title; *State ex rel. Ellis v. Cuyahoga County*, 70 Ohio St. 341, 71 N. E. 717 (dissenting opinion), on use of quo warranto proceeding to determine the right of rival boards to exercise official functions; *Albright v. Territory*, 13 N. M. 64, 79 Pac. 719, 11 A. & E. Ann. Cas. 1165, holding that mandamus is remedy of person entitled to office if not voluntarily admitted to possession after ouster of incumbent.

Cited in notes in 31 L.R.A. 344, on mandamus to compel surrender of office; 31 L.R.A. 356, on special provision as to mandamus to compel surrender of office.

Judicial notice.

Cited in reference note in 93 A. D. 572, on extent of judicial notice.

Cited in note in 124 A. S. R. 35, on judicial notice of historical facts.

Statutory construction.

Cited in *Hartford F. Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42, considering how courts are to construe the legislative intent.

36 AM. REP. 334, FIRST NAT. BANK v. GRANT, 71 ME. 374.

Liability of maker and indorsers of accommodation note.

Cited in *Miller v. Larned*, 103 Ill. 562, on maker of an accommodation note as having no defense against a bona fide holder for value.

Cited in reference note in 14 A. S. R. 797, on accommodation indorsers.

Cited in notes in 31 A. S. R. 745, on rights and liabilities of makers and indorsers of accommodation paper; 46 L.R.A. 772, on defense that negotiable paper transferred after maturity was accommodation paper.

36 AM. REP. 336, MADDOX v. BROWN, 71 ME. 432.

Parent's liability for acts of child.

Cited in *Schaefer v. Osterbrink*, 67 Wis. 495, 58 A. R. 875, 30 N. W. 922, holding parent liable for injury resulting from negligent acts of minor son where such son was acting for father at the time; *File v. Unger*, 27 Ont. App. 469, holding father not liable for injury caused by negligent driving of father's team by son, though latter had former's implied consent.

Cited in reference note in 26 A. S. R. 286, on liability of parent for torts of minor child.

Cited in notes in 74 A. D. 778; 50 A. R. 386; 74 A. S. R. 804,—on parent's liability for acts of his children; 10 L.R.A.(N.S.) 935, on parent's liability at common law for torts of minor child; 10 L.R.A.(N.S.) 941, on parent's liability at common law for torts of minor child occupying relation of servant.

Distinguished in *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533, holding that prima facie case of master and servant is made out where it is shown son was running automobile by authority of father.

Liability for acts of servant or agent.

Cited in reference note in 36 A. R. 404, as to when servant is acting within scope of his employment so as to render master liable for his torts.

Cited in notes in 35 A. D. 197, on liability of master for torts of servants deviating from master's business; 54 A. S. R. 81, on master's liability for acts of servants while deviating from employment; 88 A. S. R. 787, on principal's liability in tort for acts of agent within scope of employment; 88 A. S. R. 792, on necessity that unauthorized act of agent be in execution of employment to hold principal liable.

— Of servant in use of vehicle.

Cited in *Evans v. Dyke Automobile Supply Co.* 121 Mo. App. 266, 101 S. W. 1132, holding bailee of an automobile not liable for its destruction by negligent act of his servant who took it without his knowledge or consent to entertain his friends; *Jones v. Hoge*, 47 Wash. 663, 125 A. S. R. 915, 14 L.R.A.(N.S.) 216, 92 Pac. 433, holding master not liable to one injured by the negligent driving of an automobile by his chauffeur, without his knowledge or consent on a personal errand for servant.

Cited in notes in 40 A. R. 229, on master's liability for consequences of servant's unauthorized use of team and the like; 27 L.R.A. 179, on master's liability for acts of servant in charge of horse taken without master's knowledge or assent.

36 AM. REP. 338, CARTER v. MANUFACTURERS' NAT. BANK, 71 ME. 448.

Interest of executor or administrator in property of decedent.

Cited in *Pond v. Pond*, 79 Vt. 352, 8 L.R.A.(N.S.) 212, 65 Atl. 97, on title of executor in personal property of testate; *Johnson v. Johnson*, 81 Me. 202, 16 Atl. 661, holding a residuary legatee of a solvent testator not a party in interest to an action brought by the executor.

Cited in note in 52 A. S. R. 119, on statutory relations of executors and administrators to estates of their decedents.

Powers of disposition vested in executor or administrator.

Cited in *Peck v. Providence Gas Co.* 17 R. I. 275, 15 L.R.A. 643, 21 Atl. 543, holding a corporation is justified in permitting an executor, with power to sell and reinvest, to transfer stocks upon sales by him made, although time for settlement of estate has passed; *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230, holding executrix under power to sell certain realty to pay debts might mortgage the realty for the same purpose; *Boeger v. Langenberg*, 42 Mo. App. 7, on sale or pledge of assets in payment or as security for executor's debts as not being valid.

Cited in reference notes in 37 A. R. 694, on pledge of estate securities for

executor's individual debt; 72 A. S. R. 865, on pledge of assets by executors and administrators; 82 A. S. R. 825, on executor's power to pledge personal assets.

Cited in notes in 78 A. S. R. 184, 185, on power of executors to mortgage or pledge assets; 78 A. S. R. 192, on power of executors to sell personal assets; 2 E. R. C. 227, on applying goods of testator in hands of personal representative to latter's debts.

Protection of third persons dealing with administrator or executor.

Cited in *Day v. Brenton*, 102 Iowa, 482, 63 A. S. R. 460, 71 N. W. 538, holding a bona fide purchaser in good faith by a deed of trust would be protected as against the cestui que trust for the fraud of trustee; *Lyman v. National Bank*, 181 Mass. 437, 63 N. E. 923, holding bona fide pledgee of assets of estate not affected by fact that executor unlawfully applied the proceeds to his own use; *Jelke v. Goldsmith*, 52 Ohio St. 499, 49 A. S. R. 730, 40 N. E. 167, holding party purchasing real estate from a demonstrator under order of court would be protected, he having no notice that administrator misapplied proceeds of sale.

Personal liability of administrator.

Cited in reference note in 38 A. R. 661, on administrator's liability on personal note for money borrowed for estate.

36 AM. REP. 343, BERNIER v. CABOT MFG. CO. 71 ME. 506.

Oral contract not to be performed within year.

Cited in *White v. Fitts*, 102 Me. 240, 120 A. S. R. 483, 15 L.R.A.(N.S.) 313, 66 Atl. 533, holding where no time is set for the completion of oral contract but it may be gathered from its terms that it is not to be performed within a year from the making of, it is within the statute of frauds; *Biest v. Ver Steeg Shoe Co.* 97 Mo. App. 137, 70 S. W. 1081, holding oral contract to render services for another for more than a year from its date is within statute notwithstanding either party may terminate before that time; *Farwell v. Tillson*, 76 Me. 227, on contract not to be performed within the year as within the statute of frauds.

Cited in reference notes in 1 A. S. R. 469; 24 A. S. R. 672,—on contracts not to be performed within a year as within statute of frauds.

Cited in notes in 93 A. D. 89, on what contracts are within statute of frauds because not to be performed within one year; 3 L.R.A. 338, on applicability of statute of frauds to contract to be performed on contingency after expiration of year.

Right to plead statute of frauds as defense.

Cited in *Freeman v. Foss*, 145 Mass. 361, 1 A. S. R. 467, 14 N. E. 141, holding an oral contract whereby plaintiff agreed to work for defendant for two years could not be set up by defendant in action by plaintiff before expiration of that time, on quantum meruit for his services.

36 AM. REP. 345, CHAFEE v. FOURTH NAT. BANK, 71 ME. 514.

Waiver of objection to assignment for creditors by assent or proving claims.

Cited in *Lacy v. Gunn*, 144 Cal. 511, 78 Pac. 30, holding that in absence of statute creditor waives objection to validity of assignment for creditors by proving and filing claims thereunder; *Aberle v. Schlichenmeir*, 51 Minn. 1, 52 N. W. 974, denying validity of attachment by creditor assenting to voidable as-

signment; *Pulsifer v. Waterman*, 73 Me. 233, holding receipt of dividend of insolvent estate no abandonment of remedy, under statute, against fraudulent grantee; *Marr v. Washburn & M. Mfg. Co.* 167 Mass. 35, 44 N. E. 1062, discharging attachment of creditor signing agreement for transfer of all of debtor's property to trustees for payment of debts.

—By nonresident creditor.

Cited in *Rosenheim v. Morrow*, 37 Fla. 183, 20 So. 243, denying right of action by nonresident creditor assenting to, and accepting dividends from, domestic assignment; *Greene v. A. & W. Sprague Mfg. Co.* 52 Conn. 330, denying right of assenting Rhode Island creditor for consideration to question validity of trustee deed for benefit of creditors valid in Rhode Island; *Perley v. Mason*, 64 N. H. 6, 3 Atl. 629, denying validity of attachment of foreign creditor proving portion of claims against debtor in insolvency, and voting for assignee; *Hawkins v. Ireland*, 64 Minn. 339, 58 A. S. R. 534, 67 N. W. 73, restraining foreign creditor from prosecuting action for its exclusive benefit, after suit to set aside bankrupt's fraudulent deed brought at its request.

Effect of foreign assignment for creditors.

Cited in *Segnitz v. Gardon City Bkg. & T. Co.* 107 Wis. 171, 81 A. S. R. 830, 50 L.R.A. 327, 83 N. W. 327, holding that assignment for creditors under a statute providing for discharge of the assignor, does not carry title to assignor's personal property in another state; *Harvey v. Edens*, 69 Tex. 420, 6 S. W. 306, holding voluntary assignment of Texas lands, executed in New York, valid as between parties, though it would be void as against creditors residing in Texas.

Cited in reference note in 37 A. R. 360, on priority between assignment for creditors made in one state and subsequent attachment in another state where property situated.

Cited in notes in 78 A. D. 596; 97 A. D. 679,—on extraterritorial effect of assignments for benefit of creditors; 55 A. R. 136, on extraterritorial effect of transfers of personal property; 23 L.R.A. 46, on transfer of real property out of state by bankruptcy or insolvency proceedings or assignment for creditors; 65 L.R.A. 356, on transfer of property out of the state by foreign assignment not opposed to *lex rei sitæ et fori*; 23 L.R.A. 37, on discrimination in favor of residents in voluntary assignment for creditors.

—To prevent or dissolve attachment.

Cited in *Moore v. Land, Title & T. Co.* 82 Md. 288, 33 Atl. 641, denying right of resident creditor to attach local choses in action, included invalid Pennsylvania assignment; *Happy v. Prickett*, 24 Wash. 290, 64 Pac. 528, holding assignment, legally made in Illinois, of property in Washington, subject to attachment of resident creditor; *Lipman v. Link*, 20 Ill. App. 359, holding assignment, legally made in New York, where all parties resided, operative as against one of the creditors, attaching property in Illinois; *Heyer v. Alexander*, 105 Ill. 385, holding property in Illinois included in Missouri assignment subject to attachment of resident creditors; *Schroder v. Tompkins*, 58 Fed. 672, denying in Indiana, right to attach, by foreign creditors, goods in branch store there, belonging to assigning Ohio firm, one member of which was resident; *May v. First Nat. Bank*, 122 Ill. 551, 13 N. E. 806, sustaining validity of assignment legally made in New York as against Massachusetts creditor attaching property in Illinois; *Barnett v. Kinney*, 147 U. S. 476, 37 L. ed. 247, 13 Sup. Ct. Rep. 403, denying right of foreign creditor to attach property in Idaho, included in assignment legally made in Utah; *Williams v. Kemper, H. & McD. Dry Goods*

Co. 4 Okla. 145, 43 Pac. 1148, sustaining validity of assignment made legally in Indian Territory, conveying property in Oklahoma, where void, against attaching Missouri creditor; *Birdseye v. Underhill*, 82 Ga. 142, 14 A. S. R. 142, 2 L.R.A. 99, 7 S. E. 863, sustaining validity of legal New York assignment, against attachment of nonresident on property in state although irregular under Georgia statute; *Woodward v. Brooks*, 128 Ill. 222, 15 A. S. R. 104, 3 L.R.A. 702, 20 N. E. 685, sustaining validity of assignee's claim under valid foreign assignment, not conflicting with local laws against foreign attaching creditor of same state; *Weider v. Maddox*, 66 Tex. 372, 59 A. R. 617, 1 S. W. 168, sustaining validity of foreign assignment valid when made as against attachment in state where the property is situated; *Belfast Sav. Bank v. Stowe*, 34 C. C. A. 229, 63 U. S. App. 14, 92 Fed. 100 (affirming 92 Fed. 90), holding that assignment in Massachusetts takes precedence in Maine over attachment of nonassenting Maine creditor; *Owen v. Roberts*, 81 Me. 439, 4 L.R.A. 229, 17 Atl. 403, holding attachment on goods of resident debtor by foreign creditor dissolved by assignment in insolvency within four months thereafter.

Rights of nonresident creditors of insolvent generally.

Cited in *Corn Exch. Bank v. Rockwell*, 58 Ill. App. 506, allowing New York creditors of corporation declared insolvent there to share equally with residents in distribution of property in Illinois; *Hammond Beef & Provision Co. v. Best*, 91 Me. 431, 42 L.R.A. 528, 40 Atl. 338, holding nonparticipating foreign corporation, not bound by discharge of debtor in state insolvency proceeding; *Ireland v. Globe Mill & Reduction Co.* 19 R. I. 180, 61 A. S. R. 756, 29 L.R.A. 429, 32 Atl. 921, denying right to attach nonresident's stock of foreign corporation in state where it has its officers and does business as the only legal residence of the corporation is in the sovereignty creating it.

Distinguished in *Catlin v. Wilcox Silver Plate Co.* 123 Ind. 477, 18 A. S. R. 338, 8 L.R.A. 62, 24 N. E. 250, upholding validity of Connecticut attachment on property of Illinois debtor, located in Indiana, against receiver claiming under Illinois creditors.

Acquirement of jurisdiction of foreign corporations.

Cited in *Cleveland Builders' Supply Co. v. Hoosier Cement Co.* 10 Pa. Dist. R. 491, 25 Pa. Co. Ct. 341, 31 Pittsb. L. J. N. S. 430, holding foreign corporation which has no office or agency in state and has no business within, not subject to judicial process therein by reason of fact that president of corporation has a permanent domicile therein.

What constitutes a mortgage.

Cited in *Cornell v. Conine-Easton Lumber Co.* 9 Colo. App. 225, 47 Pac. 912, holding that trust deeds are mortgages with power of sale; *Austin v. Sprague Mfg. Co.* 14 R. I. 464, holding deed of corporation to secure debt feasible on payment at fixed time, with power of sale and equity of redemption, a valid mortgage.

36 AM. REP. 352, AMES v. JORDAN, 71 ME. 540.

Relation of master and servant.

Cited in *Swackhamer v. Johnson*, 39 Or. 383, 54 L.R.A. 625, 65 Pac. 91, holding employment agent not liable for damage done by laborers hired by him to a promoter to be used in constructing a railroad, the agent having no control over them in any way.

Cited in notes in 22 A. S. R. 461, on when relation of master and servant

exists; 54 A. S. R. 75, on true test of master's liability for servant's acts; 37 L.R.A. 81, on position as master of servants delegated to perform work contracted for by their master; 13 L.R.A.(N.S.) 1125, on who is responsible for acts of driver furnished with a hired vehicle.

Master's liability for servant's negligence.

Cited in reference note in 20 A. S. R. 403, on master's liability for servant's negligence or incompetency.

Cited in note in 8 L.R.A. 464, on liability of master for injuries by negligence of servant.

36 AM. REP. 353, WHITE v. CARR, 71 ME. 555.

Advice of counsel as defense in action for malicious prosecution.

Cited in *Steed v. Knowles*, 79 Ala. 446; *Connelly v. White*, 122 Iowa, 391, 98 N. W. 144; *Watt v. Corey*, 76 Me. 87; *Monaghan v. Cox*, 155 Mass. 487, 31 A. S. R. 555, 30 N. E. 467,—on fact that part acted on advice of counsel as a defense in action of malicious prosecution.

Cited in notes in 26 A. S. R. 144, 145; 18 L.R.A.(N.S.) 51, 71; 16 E. R. C. 756; 25 L. ed. U. S. 117,—on advice of counsel as defense in action for malicious prosecution.

— Biased or interested counsel.

Cited in *Merchant v. Pielke*, 10 N. D. 48, 84 N. W. 574; *Adkin v. Pillen*, 136 Mich. 682, 100 N. W. 176,—holding the advice of an attorney who is directly interested in the subject matter of the controversy is no defense to an action for malicious prosecution; *Perrenoud v. Helm*, 65 Neb. 77, 90 N. W. 980, holding in action for malicious prosecution court erred in refusing an instruction on fact that attorney to whom defendant went for advice was not unbiased and that defendant knew it.

36 AM. REP. 355, LAZEAR v. NATIONAL UNION BANK, 52 MD. 78.

Who may set up usury as defense.

Cited in *Importers' & T. Nat. Bank v. Littell*, 47 N. J. L. 233, holding maker of note could not set up as a defense that plaintiff discounted the note for payee at a rate greater than the legal interest.

Right to recover payments made on usurious contract.

Cited in *Lealos v. Union Nat. Bank*, 9 N. D. 60, 81 N. W. 56, holding one of two joint makers of a note cannot recover for usury where the other maker paid the note.

Right of national bank to purchase negotiable paper.

Cited in *First Nat. Bank v. Sherburne*, 14 Ill. App. 566; *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909,—on authority of national bank to purchase promissory notes; *Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88, on whether act of bank amounted to a purchase of or a discount of notes.

Cited in note in 16 L.R.A. 224, on discount of bill or note as including buying and selling.

— Right to set up ultra vires.

Distinguished in *United German Bank v. Katz*, 57 Md. 128, holding indorser of a note could not set up as a defense in action on by bank that the bank exceeded its powers in discounting it.

Disapproved in *First Nat. Bank v. Smith*, 8 S. D. 7, 65 N. W. 437, holding

want of authority in a national bank to purchase a negotiable note cannot be used by the maker as a defense in action upon it.

Usury by national banks.

Cited in notes in 56 L.R.A. 679, on extent of invalidity generally from charging or taking of usury by national bank; 56 L.R.A. 693, on who may maintain action against national bank for taking usury where interest is actually paid; 56 L.R.A. 705, on prerequisites to suit against national bank for twice amount of illegal interest paid to it; 105 A. S. R. 508; 23 L. ed. U. S. 197,—on usury by national banks.

Construction of usury statutes.

Cited in *McBroon v. Scottish Mortg. & Land Invest. Co.* 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852, on the construction of statutes regulating usury.

Admissibility of parol evidence.

Cited in *Slingluff v. Andrew Volk Builders' Supply Co.* 89 Md. 557, 43 Atl. 759, holding parol not admissible to establish some of terms of a guaranty; *Scott v. Baltimore & O. R. Co.* 93 Md. 475, 49 Atl. 327, holding conversation evincing the intentions of the parties not admissible where there is a written contract; *Horner v. Beasley*, 105 Md. 193, 65 Atl. 820, holding parol evidence inadmissible to show terms of contract where there is a written contract; *Welz v. Rhodius*, 87 Ind. 1, 44 A. R. 747; *Sentman v. Gamble*, 69 Md. 293, 14 Atl. 673 (dissenting opinion),—on inadmissibility of parol to vary a written contract.

Cited in note in 6 L.R.A. 42, on admissibility of parol evidence to explain patent ambiguity.

36 AM. REP. 364, *STONEBREAKER v. ZOLLIKOFFER*, 52 MD. 154.

Interest of life tenant in timber or gravel.

Cited in *Keniston v. Gorrell*, 74 N. H. 53, 64 Atl. 1101, holding life tenant entitled to estate for life in proceeds derived from the sale of timber on the estate, severed without her fault; *Potomac Dredging Co. v. Smoot*, 108 Md. 54, 69 Atl. 507, holding life tenant of land bounding on watercourse not authorized to commit waste by carrying away gravel from shore.

Cited in reference note in 21 A. S. R. 934, as to whom income belongs.

Cited in note in 106 A. S. R. 307, on character of timber as affecting right to estover.

Construction of will.

Cited in *Abell v. Abell*, 75 Md. 44, 23 Atl. 71, on the construction of the terms of a will.

How remainders are to be construed.

Cited in *Bunting v. Speck*, 41 Kan. 424, 3 L.R.A. 690, 21 Pac. 288, holding no remainder will be construed to be contingent which may consistently with the words used and the intention expressed be deemed vested; *Gindrat v. Western R. Co.* 96 Ala. 162, 19 L.R.A. 839, 11 So. 372, distinguishing between vested and contingent remainders.

Cited in note in 29 L.R.A. (N.S.) 1124, 1163, on rule in *Shelley's case*.

Construction of word "children."

Cited in reference note in 63 A. D. 551, on construction of word "children" in deed.

Cited in note in 12 L.R.A.(N.S.) 294, on "children" as a word of purchase or limitation where children's estate is in remainder.

36 AM. REP. 366, JONES v. SYER, 52 MD. 211.

Validity of assignment for creditor tending to delay liquidation.

Cited in *Kansas City Packing Co. v. Hoover*, 1 App. D. C. 268, holding assignment void which by its terms operated to hinder and delay creditors; *Bernard v. Barney Myroleum Co.* 147 Mass. 356, 17 N. E. 887, holding an assignment to a creditor fraudulent to the others where the object was not to secure a debt but prevent the attachment of the property by other creditors.

Cited in reference notes in 69 A. D. 195, on validity of assignment for benefit of creditors giving discretionary power to trustee to sell on credit; 42 A. R. 354, on validity of assignment for benefit of creditors containing provision that assignee may do whatever best.

Validity of deed of trust.

Cited in *DeWolf v. Sprague Mfg. Co.* 49 Conn. 282, holding on facts deed of trust void as to nonassenting creditors; *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L.R.A. 252, 75 N. W. 911; *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203,—on when court will construe deed of trust void or fraudulent as to creditors.

36 AM. REP. 367, MURRAY v. McSHANE, 52 MD. 217.

Liability for injury to party rightfully in street.

Cited in *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L.R.A. 215, 18 S. E. 782, on right of traveler on street or highway to recover for injuries received through fault of another; *Havre De Grace v. Fletcher*, 112 Md. 562, 77 Atl. 114, holding city liable for injury to child on street caused by fall of barrels negligently permitted to be stacked alongside street.

Cited in reference notes in 42 A. R. 601, on liability for injury to person traveling in highway; 50 A. R. 743, on liability of city for injury from materials it permits to be left in the street.

Cited in notes in 59 A. D. 737, on liability of owner of premises for injuries and nuisances to passers-by; 20 L.R.A.(N.S.) 751, on liability of municipality for defects or obstructions in streets.

Distinguished in *Walker v. Marye*, 94 Md. 762, 51 Atl. 1054, holding abutter not liable where plaintiff injured by falling over water pipe projecting from defendant's premises, but which he did not put there or have any control over; *McIntire v. Roberts*, 149 Mass. 450, 14 A. S. R. 432, 4 L.R.A. 519, 22 N. E. 13, holding occupier of building not liable to traveler on street who was pushed through an unguarded elevator well near street; *Jackson v. Greenville*, 72 Miss. 220, 48 A. S. R. 553, 27 L.R.A. 527, 16 So. 382, holding adult merely using sidewalk near his boarding house for sole purpose of playing with a dog could not recover for injury received because of defects.

—Injury by falling objects.

Cited in *Sinkovitz v. Peters Land Co.* 5 Ga. App. 788, 64 S. E. 93, holding that person walking on street may recover from owner for injury caused by fall of glass from building; *Mitchell v. Brady*, 124 Ky. 411, 124 A. S. R. 406, 13 L.R.A.(N.S.) 751, 99 S. W. 266, holding owner of building liable for death of traveler in street caused by being struck by an iron water pipe falling from wall of building, its fastenings having become defective; *Walter v. Baltimore*

Electric Co. 109 Md. 513, 22 L.R.A.(N.S.) 1178, 71 Atl. 953, holding that fall of wire of electric lighting company strung over street, is *prima facie* evidence of negligence of company; Waller v. Ross, 100 Minn. 7, 117 A. S. R. 661, 12 L.R.A.(N.S.) 721, 110 N. W. 252, 10 A. & E. Ann. Cas. 715, holding party walking along sidewalk might recover for injuries received by the falling of an awning on her.

Cited in reference notes in 54 A. R. 772, on tenant's liability after surrender for fall of fence near sidewalk; 10 A. S. R. 40, on liability of owner for injuries from dangerous walls and buildings; 123 A. S. R. 571, on duty and liability of landowner to adjoining proprietor as to falling tools, bricks, and materials.

Cited in notes in 12 L.R.A. 190, on liability of abutting property owner for injuries caused by materials falling in the street; 34 L.R.A. 559, on personal liability for injury to person in street by falling walls or building.

Distinguished in *Strasburger v. Vogel*, 103 Md. 85, 63 Atl. 202, holding plaintiff could not recover for injuries received by being struck by a brick falling from defendant's chimney while he was passing street, no neglect being shown on part of defendant to keep chimney in repair.

Duty devolving on owner of premises to keep in reasonably safe condition.

Cited in *Rollestone v. Cassirer*, 3 Ga. App. 161, 59 S. E. 442, on duty owed by owner of premises to licensees to keep in a reasonably safe condition.

Cited in reference note in 1 A. S. R. 490, on liability of landowner for injuries to persons coming on premises.

Loitering in public way as contributory negligence.

Cited in *Whitewright v. Taylor*, 23 Tex. Civ. App. 486, 57 S. W. 311, holding party injured because of defective bridge over which he was passing did not forfeit protection from injury by mere fact that he stopped and leaned on railing of to converse with another person; *Kaples v. Orth*, 61 Wis. 531, 21 N. W. 633, holding mere fact that injured party sat down to rest on steps leading from street did not necessarily render her guilty of contributory negligence.

36 AM. REP. 371, HISS v. BALTIMORE & H. PASS. R. CO. 52 MD. 242.

Additional servitudes on fee of country highway.

Cited in *Green v. City & Suburban R. Co.* 78 Md. 294, 44 A. S. R. 288, 28 Atl. 626; *Lonaconing Midland & F. R. Co. v. Consol. Coal Co.* 95 Md. 630, 53 Atl. 420,—holding the construction of electric railroad along country road might be authorized without providing for compensation; *Baltimore County Water & Electric Co. v. Dubreuil*, 105 Md. 424, 9 L.R.A.(N.S.) 684, 66 Atl. 439, holding the laying of water mains in a country highway the fee to which is in the abutting land owners could not be authorized without making compensation to owner.

— In city streets.

Cited in *Dulaney v. United R. & Electric Co.* 104 Md. 423, 65 Atl. 45, holding legislature might grant the right to lay street railway in city street without making compensation to adjoining owners.

Cited in reference notes in 14 A. S. R. 569; 41 A. R. 290,—on right of lot owner to compensation for use of street by street railway; 1 A. S. R. 319, on laying horse railroad track in street as new servitude.

Cited in notes in 4 A. S. R. 402, on damages for establishing railroad on highway where fee of highway is in the public; 4 A. S. R. 403, on damages for establishing railroad on highway where fee of street is in abutting landowner; 25 A. S. R. 478, on right to construct railroad in street without compensation to abutting landowners; 4 L.R.A. 624, on use of public streets for horse railways; 17 L.R.A. 477, on street railways as additional burden to adjoining property.

Legislative authority over streets.

Cited in note in 4 L.R.A. 623, on sovereign authority of legislature over city streets.

Taking of property for public use.

Cited in note in 16 A. S. R. 613, on what is a taking of property for public use.

36 AM. REP. 375, FRANKLIN BANK v. LYNCH, 52 MD. 270.

Authority to draw as amounting to acceptance of bill.

Cited in *First Nat. Bank v. Clark*, 61 Md. 400, 48 A. R. 114, on telegram authorizing the drawing of draft on sender of as amounting to an acceptance of draft; *Merchants Bank v. Winter*, Newfoundl. Rep. (1897-1903) 30; *Bank of Montreal v. Thomas*, 16 Ont. Rep. 503,—holding that telegram authorizing party to draw, no time being mentioned, will be presumed to mean at sight.

Cited in reference notes in 38 A. R. 2, on acceptance of draft by telegram; 14 A. S. R. 257, on person authorizing and subsequently countermanding draft by telegram as acceptor.

Cited in note in 4 E. R. C. 242, on acceptance of bill of exchange.

Right to maintain action for breach of promise to indorse bill or note.

Cited in *Smith v. Easton*, 54 Md. 138, 39 A. R. 355, holding an action will lie for a breach of promise to indorse a note.

Authority to draw bill as enuring to holder of it.

Cited in *Brown v. Ambler*, 66 Md. 391, 7 Atl. 903, holding a letter authorizing a party to draw a bill of lading would enure to every bona fide holder of the draft.

36 AM. REP. 380, LANGE v. WAGNER, 52 MD. 310.

Speculative profits as an element of damages.

Cited in *Gossage v. Philadelphia, B. & W. R. Co.* 101 Md. 698, 61 Atl. 692, holding plaintiff in action for destruction of vessel could not recover profits that he might have made as damages.

Necessity that damages be the natural consequences of the wrongful act.

Cited in *Hutchins v. Munn*, 28 App. D. C. 271, on right to recover damages which is the natural consequences of the wrongful act.

Cited in notes in 47 A. R. 381, on proximate cause; 41 A. R. 53, as to when injury is too remote to recover therefor.

Damages for injury to animals.

Cited in note in 36 A. S. R. 831, on liability for deterioration in value of animals.

Duty to avoid danger.

Cited in *Carroll Springs Distilling Co. v. Schnepfe*, 111 Md. 420, 74 Atl. 823,

holding party bound to use reasonable exertion to avoid damage from another's wrongful act.

Determination of proximate and remote cause.

Cited in note in 36 A. S. R. 857, on functions of court and jury in determination of proximate and remote cause.

36 AM. REP. 384, CULBERTSON v. SMITH, 52 MD. 628.

Sufficiency of consideration for contract.

Cited in note in 60 A. S. R. 434, on necessity and sufficiency of expression of consideration of contract.

— Of guaranty.

Cited in *Highland v. Dresser*, 35 Minn. 345, 29 N. W. 55, holding a consideration need not be expressed in guaranty distinct from that expressed in principal contract where guaranty is embodied in the principal contract.

Status of endorser of sealed bill.

Cited in *Seigman v. Hoffacker*, 57 Md. 321, holding the indorsement of a sealed bill does not make the indorser a drawer.

Liability of endorser before delivery.

Cited in note in 97 A. S. R. 985, on liability as maker or guarantor by indorsement of non-negotiable instrument before delivery.

36 AM. REP. 389, ROSE v. COFFIELD, 53 MD. 18.

Sufficiency of notice of dissolution of a partnership.

Cited in *Solomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336, on publication in a newspaper as sufficient notice of the dissolution of a partnership.

Cited in reference note in 58 A. D. 174, on actual notice of dissolution of partnership required as to customers in order to exonerate retiring partner.

Cited in notes in 40 A. S. R. 573, on notice to terminate liability after dissolution of firm; 4 L.R.A.(N.S.) 801, on necessity of actual notice of retirement of member of firm to relieve retiring member from liability on obligation renewed after retirement.

Dissolution of partnership as affecting rights of third parties.

Cited in *Easton v. George Wostenholm & Son*, 69 L.R.A. 973, 69 C. C. A. 662, 137 Fed. 524, on dissolution of partnership as affecting rights of third parties.

36 AM. REP. 395, BALTIMORE v. O'DONNELL, 53 MD. 110.

Liability of city for defective condition of streets and highways.

Cited in *Luce v. Holloway*, 156 Cal. 162, 103 Pac. 886; *Baltimore v. State*, 92 C. C. A. 335, 166 Fed. 641,—holding city bound to keep streets in reasonably safe condition, and to place barrier or safeguards around dangerous places.

Cited in notes in 17 A. S. R. 737, on municipal liability for injury by excavations or obstructions in street; 20 L.R.A.(N.S.) 547, on liability of municipality for defects or obstructions in streets.

— As affected by independent contractor's neglect.

Cited in *Jacksonville v. Drew*, 19 Fla. 106, 45 A. R. 5, holding city not relieved from liability for injury resulting from failure to keep bridge in repair by fact that it had entered into contract with another to make such repairs; *Baltimore v. Beck*, 96 Md. 183, 53 Atl. 976, holding city liable for injury to

plaintiff through failure to guard obstruction in streets with a light, although a duty rested on light company by contract to light streets; *Jefferson v. Chapman*, 127 Ill. 438, 11 A. S. R. 136, 20 N. E. 33, holding village liable for injury received by falling through defective crossing which had not been properly replaced by party improving street; *Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381, holding city liable for injury resulting from coming in contact with barb wire stretched across street in course of repair, there being no guard of any kind, though placed there by the independent contractor; *Kinsey v. Kinston*, 145 N. C. 106, 58 S. E. 912, holding city liable where plaintiff was injured by falling into unguarded ditch, dug across sidewalk, in the evening, for the use of private person; *McAllister v. Albany*, 18 Or. 426, 23 Pac. 845, holding city liable for injury to plaintiff caused by falling into excavation made in street under city authority, by reason of failure of contract to properly guard with lights; *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Circleville v. Neuding*, 41 Ohio St. 465,—holding same where horse killed by falling into excavation in street not properly guarded although city had no control over the work as to manner of doing; *Thillman v. Baltimore*, 111 Md. 131, 73 Atl. 722, holding city liable to abutting owner for injury caused by reason of contractor's negligent manner of grading street.

Cited in note in 66 L.R.A. 128, on duty of municipality to keep highway in safe condition during work by independent contractor.

Distinguished in *Anne Arundel County v. Duvall*, 54 Md. 350, 39 A. R. 393, holding county not liable for injuries resulting through the negligence of an employee of independent contractor engaged in repairing a road; *Sinclair v. Baltimore*, 59 Md. 592, holding city not liable for injuries resulting from failure to light obstructions on street where such duty rested upon independent police department not controlled by city; *Symons v. Allegany County*, 105 Md. 254, 65 Atl. 1067, holding county not liable for injury of plaintiff on highway through the negligence of independent contractor in blasting rock for the repair of the highway.

Principal as liable for acts of independent contractor.

Cited in *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 14 A. S. R. 427, 4 L.R.A. 213, 21 N. E. 482, holding street railway corporation liable for the negligence of independent contractor in not properly guarding the work in course of construction, resulting in injury to plaintiff; *Fowler v. Saks*, 7 Mackey, 570, 7 L.R.A. 649; *City & Suburban R. Co. v. Moores*, 80 Md. 348, 45 A. S. R. 345, 30 Atl. 643,—on liability of owner of property for injuries resulting through the negligence of an independent contractor; *Baltimore & Y. Turnp. Co. v. Parks*, 74 Md. 282, 22 Atl. 399, holding turnpike company liable for injuries due to failure to keep road in repair although condition was due to excavations by city authorities for purpose of taking up water mains; *Bernheimer Bros. v. Bager*, 108 Md. 551, 129 A. S. R. 458, 70 Atl. 91, to point that master's duty to furnish safe place to work cannot be delegated to independent contractor.

Cited in reference notes in 42 A. R. 780; 40 A. R. 759,—on municipal liability for negligence of independent contractor.

Cited in notes in 30 A. S. R. 412, on municipal liability for negligence or misconduct of contractors; 76 A. S. R. 419, on liability for negligence of independent contractors in performing work for cities; 14 L.R.A. 833, on liability of municipality for breach of its duty by independent contractor em-

ployed by it; 66 L.R.A. 131, on liability of municipality for acts of independent contractor employed on municipal duties resulting from municipality's nonperformance of absolute duties.

36 AM. REP. 399, ROBINSON v. STATE, 53 MD. 151.

Admissibility of evidence of motive in criminal action.

Cited in *State v. Worthen*, 111 Iowa, 267, 82 N. W. 910, holding evidence that defendant knew that prosecutor had valuables in house admissible on question of intent where defendant entered the house in the night time; *O'Donnell v. People*, 110 Ill. App. 250, holding evidence of defendants in a prosecution for a conspiracy to corrupt a jury is admissible when it tends to contradict the state's case in connection with certain alleged acts done pursuant to the conspiracy and part of the *res gestæ*; *People v. Manahan*, 61 App. Div. 75, 70 N. Y. Supp. 108, 15 N. Y. Crim. Rep. 431, holding court erred on trial of indictment for conspiracy, in refusing to allow defendant to introduce evidence of motive in doing an act claimed by prosecution to show the purpose of the conspirator; *State v. Tough*, 12 N. D. 435, 96 N. W. 1025, on evidence of motive on part of defendant admissible in criminal action.

Cited in reference note in 2 A. S. R. 391, on necessity for felonious intent as element of burglary.

What constitutes burglary.

Cited in note in 2 A. S. R. 383, on what constitutes burglary.

36 AM. REP. 400, EVANS v. DAVIDSON, 53 MD. 245.

Liability of principal for act of servant.

Cited in *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 109, 33 L.R.A. 306, 34 S. W. 547; *Barabasz v. Kabat*, 86 Md. 23, 37 Atl. 720,—on master's liability when servant acting within scope of authority.

Cited in reference note in 36 A. R. 336, on liability of master for negligence of servant not in strict line of duty.

Cited in notes in 40 A. R. 228, on test of master's liability for act of servant; 88 A. S. R. 787, on principal's liability in tort for acts of agent within scope of employment; 17 E. R. C. 277, on liability of master for acts of servant in scope of his employment.

—Forbidden excessive or unlawful acts.

Cited in *Carter v. Louisville, N. A. & C. R. Co.* 98 Ind. 552, 49 A. R. 780, holding railroad company liable where servants injured a trespasser by the reckless manner in which they evicted him from train; *Bryan v. Adler*, 97 Wis. 124, 65 A. S. R. 99, 41 L.R.A. 658, 72 N. W. 368, holding the keeper of a public restaurant whose waiter refuse to serve a customer simply because he is a colored man is liable in damages though waiter violated master's instructions; *Lewis v. Schultz*, 98 Iowa, 341, 67 N. W. 266; *Baltimore Consul R. Co. v. Pierce*, 89 Md. 495, 45 L.R.A. 527, 43 Atl. 940; *Deck v. Baltimore & C. R. Co.* 100 Md. 168, 108 A. S. R. 399, 59 Atl. 650; *Schaefer v. Osterbrink*, 67 Wis. 495, 58 A. R. 875, 30 N. W. 922,—on liability of master for wrongful act of servant; *Rickards v. Rickards*, 98 Md. 136, 103 A. S. R. 393, 63 L.R.A. 724, 56 Atl. 397, holding an executed contract of sale made on Sunday by a general agent cannot be rescinded by his principal on the ground that statute forbid sale of goods on Sunday and that the agent was not authorized to do an unlawful act.

Cited in notes in 35 A. D. 197, on liability of master for torts of servants deviating from master's business; 27 L.R.A. 176, on limitation of scope of servants' employment for acts for which master will be liable.

36 AM. REP. 404, MITCHELL v. SEIPEL, 53 MD. 251.

Easements appurtenant.

Cited in *Wells v. Garbutt*, 132 N. Y. 430, 30 N. E. 978, 4 Silv. Ct. App. 427, holding party conveying one of two parcels of land retains no easement in favor of land retained unless the burden is apparent and necessary to its enjoyment; *Scott v. Moore*, 98 Va. 668, 81 A. S. R. 749, 37 S. E. 342, on easement as passing as incident to a grant.

Cited in notes in 40 A. R. 381, on what passes under deed as appurtenances; 136 Am. St. R. 695, 697, on creation and conveyance of easements appurtenant.

Creation of easement by necessity.

Cited in *Powers v. Harlow*, 53 Mich. 507, 51 A. R. 154, 19 N. W. 257, holding leasing premises which cannot be approached except across the lessor's land gives a right of way across it of necessity; *Plarne v. Coal Creek Min. & Mfg. Co.* 90 Tenn. 619, 18 S. W. 402, holding the grant of the minerals in a tract of land carries by implication a right of way over the lands to mine and remove minerals; *Lebus v. Boston*, 107 Ky. 98, 92 A. S. R. 333, 47 L.R.A. 79, 51 S. W. 609; *Jay v. Michael*, 92 Md. 198, 48 Atl. 61; *Adams v. Marshall*, 138 Mass. 228, 52 A. R. 271; *Fritz v. Tompkins*, 18 Misc. 514, 41 N. Y. Supp. 985,—on creation of easement by necessity.

Cited in reference notes in 14 A. S. R. 556, on ways of necessity; 25 A. S. R. 425, on when grantee entitled to right of way of necessity.

Cited in note in 122 A. S. R. 212, on way of necessity where necessity is created by grantee.

Creation of easement by implication.

Cited in *Burns v. Gallagher*, 62 Md. 462; *Lippincott v. Harvey*, 72 Md. 572, 19 Atl. 1041,—on creation of easement by implied reservation; *Shoemaker v. Shoemaker*, 11 Abb. N. C. 80; *Eliason v. Grove*, 85 Md. 215, 36 Atl. 844,—distinguishing between implied grants of easements and between implied reservations.

Cited in reference notes in 83 A. D. 547, on easement of lateral support; 100 A. D. 117; 38 A. R. 671,—on easement in right of way implied by severance of deceased's property; 4 A. S. R. 617, as to when right to use alley is not implied on severance of estate.

Cited in notes in 57 A. D. 759, on implied grant of apparent and continuous easement on conveying part of heritage; 57 A. D. 762, as to whether easement must be necessary to pass by implication; 57 A. D. 766, on implied grant of easement of light and air; 57 A. D. 767, on implied grant of easement in way; 40 A. R. 537, on what passes under deed by implication; 34 A. S. R. 708, on implied grant of easement by severance and sale of property; 13 L.R.A. 657, on implied reservations of right of way; 26 L.R.A.(N.S.) 338, on easements created by severance of tract with apparent benefit existing; 10 E. R. C. 78, on implied grant of easement by grant of dominant estate.

Abandonment of easement.

Distinguished in *Duval v. Becker*, 81 Md. 537, 32 Atl. 308, holding a mortgagor could not before default by his own act abandon an easement appurtenant to the estate so as to prevent easement passing at foreclosure sale.

Partition of lands.

Cited in *Claude v. Handy*, 83 Md. 225, 34 Atl. 532, on duty of commissioners in the partition of land.

36 AM. REP. 422, BROWN v. WARD, 53 MD. 376.**Belief in spiritualism as grounds for avoiding will.**

Cited in *Owen v. Crumbaugh*, 22 Ill. 380, 119 A. S. R. 442, 81 N. E. 1044, 10 A. & E. Ann. Cas. 606, holding a belief in the doctrines of spiritualism is not such evidence of insanity as justifies the setting aside of a will; *Henderson v. Jackson*, 138 Iowa, 326, 26 L.R.A.(N.S.) 479, 111 N. W. 821, to point that person is not incapacitated to make will because conduct was influenced by spiritual beliefs and manifestations; *Buchanan v. Pierie*, 205 Pa. 123, 97 A. S. R. 725, 54 Atl. 583, holding will would not be set aside because the testator believed that he could through mediums communicate with the spirits of the departed, it not appearing that he believed or admitted that he was influenced by them in the preparation of his will.

Cited in reference note in 1 A. S. R. 89, on belief in spiritualistic communications or revelations as ground for avoiding will.

Cited in notes in 16 L.R.A. 678, on belief in spiritualism, witchcraft, etc. as affecting capacity to make will or deed; 15 L.R.A.(N.S.) 674, on effect of belief in spiritualism upon testamentary capacity.

Belief in spiritualism as evidence of insane delusion.

Cited in *Steinkuehler v. Wempner*, 169 Ind. 154, 15 L.R.A.(N.S.) 673, 81 N. W. 482, on belief in spiritualism as evidence of an unsound mind; *Middle-ditch v. Williams*, 45 N. J. Eq. 726, 4 L.R.A. 738, 17 Atl. 826, holding belief in spiritualism is not an insane delusion.

Cited in notes in 63 A. S. R. 93, on undue influence of spiritualism as insane delusion; 37 L.R.A. 270, on belief in spiritualism as insane delusion.

Capacity to make a will.

Cited in *Davis v. Denny*, 94 Md. 390, 50 Atl. 1037, on sufficiency of mental capacity on part of testator to make a will.

Cited in reference note in 7 A. S. R. 495, on testamentary capacity.

Insane delusion as grounds for avoiding a will.

Cited in *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271, holding evidence of insane delusions insufficient to set aside a will where it is not shown that the delusions affected the execution of the will; *Layer v. Layer*, 110 Ky. 542, 62 S. W. 15; *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413; *Jones v. Collins*, 94 Md. 403, 51 Atl. 398; *Johnson v. Johnson*, 105 Md. 81, 121 A. S. R. 570, 65 Atl. 918; *Re Vedder*, 6 Dem. 92; *Re Henry*, 18 Misc. 149, 41 N. Y. Supp. 1096,—on nature of a delusion sufficient to avoid a will.

Cited in notes in 4 L.R.A. 738; 12 L.R.A. 161,—on insane delusions affecting testamentary capacity; 37 L.R.A. 275, on insane delusions as to misconduct of heirs.

Presumption in favor of mental capacity.

Cited in *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481, on testator as presumed to have sufficient mental capacity to make a will.

Cited in notes in 17 L.R.A. 494, on burden of proof of testamentary capacity; 36 L.R.A. 724, on presumption of sanity with relation to wills.

36 AM. REP. 428, MERCHANTS' & M. TRANSP. CO. v. ASSOCIATED FIREMEN'S INS. CO. 53 MD. 448.

Liability for expense of submerging insured vessel to extinguish fire.

Cited in 2 May Insurance, 4th ed. p. 985, on nonliability of insurer for expenses of submerging, raising, discharging, and reloading of cargo, though done to extinguish fire.

36 AM. REP. 433, FILDEW v. BESLEY, 42 MICH. 100, 3 N. W. 278.

Rights of parties under an uncompleted contract.

Cited in Hanley v. Walker, 79 Mich. 607, 8 L.R.A. 207, 45 N. W. 57, holding where a party fails to comply substantially with a nonapportionable contract, or where some act or fact is made a condition precedent to payment there can be no recovery in absence of waiver; Johnson v. Henry, 127 Mich. 548, 86 N. W. 1027, holding the owner's right to damages for failure to complete work on time is now waived by permitting or even requiring the contractor to go on and complete his contract.

Cited in reference notes in 48 A. R. 232, on act of God excusing performance of contract; 53 A. R. 688, on specific performance of contracts; 1 A. S. R. 468, on recovery for services rendered where special contract is not completed; 25 A. S. R. 660, on recovery for part performance when full performance of contract was rendered impossible; 36 A. S. R. 644, on effect of destruction of thing agreed to be produced on necessity of completing contract; 69 A. S. R. 546, on termination of contract by destruction of subject-matter.

Cited in note in 1 E. R. C. 347, on vis major or inevitable accident as excusing performance of contract.

— **Where building is destroyed pending work thereon.**

Cited in Parker v. Scott, 82 Iowa, 266, 47 N. W. 1073, holding one under contract to construct a spire to a building has no right to abandon his contract, and maintain an action for labor should it be blown down before completed; Krause v. Crothersville, 162 Ind. 278, 102 A. S. R. 203, 65 L.R.A. 111, 70 N. E. 264, 1 A. & E. Ann., Cas. 460, holding the builder cannot recover where under contract to build an annex to a school building, the old and new structure having burned before completion of annex.

Cited in reference notes in 57 A. R. 413, on effect of fire before completion of entire contract for repairs; 60 A. R. 38, on recovery for repairs where building destroyed before completion.

Cited in notes in 59 A. S. R. 285, as to when complete performance is essential to cause of action on building and analogous contracts; 5 L.R.A.(N.S.) 1109, on who must bear loss caused by destruction of building or other structure in process of erection.

Distinguished in Teakle v. Moore, 131 Mich. 427, 91 N. W. 636, holding where roof falls by reason of negligence of agent of owner the contractor might recover for that part of his work done; Zigler v. McClellan, 15 Or. 499, 16 Pac. 179, holding in absence of a motion for a non suit, or instruction of the court presenting question of recovery under a contract where building burns before completed, such question cannot be considered.

Duty seasonably to accept or reject building not conforming to contract.

Cited in Eaton v. Gladwell, 108 Mich. 678, 66 N. W. 598; Eaton v. Gladwell, 121 Mich. 444, 80 N. W. 292, 6 Det. L. N. 531,—holding owner seasonably

refuses to accept the work, he may avoid liability upon the unperformed contract but cannot delay and recover rental value.

36 AM. REP. 437, PRINTZ v. PEOPLE, 42 MICH. 144, 3 N. W. 306.
Admissibility in evidence of opinions as to value.

Cited in *Yost v. Conroy*, 92 Ind. 464, 47 A. R. 156, holding the opinions of witnesses as to value are competent in prosecutions for crime.

Cited in reference note in 12 A. S. R. 883, on admissibility in evidence of opinion of witness as to value.

Cited in note in 55 A. R. 446, on competency of opinions as to value.

— Owner's opinion of value.

Cited in *State v. Maggard*, 160 Mo. 469, 83 A. S. R. 483, 61 S. W. 184, holding where there is no evidence that the thing had any market value, the owner may testify to the actual value, regardless of any market value.

— Valuation of household goods or wearing apparel.

Cited in *Erickson v. Draskowski*, 94 Mich. 551, 54 N. W. 283, holding housekeepers may testify as to value of articles of household furniture owned by them, such as housekeepers are accustomed to buy; *Withey v. Pere Marquette*, 141 Mich. 412, 113 A. S. R. 533, 1 L.R.A.(N.S.) 352, 104 N. W. 773, 7 A. & E. Ann. Cas. 57, holding witnesses, after inspecting wearing apparel injured by common carrier may state the amount of injury.

Cited in reference note in 59 A. R. 443, on admissibility of opinion evidence as to value of sealskin coat.

— Value of services.

Cited in *Missouri P. R. Co. v. Palmer*, 55 Neb. 559, 76 N. W. 169, holding it permissible to allow plaintiff to testify as to the value of her services while nursing and caring for her injured child; *Alt v. California Fig Syrup Co.* 19 Nev. 118, 7 Pac. 174, holding nonexpert witnesses may give their opinion as to the value of services in the preparation of a medicine, the process of manufacture being known only to the one preparing it and one other.

Cited in reference note in 37 A. R. 152, on opinion of nonexpert as to value of services and commodities.

Criteria of value of household goods and wearing apparel.

Cited in *McMahon v. Dubuque*, 107 Iowa, 62, 70 A. S. R. 143, 77 N. W. 517, holding the actual value of household goods and wearing apparel used by family should be based on cost, condition and age and not the market value.

36 AM. REP. 438, PEOPLE v. KNAPP, 42 MICH. 267, 3 N. W. 927.

Interference with jury as ground for reversal or new trial.

Cited in *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50, holding reading of newspaper article, injurious to accused, to jury while deliberating, vitiates verdict; *Ogden v. United States*, 50 C. C. A. 380, 112 Fed. 523, holding taking to jury room of indictments indorsed with verdict of guilty found by former jury, ground for new trial; *Coolman v. State*, 163 Ind. 503, 72 N. E. 568, holding it not proper for the judge to make any communication to the jury after they retire, except in open court, and in presence of defendant or his counsel.

Distinguished in *Nichols v. Nichols*, 136 Mass. 256, holding that allowing physician to administer to sick juror while jury is out will not vitiate verdict.

—Effect of presence of officer in jury room.

Cited in *People v. Draper*, 1 N. Y. Crim. Rep. 138, holding it not necessarily error but condemning the practice; *Tarkington v. State*, 72 Miss. 731, 17 So. 768, holding presence of officers and witnesses in jury room, although not communicating with jurors, vitiates verdict; *Rickard v. State*, 74 Ind. 275; *Coomey v. State*, 61 Neb. 342, 85 N. W. 281; *Gandy v. State*, 24 Neb. 716, 40 N. W. 302,—holding presence of bailiff in jury room vitiates verdict.

Not followed in *Crockett v. State*, 52 Wis. 211, 37 A. R. 753, 8 N. W. 603, holding presence of officer in charge in room with jury while deliberating no ground for new trial; *Gainey v. People*, 97 Ill. 270, 37 A. R. 109, holding presence of bailiff during part of jury's deliberations, no improper influence being shown, does not vitiate verdict; *State v. Flint*, 60 Vt. 304, 14 Atl. 178, holding presence of bailiff during deliberations of jury in case where he was witness does not vitiate verdict.

Disapproved in *People v. Draper*, 28 Hun, 1, holding that new trial will not be granted because officer attending jury was in room during deliberations; *Graves v. Territory*, 16 Okla. 538, 86 Pac. 521, 8 A. & E. Ann. Cas. 649, holding the presence of a bailiff in the jury room during deliberations of jury, immaterial error where he took no part and it is shown his presence in no way influenced them.

Materiality of previous chastity of prosecutrix.

Cited in *People v. Mills*, 94 Mich. 630, 54 N. W. 488, holding previous chastity of woman necessarily in issue, in prosecutions for seduction.

Cited in reference note in 93 A. D. 207, on calling witnesses to prove former witness's denial of adultery false.

Complainant in prosecution for adultery.

Cited in note in 19 L.R.A.(N.S.) 788, on construction and effect of provisions requiring prosecution for adultery to be upon complaint of husband or wife.

36 AM. REP. 442, BENNETT v. BEAM, 42 MICH. 346, 4 N. W. 8.

Promise of marriage.

Cited in note in 63 A. D. 537, on construction and effect of promise of marriage.

Defense to action for breach of promise to marry.

Cited in note in 63 A. D. 544, on offer to marry as defense to action for breach of promise to marry.

Admissibility of evidence of pecuniary standing in action for breach of promise of marriage.

Cited in *Totten v. Read*, 16 Daly, 282, 10 N. Y. Supp. 318; *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686; *Gemmill v. Brown*, 25 Ind. App. 6, 56 N. E. 691; *Olson v. Solverson*, 71 Wis. 663, 38 N. W. 329,—holding evidence of defendant's pecuniary circumstances is competent in an action for breach of promise of marriage; *Chellis v. Chapman*, 125 N. Y. 214, 11 L.R.A. 784, 26 N. E. 306, holding evidence of general reputation, as to wealth, is competent upon the question of damages; *Vierling v. Binder*, 113 Iowa, 337, 85 N. W. 621; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875,—holding such evidence admissible as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage contract; *Leavell v. Leavell*, 114 Mo. App. 24, 89 S.

W. 55, holding defendant's wealth may be shown as an aid to the measure of punitive damages though such damages may not be asked.

Cited in reference note in 26 A. S. R. 924, on admissibility of evidence of wealth of defendant in suit for breach-of-marriage-promise.

Cited in notes in 63 A. D. 545, on measure of damages for breach of promise to marry; 63 A. D. 546, on pecuniary circumstances of defendant as element to be considered in awarding damages for breach of promise to marry.

Distinguished in *Watson v. Watson*, 53 Mich. 168, 51 A. R. 111, 18 N. W. 605, holding damages for seduction cannot be aggravated, by evidence of defendant's wealth.

—Of seduction in aggravation of damages.

Cited in *Harrison v. Carlson*, 45 Colo. 55, 101 Pac. 76; *Anderson v. Kirby*, 125 Ga. 62, 114 A. S. R. 185, 54 S. E. 197, 5 A. & E. Ann. Cas. 103; *Geiger v. Payne*, 102 Iowa, 581, 69 N. W. 554,—holding seduction may be pleaded in an action for breach of promise of marriage in aggravation of damages; *Kennedy v. Rodgers*, 2 Kan. App. 764, 44 Pac. 47, holding a recovery may be had for injury to feelings and affections, mortification which plaintiff has been made to undergo, and the harm that may have been done to her prospects in life.

Cited in reference note in 26 A. S. R. 924, on admissibility of evidence of plaintiff's seduction in breach-of-marriage-promise suit.

Cited in note in 44 A. D. 178, on evidence of seduction in action for breach of promise.

Disapproved in *Wrynn v. Downey*, 27 R. I. 454, 114 A. S. R. 63, 4 L.R.A. (N.S.) 615, 63 Atl. 401, 8 A. & E. Ann. Cas. 912, holding evidence of seduction is not admissible in aggravation of damages in such action.

Damages for seduction.

Cited in reference note in 35 A. S. R. 132, on damages for seduction.

Variance between declaration and proof.

Cited in *Sax v. Detroit*, G. H. & M. R. Co. 125 Mich. 252, 84 A. S. R. 572, 84 N. W. 314, holding a variance between the declaration and proof relating to a recital of a former occupation in this case unsubstantial matter, and therefore immaterial.

36 AM. REP. 446, MORRISON v. BERRY, 42 MICH. 389, 4 N. W. 731.

Liability of wife to a third party for improvements made under contract with husband.

Cited in *Holmes v. Bronson*, 43 Mich. 562, 6 N. W. 89, holding she is not liable for cost of improvements put into her house where done by contract with and in reliance on the responsibility of her husband; *Luebe v. Thorpe*, 94 Mich. 268, 54 N. W. 41, holding where services were rendered to one whose husband acted as principal there can be no recovery from the wife.

Distinguished in *Popp v. Connery*, 138 Mich. 84, 110 A. S. R. 304, 101 N. W. 54, holding where building is erected on land of a married woman with her consent and of materials selected by her she is liable for such material though her husband contracted for same.

Character of annexation necessary to convert article into realty.

Cited in *Cook v. Condon*, 6 Kan. App. 574, 51 Pac. 587, holding where permanent annexation is intended, the article becomes a part of the realty; *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205, holding where it was the intention of par-

ties when a building was erected that it be made part of realty it could not be moved or conveyed; *Lansing Iron & Engine Works v. Walker*, 91 Mich. 400, 30 A. S. R. 488, 51 N. W. 1061, holding a portable sawmill does not become a fixture by being fitted in place upon land on which vendee owns an undivided interest where sale was conditional—the title remaining in vendor until full payment; *Stevens v. Barfoot*, 13 Ont. App. 366, holding that boiler and engine placed in building by mortgagor passes with realty.

Cited in reference note in 40 A. R. 107, on right to chattels affixed by defaulting purchaser of land as between lessor of chattels and owner of land.

Distinguished in *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899, holding where articles on being removed from mill are equally capable of being used elsewhere they may be either real or personal property, according to the intent of the parties; *Michigan Mut. L. Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035, holding a house moved upon adjoining land six months before action is brought cannot be replevied.

Right to maintain trover for property which by annexation has become realty.

Cited in *Detroit & B. C. R. Co. v. Busch*, 43 Mich. 571, 6 N. W. 90, holding the owner of ties used by subcontractor for construction of railway, cannot after same has become realty bring trover for their conversion.

Estoppel from acceptance of thing done.

Cited in *Bond v. Pontiac, O. & P. A. R. Co.* 62 Mich. 643, 4 A. S. R. 885, 29 N. W. 482, holding the appropriation of what one has a right to suppose was properly done creates no estoppel.

Presumption of agency where husband acts for his wife.

Cited in *Fechheimer v. Peirce*, 70 Mich. 440, 38 N. W. 325, holding there can be no presumption of a husband's authority to act for his wife.

36 AM. REP. 450, EVENING NEWS ASSO. v. TRYON, 43 MICH. 549, 4 N. W. 267.

Compensatory or punitive damages for torts partaking of malice.

Cited in *Ross v. Leggett*, 61 Mich. 445, 1 A. S. R. 608, 28 N. W. 695, holding where an arrest is made without authority, a charge that all the circumstances of the act are to be taken into consideration to determine questions of punitive damages correctly states the law; *Childers v. San Jose Mercury Printing Pub. Co.* 105 Cal. 284, 45 A. S. R. 40, 38 Pac. 903, holding exemplary damages may be based alone upon a publication libelous per se.

Cited in reference notes in 12 A. S. R. 698, on necessity of showing special damages where words are not libelous per se; 47 A. S. R. 348, on damages recoverable in actions for libel.

Cited in notes in 72 A. D. 431, on actual loss and injury as element of damages in slander or libel; 15 A. S. R. 339, on elements increasing or mitigating damages for newspaper libel.

Presumption of law from fact of publishing of libel.

Cited in *Morse v. Times-Republican Printing Co.* 124 Iowa, 707, 100 N. W. 867, holding both malice and injury are implied in the publishing of words libelous per se, and good faith is not avoidable as a defense; *Wheaton v. Beecher*, 66 Mich. 307, 33 N. W. 503, holding the publishing of a falsehood concerning a candidate for public office, without justification and with intent to injure is libel.

ous; *Davis v. Marxhausen*, 103 Mich. 315, 61 N. W. 504, holding the law presumes a published article done purposely, knowingly and for no justifiable end, to be malicious; *Paxton v. Woodward*, 31 Mont. 195, 107 A. S. R. 416, 78 Pac. 215, 3 A. & E. Ann. Cas. 546, holding malice is an inference of fact which the jury may draw from the libelous publication alone.

Admissibility of retraction of slander or libel.

Cited in *Constitution Pub. Co. v. Way*, 94 Ga. 120, 21 S. E. 139, holding the retraction must be made or offered before the person libeled has sought redress in the courts to be available in reducing the damages.

Distinguished in *Turton v. New York Recorder Co.* 144 N. Y. 144, 38 N. E. 1009, holding evidence of a fair and honest retraction of the charges made subsequent to the commencement of the action ought to be permitted in mitigation.

36 AM. REP. 452, WEBSTER v. ANDERSON, 42 MICH. 554, 4 N. W. 288.

Sufficiency of delivery to support sale.

Cited in *Shaul v. Harrington*, 54 Ark. 305, 15 S. W. 835, holding where a completed contract of sale appears and vendor is to hold as bailee for the vendee in lieu of actual delivery the sale is complete against creditors, if not otherwise fraudulent; *Cunningham v. O'Connor*, 136 Mich. 293, 99 N. W. 25, holding where parties indebted agree to turn over a field of beans to apply on their debt and creditor takes possession and harvests the same a complete sale is shown; *Lathrop v. Clayton*, 45 Minn. 124, 47 N. W. 544, holding the law relating to delivery and possession accommodates itself to its nature and situation as well as to the circumstances about each case; *Rail v. Little Falls Lumber Co.* 47 Minn. 422, 50 N. W. 471, on principles governing passing of title without delivery; *Godkin v. Weber*, 154 Mich. 207, 20 L.R.A.(N.S.) 498, 114 N. W. 924, holding that accepted offer to buy lumber in party's possession does not amount to sale where former thereafter performed no act indicating acceptance as required by statute; *Stearns v. Grand Trunk R. Co.* 156 Mich. 145, 120 N. W. 572, to point that where something is to be done by seller to ascertain identity, quantity or quality of thing sold title does not pass; *Barber v. Andrews*, 29 R. I. 51, 26 L.R.A.(N.S.) 1, 69 Atl. 1, holding title to hay passed where certain quantity was to be taken from larger quantity stored in barn and where method of measuring was agreed upon.

Cited in reference notes in 40 A. R. 167, on effect of sale of chattel where vendor retains possession; 60 A. S. R. 237, on retention of possession by vendor of personalty; 98 A. S. R. 977, on sufficiency of delivery or change of possession of property sold as against creditors and subsequent purchasers.

Cited in notes in 97 A. D. 342, on change of possession sufficient as against creditors and subsequent purchasers; 37 A. R. 21, on delivery satisfying statute of frauds; 26 L.R.A.(N.S.) 47, on sufficiency of selection or designation of goods sold out of larger lot.

36 AM. REP. 454, PORTER v. HANNIBAL & ST. J. R. CO. 71 MO. 66.

Mental suffering as an element of damages.

Cited in *Chase v. Western U. Teleg. Co.* 10 L.R.A. 464, 44 Fed. 554, holding mental suffering alone is no ground for recovery of damages for delay in delivering a telegraphic message; *Breen v. St. Louis Transit Co.* 102 Mo. App. 479, 77 S. W. 78, holding such mental suffering as natural result from the assault and bat-

tery committed upon plaintiff by street car conductor is properly admitted in estimating damages; *Milledge v. Kansas City*, 100 Mo. App. 490, 74 S. W. 892, holding the pain already suffered and that which must continue to be endured for the future should be considered where injuries were caused by wrong doer; *Hyatt v. Hannibal & St. J. R. Co.* 19 Mo. App. 287, holding mental suffering and pain an element of damage for breach of contract.

Cited in reference note in 5 A. S. R. 48, on injury to feelings as element of damages.

Cited in notes in 7 A. S. R. 535, on mental anguish as element of damages; 8 L.R.A. 765, on mental anguish as element of damages for personal injury; 12 L.R.A. 699, on pain and suffering as element of damages for personal injury.

Distinguished in *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 38 A. S. R. 575, 20 L.R.A. 172, 22 S. W. 345, holding damages cannot be recovered for mental suffering and pain caused by a telegraph company's failure to deliver a social telegram.

Diligence required of servant in ascertaining existence of danger.

Cited in *Stoeckman v. Terre Haute & I. R. Co.* 15 Mo. App. 503; *Banks v. Wabash Western R. Co.* 40 Mo. App. 458; *Flynn v. Union Bridge Co.* 42 Mo. App. 529,—holding he is chargeable with knowledge of the defective condition where patent or such as would be discovered by a servant ordinarily observant; *Houston & T. C. R. Co. v. McNamara*, 59 Tex. 255, holding the law does not charge servants with knowledge of facts which they could have known only by exercise of extraordinary diligence; *Lee v. St. Louis, M. & S. E. R. Co.* 112 Mo. App. 372, 87 S. W. 12, holding it is not incumbent upon the servant to search for latent defects in the machinery and appliances furnished him; *Devlin v. Wabash, St. L. & P. R. Co.* 87 Mo. 545, holding he is not bound to investigate for himself a department of work with which he has nothing to do; *Aldridge v. Midland Blast Furnace Co.* 78 Mo. 559, holding while the servant is not required to search for latent defects, he is presumed to have knowledge of those so patent that an ordinarily observant man would have observed; *Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 163, 133 Fed. 13, holding the act of coupling or uncoupling cars by going between them while in motion has been held under the circumstances of the particular case not to constitute negligence as a matter of law; *Hollenbeck v. Missouri P. R. Co.* 141 Mo. 97, 38 S. W. 723, holding a brakeman, unless he knew or may be presumed to have had knowledge of a ditch into which he fell he cannot be held to have assumed the risk.

Cited in notes in 4 L.R.A. 797, on right of servant to presume that master has performed his duty; 41 L.R.A. 127, on comparison of obligations of master and servant as to inspection; 41 L.R.A. 130, on relation of obligations of master and servant as to inspection where servant has equal or superior knowledge or means of knowledge.

Assumption of risk where danger is known or obvious.

Cited in *Southern R. Co. v. Wiley*, 88 Miss. 825, 41 So. 511; *Zellars v. Missouri Water & Light Co.* 92 Mo. App. 107,—holding he assumes only such risks in respect to the place as are obvious or known to him; *Rigsby v. Oil Well Supply Co.* 115 Mo. App. 297, 91 S. W. 460, holding the servant by continuing to work knowing that a pile of lumber was liable to topple over, assumed the risk of being injured; *Dean v. St. Louis Woodenware Works*, 106 Mo. App. 167, 80 S. W. 292, holding an agreement that employee shall work with certain tools, thereby taking the responsibility on himself, is not inconsistent with doctrine that the

master cannot contract against his own negligence; *Kleine v. S. E. Freunds Sons Shoe & Clothing Co.* 91 Mo. App. 102, holding a servant assumed the risk of injury to his hands by using a rope where the risk was not only known to him but obvious; *Junior v. Missouri Electric Light & P. Co.* 127 Mo. 79, 29 S. W. 988, holding same where servant by neglect of the means furnished, brought his hands in contact with electric wires; *Marshall v. Kansas City Hay Press Co.* 69 Mo. App. 256, holding a servant by the continued use of a defective and dangerous privy voluntarily assumed the risk incident to its use; *Watson v. Kansas & T. Coal Co.* 52 Mo. App. 366, holding where the defect in the machinery or implement is known to the employee, and he still enters the service, he takes upon himself the risks incident to such defect; *Goins v. Chicago, R. I. & P. R. Co.* 37 Mo. App. 221, holding if the risk is such as is obvious to any one, using his senses, then it will be presumed, ordinarily, that the servant took notice thereof; *Dowling v. Gerard B. Allen & Co.* 74 Mo. 13, 41 A. R. 298; *Czernicke v. Ehrlich*, 212 Mo. 386, 111 S. W. 14,—holding one takes upon himself the ordinary risks of the employment; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 24 A. S. R. 333, 12 L.R.A. 746, 15 S. W. 1112; *Sykes v. St. Louis & S. F. R. Co.* 178 Mo. 693, 77 S. W. 723,—holding where servant continued in service knowing of defective condition of cars and without promise that they would be repaired he assumed the risk; *Gleeson v. Excelsior Mfg. Co.* 94 Mo. 201, 7 S. W. 188, holding where one entered employment knowing hatchways were unguarded and as part of his undertaking was to close them when left open, he assumed all risks due to them; *Price v. Hannibal & St. J. R. Co.* 77 Mo. 508, holding servant assumes the risk incident to sleeping in a round house, knowing as well as the company the danger incident thereto; *Griffin v. Ohio & M. R. Co.* 124 Ind. 326, 24 N. E. 888, holding where servant is employed to dig out gravel from under a stratum of clay he cannot recover as he assumed the risk incident to the work; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594, holding where the defect is equally known to both employer and employee there can be no recovery; *Obermeyer v. Logeman Chair Mfg. Co.* 120 Mo. App. 59, 96 S. W. 673 (dissenting opinion), on assumption of risk by servant.

Cited in notes in 77 A. D. 224, as to when servant assumes risk of dangerous machinery and appliances; 4 L.R.A. 53, as to what risks are not assumed by servant; 17 L.R.A. (N.S.) 77, 78, on servant's assumption of risk from latent danger or defect.

Duty of master in furnishing safe tools, machinery or appliances.

Cited in *Williams v. St. Louis & S. F. R. Co.* 119 Mo. 316, 24 S. W. 782; *Zellers v. Missouri Water & Light Co.* 92 Mo. App. 107; *Depuy v. Chicago, R. I. & P. R. Co.* 110 Mo. App. 110, 84 S. W. 103,—holding the master is required as a general rule to furnish his servant with a reasonably safe place in which to work; *Steinhauser v. Spraul*, 114 Mo. 551, 21 S. W. 515; *Bennett v. Himmelberger-Harrison Lumber Co.* 116 Mo. App. 699,—holding the master is required to use reasonable care and precaution to furnish reasonably safe tools but he is not an insurer of their safety; *Waldhier v. Hannibal & St. J. R. Co.* 71 Mo. 514; *Waldhier v. Hannibal & St. J. R. Co.* 87 Mo. 37,—holding the servant has a right to assume that the master has performed his duty in keeping machinery in repairs until the contrary appears to him; *Tabler v. Hannibal & St. J. R. Co.* 93 Mo. 79, 5 S. W. 810, holding he must keep them in good order and repair; *Nicholds v. Crystal Plate Glass Co.* 126 Mo. 55, 27 S. W. 516; *Epperson v. Postal Teleg. Cable Co.* 155 Mo. 346, 55 S. W. 1050; *Reber v. Tower*, 11 Mo. App. 199,—

Am. Rep. Vol. XVII.—71.

holding the master chargeable with knowledge which he might have acquired by the exercise of due care, the same as though he actually possessed it; *Bartley v. Trorlicht*, 49 Mo. App. 214, holding the duties required for the safety and protection of his servants cannot be cast off either upon an independent contractor or other servants; *O'Donnell v. Baum*, 38 Mo. App. 245, holding the law requires the master to inspect the machinery in the first instance, and to continue the inspection during its use; *Muirhead v. Hannibal & St. J. R. Co.* 19 Mo. App. 634, holding the degree of care to be exercised must be proportionate to the dangerous nature of the means, instruments and machinery used; *Garaci v. Hill O'Meara Constr. Co.* 124 Mo. App. 709, 102 S. W. 594, holding where a defect, discoverable by that degree of care imposed by law upon the master, is shown it is not an ordinary risk incident to the employment; *Bowen v. Chicago, B. & K. C. R. Co.* 95 Mo. 268, 8 S. W. 230, holding if the agent is shown to be negligent in performing duties of the master, this negligence is imputed to the master; *Covey v. Hannibal & St. J. R. Co.* 86 Mo. 635, holding knowledge of agent of master of defective machinery is to be attributed to the master; *Coontz v. Missouri P. R. Co.* 121 Mo. 652, 26 S. W. 661, holding he cannot relieve himself by delegating it upon a servant; *Condon v. Missouri P. R. Co.* 78 Mo. 567, holding mere fact that injury resulted from a defect in the hand-hold is not itself sufficient without showing master knew of the defect, or by reasonable diligence might have known it; *Hester v. Jacob Dold Packing Co.* 84 Mo. App. 451; *Glasscock v. Swafford Bros. Dry Goods Co.* 106 Mo. App. 657, 80 S. W. 364,—holding it not enough to show a defect in the place or appliance but it must be shown it was known to master or could have been known by exercise of ordinary care; *Smith v. St. Louis, K. C. & N. R. Co.* 69 Mo. 32, 33 A. R. 484; *Siela v. Hannibal & St. J. R. Co.* 82 Mo. 430; *Clowers v. Wabash, St. L. & P. R. Co.* 21 Mo. App. 213,—holding he is bound to provide such instruments with which to carry on his business as are reasonably safe, secure and sufficient for the purpose; *Current v. Missouri P. R. Co.* 86 Mo. 62, holding a petition fatally defective in not alleging defendant knew of defective machine plaintiff worked with, or by exercise of due care might have known of it; *Solomon R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657, holding the duty extends to the keeping of machinery in repair and to this end all reasonable and necessary inspections must be made; *O'Neil v. St. Louis, I. M. & S. R. Co.* 3 McCrary, 423, 9 Fed. 337, holding the master liable where he introduces new and unusual machinery without notice to the employee, who while exercising the required diligence meets with injury; *McKee v. Chicago, R. I. & P. R. Co.* 83 Iowa, 616, 13 L.R.A. 817, 50 N. W. 209 (dissenting opinion), on duty of master to provide suitable appliances.

Cited in reference note in 77 A. D. 221, on amount of care required of master in regard to machinery and appliances furnished to servant.

Cited in notes in 41 L.R.A. 134, on imputing the master's knowledge of servants charged with duty of seeing that place of work is safe; 6 L.R.A. 75, on duty of railroad company to exercise care to prevent injury to track men by moving trains.

Negligence of fellow servant.

Cited in *Tierney v. Minneapolis & St. L. R. Co.* 33 Minn. 311, 53 A. R. 35, 23 N. W. 229, holding negligence of employees of a corporation in keeping safe instrumentalities for use of servants is attributable to a corporation; *Hall v. Missouri P. R. Co.* 74 Mo. 298, holding the carelessness of the section foreman and his knowledge of the obstruction are imputable to the railway company.

Cited in note in 2 L.R.A. 192, on liability of master for injury to servant from negligence of vice principal.

Distinguished in *Corbett v. St. Louis, I. M. & S. R. Co.* 26 Mo. App. 621, holding a track repairer not entitled to recover for negligence of trainmen on ground that he was not a fellow-servant of trainmen.

Reversal of verdict on ground of its being excessive.

Cited in *Pry v. Hannibal & St. J. R. Co.* 73 Mo. 123, holding a judgment will be set aside as excessive only where verdict was the result of passion or prejudice, or the damages palpably excessive; *Dougherty v. Missouri R. R. Co.* 97 Mo. 647, 8 S. W. 900, holding where verdict is not so large as to unmistakably evince prejudice and passion on part of jury it will be allowed to stand; *Furnish v. Missouri P. R. Co.* 102 Mo. 438, 22 A. S. R. 781, 13 S. W. 1044, declaring the serious nature and extent of plaintiff's injuries forbade pronouncing excessive a verdict of \$15,000; *Burdick v. Missouri P. R. Co.* 123 Mo. 221, 45 A. S. R. 528, 26 L.R.A. 384, 27 S. W. 453 (dissenting opinion), on right of appellate court to reverse for excessive damages; *Gratiot v. Missouri P. R. Co.* 116 Mo. 450, 21 S. W. 1094 (re-affirming in banc [Mo.] 16 L.R.A. 189, 16 S. W. 384), holding court will not disturb a verdict for \$10,000 as excessive where a physician was permanently disabled and his practice lost.

Cited in notes in 14 L.R.A. 680, on excessive verdicts in suits for damages for personal injuries; 26 L.R.A. 395, on granting of new trial by appellate court for excessive damages.

—Repeated verdicts to same effect.

Cited in *Baker v. Independence*, 93 Mo. App. 165, holding a verdict for injuries caused by a wrongdoer will not be set aside as excessive where there has been two verdicts in the case, the second greater than the first; *Loker v. Southwestern Missouri Electric R. Co.* 94 Mo. App. 481, 68 S. W. 373, holding repeated verdicts should not be disturbed.

Extent of recovery under the statute for wrongful death.

Cited in *Rains v. St. Louis, I. M. & S. R. Co.* 71 Mo. 164, 36 A. R. 459, holding loss of services during minority, cost of nursing, surgical and medical attendance and funeral expenses may be included as damages in action by parent for the death of child.

Distinguished in *Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398, holding exemplary as well as actual damages may be recovered in an action by the widow for the intentional killing of her husband.

Presumption as to ordinary care being used.

Distinguished in *Lee v. Publishers George Knapp & Co.* 55 Mo. App. 390, holding an instruction that a legal presumption exists that deceased was exercising ordinary care at time of accident is erroneous where there is evidence tending to show negligence.

Loss of comfort and society an element of damage in action for wrongful death.

Cited in *Marshall v. Consolidated Jack Mines Co.* 119 Mo. App. 270, 95 S. W. 972, holding loss of comfort and society of a deceased son cannot be allowed an element of damages in action by parent.

Power of court to require a remittitur where verdict is excessive.

Cited in *Phippin v. Missouri P. R. Co.* 196 Mo. 321, 93 S. W. 410, holding a

remitter may be required where, in the opinion of the court the verdict is excessive.

Import of the words "necessary injury."

Cited in *Knight v. Sadtler Lead & Zinc Co.* 75 Mo. App. 541, on the words "necessary injury" and "pecuniary injury" having been regarded as of the same import.

Effect of instruction authorizing recovery for injuries of "permanent character."

Cited in *O'Neill v. Blase*, 94 Mo. App. 648, 68 S. W. 764, holding an instruction authorizing compensation for injuries of a "permanent character" is not erroneous as being too general.

36 AM. REP. 456, NOFSINGER v. RING, 71 MO. 149.

Effect of sale leaving decision as to quality to third person.

Cited in *Del Bondio v. Jacob Dold Pkg. Co.* 79 Mo. App. 465, holding in absence of fraud, the decision of one agreed upon to determine whether goods offered conform to the requirements of the contract, is binding; *Andrews v. Schreiber*, 93 Fed. 367, holding where wheat shipped on contract was subject to inspection by third party to determine whether it came up to a required grade, it did not become deliverable where the inspection showed an inferior grade; *Brooke v. Laurens Mill. Co.* 78 S. C. 200, 125 A. S. R. 780, 58 S. E. 806, holding the grading by an arbiter must be accepted as final where parties contract to refer the grading to such third party; *Empeon Packing Co. v. Clawson*, 43 Colo. 188, 95 Pac. 546, holding that parties are conclusively bound by determination of person stipulated in contract to decide questions arising therefrom.

36 AM. REP. 459, RAINS v. ST. LOUIS, I. M. & S. R. CO. 71 MO. 164.

Assumption by continued service after knowledge of risk.

Cited in *Lee v. St. Louis, M. & S. E. R. Co.* 112 Mo. App. 372, 87 S. W. 12, holding the assumption of patent defects and obvious dangers rests not alone upon the contract of hire, but upon the maxim *volenti non fit injuria*; *Umback v. Lake Shore & M. S. R. Co.* 83 Ind. 191; *Harff v. Green*, 168 Mo. 308, 67 S. W. 576,—holding the servant, by working where appliances or place furnished is so glaringly dangerous that a person of ordinary prudence would be warned, assumes all risk by continuing in service; *Kelly v. Union Railway & T. Co.* 11 Mo. App. 1, holding where party assumed a position of danger on tracks voluntarily the risk is assumed and nothing but actual knowledge of his danger and failure to warn by railway company will give right of action; *Er-slew v. New Orleans & N. E. R. Co.* 49 La. Ann. 86, 21 So. 153, holding where servant has positive knowledge or reasonable means of positive knowledge of a dangerous guy wire and notwithstanding continued in service he assumed this additional risk.

Disapproved in *Kelley v. Union Railway & T. Co.* 18 Mo. App. 151, holding even though the injured party assumed a position of danger on tracks voluntarily, where defendant might by exercise of proper care have averted the accident he is liable.

— Low bridges or projections near tracks.

Cited in *Williamson v. Newport News & M. Valley Co.* 34 W. Va. 657, 26 A. S. R. 927, 12 L.R.A. 297, 12 S. E. 824, holding where brakeman was fully

aware of lowness of bridge, though the railway company was not free from blame in maintaining it, there can be no recovery in consequence of injuries; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 13 A. S. R. 84, 4 L.R.A. 710, 6 So. 277, holding if brakeman after being warned of a low bridge, through carelessness fails to exercise that care and watchfulness an ordinarily prudent man would, he is contributorily negligent; *Woodell v. West Virginia Improv. Co.* 38 W. Va. 23, 17 S. E. 386, holding there can be no recovery where trainman's injuries resulted from a projecting limb of tree, of which he had notice prior to time of accident and had been warned against; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 13 A. S. R. 84, 4 L.R.A. 710, 6 So. 277, holding that brakeman familiar with situation injured by being struck by low bridge cannot recover.

Cited in reference notes in 37 A. R. 684, on contributory negligence of railroad employee in riding voluntarily on top of freight train; 7 A. S. R. 450, on liability of railroad company for injuries caused by bridge; 13 A. S. R. 93, on railroad company's duty to employee regarding low bridges.

Liability of master using defective machinery.

Cited in *Waldhier v. Hannibal & St. J. R. Co.* 71 Mo. 514, on liability of master for using defective machinery.

Cited in note in 92 A. D. 219, on duty of employer to furnish safe premises and conditions in and under which to work.

Necessity of showing freedom from contributory negligence.

Cited in *Pennsylvania Co. v. Finney*, 145 Ind. 551, 42 N. E. 816, holding the jury is not authorized, arbitrarily, without evidence, to infer the absence of contributory negligence on part of deceased.

Who are fellow servants.

Cited in *Galveston, H. & S. A. R. Co. v. Farmer*, 73 Tex. 85, 11 S. W. 156, holding a station-master is the fellow servant of the engineer on a passing train; *Smith v. American Car & Foundry Co.* 122 Mo. App. 610, 99 S. W. 790, holding where a board which caused the injuries was thrown from the car at the direction of one in charge and direction of the work of a crew, the act was that of a vice-principal.

Cited in notes in 51 L.R.A. 553, on employees supervising track work on railways as vice-principals; 51 L.R.A. 614, on vice-principalship with reference to relative rank of negligent servant.

Import of the words "necessary injury" and "pecuniary injury."

Cited in *Knight v. Sadtler Lead & Zinc Co.* 75 Mo. App. 541, holding the words "necessary injury" and "pecuniary injury" are looked upon as of the same import.

Measure of damages.

Cited in notes in 48 A. D. 639, 640, on damages for death of relative; 11 L.R.A. 690, on rule of damages for negligent act or omission.

—In action by parent for death of child.

Cited in *Hedrick v. Itwaco R. & Nav. Co.* 4 Wash. 400, 30 Pac. 714, holding the measure is the value of child's services from time of injury until he would have attained the age of majority, and in proper cases expenses of nursing and medical treatment; *Louisville, N. A. & C. R. Co. v. Goodykoontz*, 119 Ind. 111, 12 A. S. R. 371, 21 N. E. 472, holding the necessary funeral expenses, if death results are also to be considered; *Hickman v. Missouri P. R. Co.* 22 Mo. App.

344, holding the loss of service should be confined to the period of the son's minority; *Marshall v. Consolidated Jack Mines Co.* 119 Mo. App. 270, 95 S. W. 972, holding loss of the comfort and society of the deceased cannot be admitted as an element of damages; *Coleman v. Himmelberger-Harrison Land & Lumber Co.* 105 Mo. App. 254, 79 S. W. 981, holding an instruction which left it to the jury to assess damages such as would compensate plaintiff for loss, without a rule to measure such damage was erroneous; *Schnable v. Providence Public Market*, 24 R. I. 477, 53 Atl. 634, on measure of damage in action by parent to recover for death of child.

Necessity of instructions as to mitigation and aggravation.

Cited in *Parsons v. Missouri P. R. Co.* 94 Mo. 286, 6 S. W. 464, holding the facts and circumstances which would have the effect of aggravating the damages should be pointed out by the court; *McCarty v. St. Louis Transit Co.* 192 Mo. 396, 91 S. W. 132, holding where mitigation or aggravation are elements in the case and presented to the jury it seems necessary that instructions as to them be asked for and be given by court; *Nichols v. Winfrey*, 79 Mo. 544, holding it the province and duty of the court to tell the jury what would constitute, under the evidence, mitigating and aggravating circumstances.

Distinguished in *Nagel v. Missouri P. R. Co.* 75 Mo. 633, 42 A. R. 418; *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 859, 1 A. S. R. 729, 4 S. W. 129,—holding where evidence discloses no mitigating circumstances it is not error to give instructions that mitigating circumstances may be considered without pointing out the circumstances.

Ground for awarding exemplary damages.

Cited in *Calcaterra v. Iovaldi*, 123 Mo. App. 347, 100 S. W. 675, holding exemplary damages may be given where injuries result from fall of a barrel thrown on top of a box near a window in reckless disregard of its liability to roll out and fall.

36 AM. REP. 462, STATE v. REDEMEIER, 71 MO. 173.

Evidence necessary to support insanity as a defense to crime.

Cited in *State v. Shuff*, 9 Idaho, 115, 72 Pac. 664, holding where question of insanity is raised by the defendant, it devolves upon him to create a reasonable doubt in minds of the jury as to his responsibility; *State v. Schaefer*, 116 Mo. 96, 22 S. W. 447, holding the burden of showing to the satisfaction of the jury that defendant was insane at time of the homicide rests upon him; *Kelch v. State*, 55 Ohio St. 146, 60 A. S. R. 680, 39 L.R.A. 737, 45 N. E. 6, holding it cast upon the accused who asserts it the burden of sustaining it by evidence sufficient to overcome the natural presumption of sanity; *Ford v. State*, 71 Ala. 385; *Danforth v. State*, 75 Ga. 614, 58 A. R. 480; *State v. Williamson*, 106 Mo. 162, 17 S. W. 172; *State v. Bell*, 136 Mo. 120, 37 S. W. 823; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *Lovegrove v. State*, 31 Tex. Crim. Rep. 491, 21 S. W. 191,—holding it must be proved by a preponderance of evidence; *Remmers v. Remmers*, 216 Mo. 541, 117 S. W. 1117, holding that insanity as defense to crime is sufficiently established by preponderance of evidence.

Cited in reference notes in 83 A. D. 239, on burden of proof of sanity when insanity is pleaded as defense to crime; 41 A. R. 379, on burden of proof of insanity in criminal case.

Cited in notes in 97 A. D. 177; 76 A. S. R. 93, 96,—on burden of proof as to insanity set up as an excuse for crime; 36 L.R.A. 722, on presumption of sanity

with relation to criminal acts; 36 L.R.A. 727, on burden of proof as to sanity; 39 L.R.A. 738, on proof of insanity in criminal cases to satisfaction of jury.

Test of insanity.

Cited in *State v. Simms*, 71 Mo. 538; *State v. Erb*, 74 Mo. 199; *State v. Kotovsky*, 74 Mo. 247; *State v. Miller*, 111 Mo. 542, 20 S. W. 243,—holding the test of insanity to be ability to distinguish between right and wrong; *State v. Turlington*, 102 Mo. 642, 15 S. W. 141, holding the insanity must render the person incapable of distinguishing between right and wrong in respect to the act he was about to commit.

36 AM. REP. 468, INTERNATIONAL BANK v. GERMAN BANK, 71 MO. 183.

Rights of assignee from one clothed with the indicia of ownership.

Cited in *Leonard v. Marshall*, 82 Fed. 396, holding one who transfers his note to another, investing him with apparent ownership, must suffer where the other is an innocent holder; *New York Security & T. Co. v. Lombard Invest. Co.* 65 Fed. 271, holding where paper by reason of transfer by indorsement, payable to order in blank, is employed as collateral security so that new right supervenes, the one must suffer who made possible such intervening rights; *Bridgens v. Dollar Sav. Bank*, 66 Fed. 9, holding it does not follow from fact that attempted transfer of bank stock was not made on bank books, that as to third parties a written transfer indorsed on certificates of stock may not invest transferee with title; *Carithers v. Stuart*, 87 Ind. 424, holding it necessary to constitute an estoppel that the immediate assignee of the true owner be clothed with apparent rights of ownership such as are recognized by business men in dealing with like securities; *Neuhoff v. O'Reilly*, 93 Mo. 164, 6 S. W. 78; *Lee v. Turner*, 89 Mo. 489, 14 S. W. 505 (reversing 15 Mo. App. 205),—holding holder will be protected where owner of a note over due or of non-negotiable note has clothed the seller to him with the usual evidences of ownership; *Turner v. Hoyle*, 95 Mo. 337, 8 S. W. 157, holding his rights in such case are derived from the real owner who by reason of negligence or mistaken confidence is precluded from disputing them; *Dymock v. Missouri, K. & T. R. Co.* 54 Mo. App. 400, holding one who clothes another with the indicia of ownership of a bill of lading is estopped from asserting his real title as against a purchaser having no knowledge of such title; *Gage v. Averill*, 57 Mo. App. 111, holding the equities of the parties do not affect a purchase of a note before maturity by a purchaser in good faith and without notice.

Distinguished in *Ferru v. New York Security & T. Co.* 21 C. C. A. 83, 40 U. S. App. 75, 74 Fed. 769, holding the purchaser of a note after maturity from one who is obliged to pay it, can in no case claim any greater rights, as holder of the paper than the person from whom he acquired it; *Keim v. Vette*, 167 Mo. 389, 67 S. W. 223, holding where the note is shown to have been originally obtained by fraud the burden is upon the holder to show his possession came for value and in good faith.

—Where possession of paper originated in fraud perpetrated against maker.

Cited in *Scott v. Abbott*, 87 C. C. A. 475, 160 Fed. 573, holding rights of general creditors of a bankrupt corporation are superior to those of stock holders who became such through fraudulent representations; *Young v. Brewster*, 62 Mo. App. 628, holding one taking from a thief, who takes tax bills in-

dorsed in blank from a safe to which he has equal access with the owner and sells to him, gets no title though an innocent purchaser.

Distinguished in *Clifford Bkg. Co. v. Donovan Commission Co.* 195 Mo. 262, 94 S. W. 527, holding where a cashier signed drafts in blank to fraudulently use in buying margins on grain the burden is upon holder to show he holds without notice of the fraud; *Bank of Commerce v. Ginocchio*, 27 Mo. App. 661, holding fact that defendant sent draft to one of a common name residing in another city and it was fraudulently received and sold to plaintiff for value gives no right of action against the sender.

Loss between two innocent persons.

Cited in *Henry & C. Co. v. Evans*, 97 Mo. 47, 3 L.R.A. 332, 10 S. W. 868, holding as between owner and subcontractor for material furnished a contractor and used in construction of building though the owner has paid contractor in full he is liable to a lien.

**36 AM. REP. 480, SHANE v. KANSAS CITY, ST. J. & C. B. R. CO.
71 MO. 237.**

Liability for injuries caused by interference with surface waters.

Cited in *Choctaw, O. & G. R. Co. v. Sarlis*, 7 Ind. Terr. 446, 104 S. W. 676, on right of railroad to obstruct flow of surface water by erecting embankment; *Union Trust Co. v. Cuppy*, 26 Kan. 754, holding it doubtful whether one has any right to obstruct flow of surface water even so as to injure the land or property of any upper proprietor; *Boyd v. Conklin*, 54 Mich. 583, 52 A. R. 831, 20 N. W. 595, holding there is no right by raising artificial obstructions, to flood the neighbor's land, by stopping the escape of waters that cannot escape otherwise; *Sinai v. Louisville, N. O. & T. R. Co.* 71 Miss. 547, 14 So. 87, holding a railway company liable where surface water, by reason of its embankment, caused injury to a plantation,—another method of construction of roadbed being open to it; *Benson v. Chicago & A. R. Co.* 78 Mo. 504; *Stewart v. Clinton*, 79 Mo. 603,—holding that dominant proprietor has no right to collect the surface waters by artificial means and conduct it in increased volumes upon the servient land; *Rychlicki v. St. Louis*, 98 Mo. 497, 14 A. S. R. 651, 4 L.R.A. 594, 11 S. W. 1001 (dissenting opinion), on rights with respect to surface waters; *Boynton v. Longley*, 19 Nev. 69, 3 A. S. R. 781, 6 Pac. 437, holding the upper land-owner, while having a right to the reasonable use of the surface water, must so use, manage and control it as not to injure his neighbor's land; *Franklin v. Durgee*, 71 N. H. 186, 58 L.R.A. 112, 51 Atl. 911, holding the right to obstruct the natural flow of surface waters is limited by the reasonably beneficial enjoyment by both of the contiguous owners; *Uhl v. Ohio River R. Co.* 56 W. Va. 494, 107 A. S. R. 968, 68 L.R.A. 138, 40 S. E. 378, 3 A. & E. Ann. Cas. 201, holding a railway company liable for injuries caused by water overflowing from stream in high water where its embankment acts as a dam in holding the water.

Cited in reference notes in 38 A. R. 753, on railroad's liability for filling up artificial ditch for carrying off surface water; 16 A. S. R. 710, on right of lower proprietor as to surface water.

Cited in notes in 32 A. D. 127, on servitude to receive flow of water; 95 A. D. 629, on rights of owner and adjacent proprietor as to surface water; 3 A. S. R. 788, on right to augment servitude of lower land as to drainage by acts of industry; 30 A. S. R. 390, on municipal liability for interference with surface

waters by grading street; 85 A. S. R. 716, on right to diminish or impede flow of surface water onto one's own land; 21 L.R.A. 594, on right as to flow of surface water; 21 L.R.A. 601, on correlative rights as to obstruction of natural flow of surface water by improvements; 22 L.R.A.(N.S.) 791, 798, on right of owner of lower as against upper landowner to obstruct surface water in natural channel.

Distinguished in *Schneider v. Missouri P. R. Co.* 29 Mo. App. 68, holding the superior proprietor has no right to collect the water in a body on his land and precipitate it in greatly increased quantities; *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 246, 27 A. S. R. 246, 13 L.R.A. 394, 13 S. E. 489, holding where embankment along the margin of a stream where overflow waters in times of flood escaped, which caused these escaping waters to be thrown upon land on opposite bank, the owner has a right of action.

Disapproved in *Egener v. New York & R. B. R. Co.* 3 App. Div. 157, 38 N. Y. Supp. 319; *Edwards v. Charlotte, C. & A. R. Co.* 39 S. C. 472, 39 A. S. R. 746, 22 L.R.A. 246, 18 S. E. 58,—holding a railway company not liable where surface water, by reason of an embankment necessary to the company, is forced back upon adjacent land; *Morrissey v. Chicago, B. & Q. R. Co.* 38 Neb. 406, 56 N. W. 946, holding where railway company's embankment was constructed in a proper manner for operation of its line, fact that surface water was thereby thrown upon plaintiff's land gives no right of action; *Rowe v. St. Paul, M. & M. R. Co.* 41 Minn. 384, 16 A. S. R. 706, 43 N. W. 76, holding subject to the reasonable restriction that one must so use his land as not to injure his neighbor, he is not bound to provide water-ways to prevent accumulation of surface water upon adjacent land by reason of improvement of his own land.

Overruled in *Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271, 53 A. R. 581, holding a railway company, not liable to a land owner for injury caused by overflow of surface water occasioned by construction of road bed in absence of negligence or unskilfulness in construction.

— Common or civil law rule.

Disapproved in *Hoester v. Hemsath*, 16 Mo. App. 485, holding rights with respect to surface waters is governed by the rules of the common law; *Martin v. Benoist*, 20 Mo. App. 262, holding the common law rule prevails and surface water is a common enemy, which each landowner may fight and drive from his land.

What constitutes surface waters.

Cited in *Edwards v. Missouri, K. & T. R. Co.* 97 Mo. App. 103, 71 S. W. 366, holding waters overflowing the banks of a stream must be regarded as surface waters.

Cited in note in 25 L.R.A. 531, on flood water as surface water.

What are water courses.

Cited in note in 15 L.R.A. 632, on swales and ravines as water courses.

Relative rights of adjacent land owners.

Cited in *Ramsdale v. Foote*, 55 Wis. 557, 13 N. W. 557, holding one may use his land in any manner he pleases so long as he does not injure his neighbor's land.

36 AM. REP. 493, SLOAN v. CAMPBELL, 71 MO. 387.

Effect of assignment of debt on vendor's lien.

Cited in *Hunt v. Selleck*, 118 Mo. 588, 24 S. W. 213; *State use of Evans v.*

Orahoad, 27 Mo. App. 496, holding the transfer of a note for purchase money of land carries with it the lien; *Majors v. Maxwell*, 120 Mo. App. 281, 96 S. W. 731, holding the assignment of a check did not destroy a lien but carried it over to the assignee; *Dickason v. Fisher*, 137 Mo. 342, 37 S. W. 1114, holding one conveying land by warranty deed retains a vendor's lien which passes by assignment; *Bates v. Childers*, 5 N. M. 62, 20 Pac. 164, to the point that vendor's lien is assignable by indorsement of note given for purchase money.

Cited in reference notes in 1 A. S. R. 257, on assignment of note as carrying vendor's lien; 3 A. S. R. 721, on existence, waiver, and assignability of vendor's lien.

Right to vendor's lien.

Cited in *West Plains Bank v. Edwards*, 84 Mo. App. 462, holding the land chargeable with a vendor's lien in favor of creditors whose debts were assumed under an assumption clause in deed as part of the consideration of purchase; *Board v. Wilson*, 34 W. Va. 609, 12 S. E. 778, holding the vendor of an equitable title to land may enforce lien for purchase money where under like circumstances vendor of legal title could assert an equitable lien.

36 AM. REP. 494, CARTHAGE v. FIRST NAT. BANK, 71 MO. 508.

Right to tax or exact license fee of national banks.

Cited in *First Nat. Bank v. Kreig*, 21 Nev. 404, 32 Pac. 641, holding national banks are only subject to state taxation upon their real estate, and upon the shares of stock in the bank owned by the stockholders.

Cited in reference note in 81 A. S. R. 773, on power of municipality to exact license from national bank.

Cited in notes in 96 A. D. 291, on power of state to tax property of national banks; 96 A. D. 297, on power of state to authorize municipalities to exact license taxes from national banks; 69 A. S. R. 40, on state taxation of national banks; 45 L.R.A. 742, on right of state to require national bank to pay tax on business; 57 L.R.A. 57, on interference with Federal agencies and burdens on Federal grants by taxation on bank franchises; 129 Am. St. R. 291, on constitutional limitations on power to impose license or occupation taxes.

36 AM. REP. 496, STATE v. EDDINGS, 71 MO. 545.

Admissibility of evidence given by defendant in former trial.

Cited in *State v. Jefferson*, 77 Mo. 136, holding where defendant offered himself as a witness on a former trial of the cause his testimony on such trial is admissible; *State v. Roes*, 92 Mo. 201, 4 S. W. 733, holding the reading a transcript of defendant's evidence, given in a former trial, admissible in rebuttal; *Steele v. State*, 76 Miss. 387, 24 So. 910, holding his sworn statement reduced to writing by a coroner or magistrate may be offered against him in the trial in the circuit court.

— Of evidence by party in former civil trial.

Cited in *Padley v. Catterlin*, 64 Mo. App. 629, holding declarations and admissions material to the issue on trial taken in a deposition in another case to which one deposing is not a party are admissible against him; *State ex rel. Goldsoll v. Chatham Nat. Bank*, 80 Mo. 626, holding a deposition in the nature of admissions adverse to her pretended rights was competent evidence although party may be present to testify; *Priest v. Way*, 87 Mo. 16 (dissenting opinion), on admissibility of testimony of defendant on a former trial

Necessity of force to constitute attempted rape.

Cited in *State v. Smith*, 80 Mo. 516, holding it immaterial whether accused entertained the idea of force or fraud; *State v. Shroyer*, 104 Mo. 441, 24 A. S. R. 344, 16 S. W. 286, holding it immaterial whether the connection was to be by actual physical force or during the unconsciousness of sleep.

36 AM. REP. 499, KING v. JEFFERSON CITY SCHOOL BOARD, 71 MO. 628.

Power of board to make rules for government of school.

Cited in *Board of Education v. Purse*, 101 Ga. 422, 65 A. S. R. 312, 41 L.R.A. 593, 28 S. E. 896, holding a school board has power to suspend a pupil whose parent enters the school room during school hours and uses offensive and abusive language in presence of school; *State ex rel. Beatty v. Randall*, 79 Mo. App. 226, holding the jurisdiction of the school board to make needful rules for conduct of pupils and of teacher to enforce such rules extends over the pupil from his home to school and return; *Re Rebenack*, 62 Mo. App. 8, holding any rule tending to advance the objects of the law in establishing public schools must be considered reasonable and proper by the courts where not subversive of rights of children or parents or in conflict with humanity; *State ex rel. Clark v. Osborne*, 24 Mo. App. 309, holding the courts will interfere where the rule reaches beyond the school board's proper sphere of action; *State ex rel. Stallard v. White*, 82 Ind. 278, 42 A. R. 496 (dissenting opinion), on enforcement of proper regulations; *Indianapolis v. State*, 129 Ind. 14, 13 L.R.A. 147, 28 N. E. 61 (dissenting opinion), on power of school officers to make rules; *State ex rel. O'Bannon v. Cole*, 220 Mo. 697, 22 L.R.A.(N.S.) 986, 119 S. W. 424, holding that reasonableness of regulation adopted by school board is to be judged in first instance by such board.

Cited in notes in 65 A. S. R. 334, on causes of suspension and expulsion from school; 6 L.R.A. 534, on rules and regulations for management and conduct of pupils in public schools; 41 L.R.A. 593, on right to exclude, suspend, or expel pupils from school for misconduct of parent affecting child; 41 L.R.A. 597, on right to exclude, suspend, or expel pupils for absence and tardiness.

— Of teacher to enforce rules.

Cited in *Deskins v. Gose*, 85 Mo. 485, 55 A. R. 387, holding a teacher may punish for an infraction of a rule against quarreling and using profane language on the way home from school.

Action to determine scope of school board's powers.

Cited in *Kinzer v. Independent School Dist.* 129 Iowa, 441, 3 L.R.A.(N.S.) 496, 105 N. W. 686, 6 A. & E. Ann. Cas. 996, holding the question whether an inferior tribunal, such as a school board, has acted within the scope of its authority may be determined in an action of mandamus or other special proceeding.

36 AM. REP. 501, DUDLEY v. CAMDEN & P. FERRY CO. 42 N. J. L. 25, Second appeal 45 N. J. L. 368, 46 A. R. 781.

Duty and liability of ferryman.

Cited in reference notes in 87 A. D. 722, on liability of keeper of common ferry towards goods; 91 A. D. 66, on ferrymen as common carriers; 49 A. R. 434, on liability of ferryman for loss of horses in charge of another.

Cited in notes in 67 A. D. 212, on effect of contributory negligence of owner

or agent accompanying live animals on liability of carrier for their injury: 87 A. D. 721, on duties and liability of keeper of public ferry; 68 L.R.A. 157, on what is within duty of ferryman as a common carrier; 68 L.R.A. 159, on duty of ferryman to maintain proper barriers to protect passengers and property.

Standard of care required of person injured.

Cited in *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 181, holding it to be ordinary care.

36 AM. REP. 505, DAVEY v. JONES, 42 N. J. L. 28.

Liability of bank for negligence of correspondent.

Cited in *Irwin v. Reeves Pulley Co.* 20 Ind. App. 101, 48 N. E. 601 (dissenting opinion), as to the liability; *Bank of Lindsborg v. Ober*, 31 Kan. 599, 3 Pac. 324, holding it liable for negligence of correspondent in failing to collect note.

Cited in note in 77 A. S. R. 627, on liability of collecting banks for their own negligence and that of their notaries, correspondents, and other agents.

Service of notice of dishonor.

Cited in reference note in 83 A. D. 150, on service of notice of dishonor of notes and bills.

Liability of collecting agencies for attorney's default.

Cited in note in 50 A. S. R. 116, on liability of collection agencies for default of their attorneys.

36 AM. REP. 508, McANDREWS v. COLLIERD, 42 N. J. L. 189.

What constitutes nuisances.

Cited in *Perrin v. Crescent City Stock Yard & Slaughterhouse Co.* 119 La. 83, 43 So. 938, 12 A. & E. Ann. Cas. 903, holding a use of property which materially interferes with the physical comfort of those who live in the neighborhood or which impairs the enjoyment of their home may be a nuisance even though it does not impair their health or result in driving them from their homes; *Driscoll v. Carlin*, 50 N. J. L. 28, 11 Atl. 482, holding defendant who had deposited timbers on side walk and left them there liable to one sustaining injury by falling over same; *Frost v. Berkeley Phosphate Co.* 42 S. C. 402, 46 A. S. R. 736, 28 L.R.A. 693, 20 S. E. 280, holding phosphate factory generating deleterious gases and vapors a nuisance; *McGregor v. Camden*, 47 W. Va. 193, 34 S. E. 936, holding oil and gas wells are not nuisances per se and whether they are a nuisance to a dwelling house and its appurtenances depends upon their location, capacity and management.

Cited in notes in 107 A. S. R. 217, on effect of care and precaution against creation of annoyance to prevent public nuisance; 1 E. R. C. 273, on liability for injury due to escape of anything likely to do harm.

Distinguished in *Simon v. Henry*, 62 N. J. L. 486, 41 Atl. 692, holding blasting of rock by dynamite in construction of public sewer through highway not a nuisance per se.

—Element of negligence.

Cited in *Weston Paper Co. v. Pope*, 155 Ind. 394, 56 L.R.A. 899, 57 N. E. 719, holding the fact that a manufacturing company has expended a large sum of money in the construction of its plant, and that it conducts its business in a careful manner and without malice, will not relieve it from liability to riparian owner for damages for depositing refuse into stream; *Mathews v. St. Louis &*

S. F. R. Co. 121 Mo. 298, 25 L.R.A. 161, 24 S. W. 591, holding statute making railway companies liable for damages caused by fire communicated by locomotive irrespective of negligence, constitutional; Longtin v. Persell, 30 Mont. 306, 104 A. S. R. 723, 65 L.R.A. 655, 76 Pac. 699, 2 A. & E. Ann. Cas. 198, holding the carrying on of blasting on premises platted as city lots, continuously for over a year, constitutes a nuisance *prima facie*, irrespective of the care exercised; Hickey v. McCabe, 30 R. I. 346, 27 L.R.A.(N.S.) 425, 75 Atl. 404, 19 A. & E. Ann. Cas. 783, holding property owner entitled to recover for physical injuries to property resulting from blasting on adjoining land.

— Agency of defendant in particular injury.

Cited in *Marine Ins. Co. v. St. Louis*, 1 M. & S. R. Co. 41 Fed. 643, holding one who creates or continues a nuisance is liable for any damage caused thereby, though the immediate cause may have been the negligence of another person; *Chicago, W. & V. Coal Co. v. Glass*, 34 Ill. App. 364, holding where the establishment and maintenance of a public nuisance results in injuries to others, it is not necessary, in order to render the person maintaining it liable, to show his immediate and direct agency in causing the injury.

— Storage of explosives and inflammables as nuisance.

Cited in *Kerbaugh v. Caldwell*, 80 C. C. A. 470, 151 Fed. 194, 10 A. & E. Ann. Cas. 453; *Kleebauer v. Western Fuse & Explosive Co.* 60 L.R.A. 377, 60 Pac. 246,—as to storing of gunpowder being nuisance *per se*; *Kinney v. Koopman*, 116 Ala. 310, 67 A. S. R. 119, 37 L.R.A. 497, 22 So. 593; *Rudder v. Koopman*, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601,—holding the storing of large quantities of gun powder and dynamite in a wooden building located within the corporate limits of a city or town in a thickly settled portion thereof constitutes a nuisance; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730, holding a magazine for the storage of gun powder and dynamite in a populous neighborhood may be found to be a nuisance at common law; *O'Hara v. Nelson*, 71 N. J. Eq. 161, 63 Atl. 836, holding the storing and using of gasoline in large quantities, in a frame building situate in thickly built-up portion of large city where there are numerous frame buildings, constitutes a nuisance; *Prussak v. Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761, holding defendant who maintained powder magazine liable for damages caused by explosion thereof resulting from it being struck by lightning; *McDonough v. Roat*, 8 Kulp, 433, holding the business of storing and handling dynamite constitutes a nuisance or otherwise according to the location and surroundings in which it is carried on; *Wilson v. Phoenix Powder Mfg. Co.* 40 W. Va. 413, 52 A. S. R. 890, 21 S. E. 1035, holding a powder mill situated on bank of river and near two railroads is a public nuisance; *Rudder v. Koopman*, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601, holding that storing large quantities of dynamite in wooden building within corporate limits of village, in thickly settled portion is nuisance.

Cited in reference notes in 19 A. S. R. 39, on gunpowder as a nuisance; 123 A. S. R. 579, on duty to adjoining proprietor as to storage of explosives.

Cited in notes in 36 A. R. 658, on the keeping of gun powder on private premises as a nuisance; 67 A. S. R. 134, 136, on liability for keeping explosives; 51 A. D. 283; 42 A. S. R. 540; 16 L.R.A.(N.S.) 693,—on storage of explosives as a nuisance; 29 L.R.A. 719, on negligence in manufacture and storage of gunpowder, nitroglycerin, dynamite, and other explosives; 29 L.R.A. 722, on effect of city ordinance on negligence in manufacture and storage of gunpowder, nitroglycerin, dynamite, and other explosives.

Municipal power over nuisance.

Cited in note in 38 L.R.A. 309, on municipal power over nuisances as to electricity, steam, and explosives.

Legislative authority as defense to action for injury.

Cited in *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 A. R. 1, 7 Atl. 432, holding act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for a public benefit as well, any right to deprive persons of the ordinary enjoyment of their property except upon condition of just compensation.

Cited in notes in 70 L.R.A. 589, on presumption as to authority of railroad company to commit nuisance under statutory authority to construct and maintain road; 1 E. R. C. 667, on right of action for damage necessarily resulting from exercise of statutory powers.

36 AM. REP. 511, COLE v. BERRY, 42 N. J. L. 308.**Conditional sales, mortgages or bailments.**

Cited in *The Marina*, 19 Fed. 760, holding an agreement by which goods delivered to the vendee are to remain the property of vendor till paid for is a conditional sale, and not a chattel mortgage within meaning of registration acts; *Tilford v. Atlantic Match Co.* 134 Fed. 924, holding a holder of bonds of a corporation secured by a trust mortgage executed prior to corporation's purchase of a boiler under conditional contract of sale reserving title in seller until price was paid, was neither a subsequent purchaser nor mortgagee within New Jersey statute making conditional contract not recorded as provided therein void as to judgment creditors and subsequent purchasers and mortgagees in good faith; *Roddy v. Brick*, 42 N. J. Eq. 218, 6 Atl. 806, holding if a conveyance resolves itself into a security, whatever be its form, it is in equity a mortgage; *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 A. S. R. 409, 19 Atl. 312, as to contract of sale where by express terms title is to remain in vendor; *Kestner v. Keiser Cigar Co.* 4 Pa. Dist. R. 479, holding if the legal effect of the contract is to require or permit the transferee to return the goods transferred as a compliance with his contract the transaction is a bailment but if the legal effect is to require transferee to purchase and pay for them at all courts so that he cannot return the goods without breach of contract the transaction is a conditional sale.

Cited in reference note in 2 A. S. R. 579, on effect of contracts of sale or lease providing for payments in instalments.

Cited in notes in 89 A. D. 127, 128, on contracts of sale or lease, providing for payments by instalments; 40 A. R. 22, on conditional sale; 57 A. R. 572, 577, on conditional sales of chattels; 94 A. S. R. 210, 214, on distinction between absolute sales and conditional sales; 94 A. S. R. 252, on distinction between conditional sale and lease; 12 L.R.A. 447, on sale of personal property on instalment plan.

—Passing of title.

Cited in *Oester v. Sitlington*, 115 Mo. 247, 21 S. W. 820; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 A. S. R. 889, 14 Atl. 379; *Hirsch v. C. W. Leatherbee Lumber Co.* 69 N. J. L. 509, 55 Atl. 645; *Call v. Seymour*, 40 Ohio St. 674,—holding where property is delivered to purchaser upon condition that title shall not pass until price has been paid that condition must be performed to divest seller of his property; *Hudson Trust & Sav. Inst. v. Carr-Curran Paper*

Mills Co. 58 N. J. Eq. 59, 43 Atl. 418, holding a sale of a machine incapable of delivery entire and payable in instalments did not pass title till erected and paid for as agreed.

Cited in reference note in 1 A. S. R. 63, on rights of vendor under conditional sale accompanied by delivery of possession to vendee.

Cited in note in 37 A. R. 668, on interest of vendee under conditional sale.

— Validity as against creditors.

Cited in *Cooper v. Philadelphia Worsted Co.* 68 N. J. Eq. 622, 60 Atl. 352; *Marvin Safe Co. v. Norton*, 48 N. J. L. 410, 57 A. R. 566, 7 Atl. 418; *Russell v. Harkness*, 4 Utah, 197, 7 Pac. 865; *McComb v. Donald*, 82 Va. 903, 5 S. E. 558,—holding where vendor agrees to sell vendee personal property for a price agreed to be paid at a future time and delivers possession but expressly retains title till payment it is a conditional sale, and though by parol or unrecorded instrument it is valid as against vendees, creditors or subsequent purchasers with or without notice.

Possession as evidence of title.

Cited in notes in 12 L.R.A. 703, on possession as evidence of title to personality; 25 L.R.A.(N.S.) 785, 787, on right of one leaving chattels in another's possession as against latter's vendees or creditors.

36 AM. REP. 518, MUHLENBRINCK v. LONG BRANCH, 42 N. J. L. 364.

Power to license as including power to tax.

Cited in *State v. Glavin*, 67 Conn. 29, 34 Atl. 708, holding license fee greatly out of proportion to reasonable cost of issuing it was tax under name of license and void; *Johnson v. Asbury Park*, 60 N. J. L. 427, 39 Atl. 693, as to power to license not including power to tax; *Littlefield v. State*, 42 Neb. 223, 47 A. S. R. 697, 28 L.R.A. 588, 60 N. W. 724; *State v. Angelo*, 71 N. H. 224, 51 Atl. 905; *State, Clark, Prosecutor, v. New Brunswick*, 43 N. J. L. 175; *Mulcahy v. Newark*, 57 N. J. L. 513, 31 Atl. 226; *Blanke v. Hoboken Bd. of Health*, 64 N. J. L. 42, 44 Atl. 847; *Thurlow Medical Co. v. Salem*, 67 N. J. L. 111, 50 Atl. 475,—holding license fees cannot be imposed for revenue unless by express authority of law; *Fielders v. North Jersey Street R. Co.* 68 N. J. L. 343, 96 A. S. R. 552, 59 L.R.A. 455, 53 Atl. 404, as to distinction between police power and taxing power.

Annotation cited in *Ex parte Gregory*, 20 Tex. App. 210, 54 A. R. 516, as to when license fee is tax.

Cited in notes in 30 L.R.A. 426, on what may be included in license fees under general power of municipality to regulate; 30 L.R.A. 429, on necessity that license fees imposed by municipality shall not be for revenue; 30 L.R.A. 430, on distinction between license measures for revenue and for regulation; 30 L.R.A. 437, on limitations of amount of license fees which municipality may impose under power to restrain or prohibit; 129 Am. St. Rep. 268, on constitutional limitations on power to impose license or occupation taxes.

Distinguished in *State, Flanagan, Prosecutor, v. Plainfield*, 44 N. J. L. 118, holding the provision in city charter granting to common council the right to regulate and prohibit the sale of spirituous liquors and also the amount of the assessment to be paid for license, confers taxing power for city purposes.

—As judicial question.

Cited in *St. Louis v. Spiegel*, 75 Mo. 145; *State v. Bengsch*, 170 Mo. 81, 70 S. W. 710,—holding it competent for the courts to make examination and see if, under a mere power to license, the power of taxation for revenue is exercised.

Reasonableness of license fee.

Cited in *La Porta v. Hoboken Bd. of Health*, 71 N. J. L. 88, 58 Atl. 115, holding license fee reasonable in particular instance.

Cited in note in 30 L.R.A. 432, on presumption of reasonableness of license fees imposed by municipalities.

Ordinances discriminating between resident and nonresident applicants for license.

Cited in *State, Morgan, Prosecutor, v. Orange*, 50 N. J. L. 389, 13 Atl. 240, holding them void.

Cited in reference note in 29 A. S. R. 403, on discrimination between residents and nonresidents in municipal ordinance.

Municipal regulation of pawnbrokers etc.

Cited in notes in 14 L.R.A. 100, on validity of ordinances relating to hawking and peddling; 32 L.R.A. 116, on power of municipalities to regulate trade of pawnbrokers, junk dealers, and dealers in secondhand clothes.

36 AM. REP. 523, WOOD v. SHELDON, 42 N. J. L. 421.

Implied warranty of genuineness in sales of choses in action.

Cited in *Meyer v. Richards*, 163 U. S. 385, 41 L. ed. 199, 16 Sup. Ct. Rep. 1148; *McClure v. Central Trust Co.* 165 N. Y. 108, 53 L.R.A. 153, 58 N. E. 777,—holding it applies to choses in action; *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98 (dissenting opinion); *Gould v. Bourgeois*, 51 N. J. L. 361, 18 Atl. 64,—holding that upon sale of personal property, act of selling is affirmation by vendor that he is owner; *Liebermann v. Reichard*, 7 North. Co. Rep. 237, holding warranty of title in grantor implied by sale extends, also, to choses in action.

Cited in notes in 23 E. R. C. 206, on implied warranty of title on sale of chattel; 10 L.R.A.(N.S.) 546, on implied warranty as to usury on transfer of paper without indorsement.

Measure of damages for breach of warranty.

Cited in *Morgan v. Hendrie Bros.* 34 Colo. 25, 81 Pac. 700, 7 A. & E. Ann. Cas. 935, holding in action for breach of warranty of title in the sale of certain shares of stock in a corporation, the measure of damages is the purchase price paid for the stock with interest, and not the value of the stock and dividends paid thereon.

36 AM. REP. 527, JOHNSON v. ARNWINE, 42 N. J. L. 451.

Foundation for admissibility of secondary evidence of contents of writing.

Cited in *Gordon v. State*, 48 N. J. L. 611, 7 Atl. 476, holding where it is proven that instrument is lost it is proper to admit secondary evidence of its contents; *McManus v. Commow*, 10 N. D. 340, 87 N. W. 8; *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. 905; *Koehler v. Schilling*, 70 N. J. L. 585, 57 Atl. 154; *Avery v. Stewart*, 134 N. C. 287, 46 S. E. 519; *Wiseman v. Northern P. R. Co.* 29

Or. 425, 23 A. S. R. 135, 26 Pac. 272,—holding party alleging loss or destruction of original must show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest and which are accessible to him; **Taliaferro v. Rice, 47 Tex. Civ. App. 3, 103 S. W. 464,** holding that strictness of proof required to permit secondary evidence of contents of paper is proportioned to importance of document in question as showing amount of care that would probably be exercised in its preservation.

Cited in note in **11 E. R. C. 458,** on admissibility of secondary evidence of contents of private document.

Questions of fact preliminary to admissibility of evidence.

Cited in **Longstreth v. Korb, 64 N. J. L. 112, 44 Atl. 934,** sustaining finding of trial court as to sufficiency of proof of diligence in searching for lost letter; **Porter v. Buckley, 78 O. C. A. 138, 147 Fed. 140; Hupfer v. National Distilling Co. 119 Wis. 417, 96 N. W. 809,**—holding identity question for trial court and the appellate court will not reverse its rulings unless against clear preponderance of the evidence.

Conclusiveness of finding of fact by trial court.

Cited in **Voorhis v. Terhune, 50 N. J. L. 147, 7 A. S. R. 781, 13 Atl. 391; Roesel v. State, 62 N. J. L. 216, 41 Atl. 408,**—holding its finding will not be set aside unless the evidence on its face does not support the conclusion on which the court based its judgment.

Defense to action for malicious prosecution.

Cited in note in **93 A. S. R. 461,** on advice of counsel as probable cause for malicious prosecution of civil action.

36 AM. REP. 535, SMITH v. OXFORD IRON CO. 42 N. J. L. 467.

Assumption of risk.

Cited in **Thomas v. Missouri P. R. Co. 109 Mo. 187, 18 S. W. 980** (dissenting opinion), as to risks assumed by servant; **Schminkey v. T. M. Sinclair & Co. 137 Iowa, 130, 114 N. W. 612,** holding that servant does not assume new and extraordinary risks created by master after entering service, and of which he had no knowledge.

Cited in notes in **92 A. D. 217,** on risk assumed by servant; **77 A. D. 223,** as to when servant assumes risk of dangerous machinery and appliances; **87 A. S. R. 573,** on assumption of risks by employees in mine; **17 L.R.A.(N.S.) 84,** on servant's assumption of risk from latent danger or defect.

Distinguished in **McDonald v. Standard Oil Co. 69 N. J. L. 445, 55 Atl. 289,** holding servant assumes risk of plain and obvious dangers which are apparent to one of ordinary skill and understanding.

—Duty of master to provide safe place and appliances.

Cited in **Smith v. Peninsular Car Works, 60 Mich. 501, 1 A. S. R. 542, 27 N. W. 662,** holding master is bound to furnish servant safe place to work; **Dewey v. Detroit, G. H. & M. R. Co. 97 Mich. 329, 37 A. S. R. 348, 22 L.R.A. 292, 56 N. W. 756** (dissenting opinion), as to duty of master to furnish safe place to work; **Nickel v. Columbia Paper Stock Co. 95 Mo. App. 226, 68 S. W. 955,** holding a paper manufacturer is liable for diseases arising from infected matter given to a paper assorter in his employ to be assorted; **Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 51 A. S. R. 604, 31 Atl. 619,** holding master must exercise reasonable care in furnishing suitable machinery
Am. Rep. Vol. XVII.—72.

and keeping same in repair; *Carroll v. Tidewater Oil Co.* 67 N. J. L. 678, 52 Atl. 275, holding if the injury is due to a latent defect which master either knew or in exercise of due care might have known, he is liable.

Cited in reference note in 4 A. S. R. 616, on master's duty to furnish safest and best materials.

Cited in notes in 87 A. S. R. 561, on duty of mine owner to provide safe machinery and appliances; 87 A. S. R. 562, on degree of care required of mine owner to prevent injury to employees; 98 A. S. R. 302, on effect of delegation of duty to supply, repair, or inspect machinery and appliances; 54 L.R.A. 154, on master's liability as to keeping instrumentalities in proper condition as depending on subject matter of inspection or repairs neglected; 17 L.R.A. (N.S.) 107, on applicability to latent defect of rule imputing to master notice of defects in original construction.

— Duty of master to warn servant of unusual risks.

Cited in *Parkhurst v. Johnson*, 50 Mich. 70, 45 A. R. 28, 15 N. W. 107, holding it duty of master to warn employee; *Hysell v. Swift & Co.* 78 Mo. App. 39, holding if master knows of, or could by reasonable diligence know of, hidden danger arising from the nature of the work or defective appliances, he must warn servant.

Cited in notes in 1 A. S. R. 550, on master's duty to warn servant employed in dangerous work; 1 L.R.A. 174, on master's duty to warn servant of danger; 4 L.R.A. 851, on duty of master to warn minors and inexperienced employees of dangers; 54 L.R.A. 99, on nondelegability of master's duty to impart information as to permanent dangers superadded to the environment after work has begun; 26 L.R.A. (N.S.) 635, on delegability of master's duty to instruct or warn servants.

— Duty to warn miner of adoption of high explosive.

Cited in *Chambers v. Chester*, 172 Mo. 461, 72 S. W. 904, holding a miner is entitled to notice when a change is made in the powder furnished him for a less explosive grade to a more explosive one.

Cited in note in 19 L.R.A. (N.S.) 997, on duty to warn servant engaged in blasting of dangers therefrom.

Master's duty as to inspection.

Cited in notes in 41 L.R.A. 71, on master's duty to inspect instrumentalities manufactured by himself; 41 L.R.A. 114, on theory that master's duty of inspection is merely to supervise the inspectors; 70 L.R.A. 832, on master's duty to inspect materials upon which servant is to work.

— Assignability of.

Cited in notes in 87 A. S. R. 572, on right of mine owner to delegate responsibility as to safety of employees; 41 L.R.A. 110, on assignability of master's duty of inspection; 41 L.R.A. 121, on assignability of master's duty of inspection as dependent upon distinction between the furnishing and the use of agencies.

Liability for negligence of fellow servant.

Cited in *Curley v. Hoff*, 62 N. J. L. 758, 42 Atl. 731, holding master not liable for negligence of carefully selected fellow servant.

Liability of master for negligence of vice principal.

Cited in *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 549, holding railway company liable for injury caused by enforcement of unreasonable and

dangerous order given by superintendent; *Vitto v. Farley*, 15 Misc. 153, 36 N. Y. Supp. 1105; *Willis v. Oregon R. & Nav. Co.* 11 Or. 257, 4 Pac. 121,—holding master liable for injury to servant occasioned by the negligence of a vice principal, to whom he has committed the substantial control of the business, and power to do all acts necessary to its conduct; *Rogers Locomotive & Mach. Works v. Hand*, 50 N. J. L. 464, 14 Atl. 766, as to the liability.

Cited in note in 7 L.R.A. 502, on master's liability for acts of agent or representative.

Distinguished in *O'Brien v. American Dredging Co.* 53 N. J. L. 291, 21 Atl. 324; *Knutter v. New York & N. J. Teleph. Co.* 67 N. J. L. 646, 58 L.R.A. 808, 52 Atl. 565,—holding master not liable on mere ground that negligent servant occupied a position of superiority or control over the party injured.

Who are fellow servants.

Cited in *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322, holding a brakeman, working a switch for his train on one track in railroad yard, is a fellow servant with engineer of another train of same corporation upon an adjacent track; *Ricker v. Central R. Co.* 73 N. J. L. 751, 7 L.R.A.(N.S.) 650, 64 Atl. 1068, 9 A. & E. Ann. Cas. 785, holding train dispatcher who issues orders in name of superintendent not fellow servant of fireman in locomotive.

Cited in notes in 75 A. S. R. 598, on persons performing master's duties as vice principals; 51 L.R.A. 569, on doctrine that general manager is not vice principal.

36 AM. REP. 542, EVENS v. GRISCOM, 42 N. J. L. 579.

Inconsistent or contradictory descriptions in devise or grant.

Cited in *Kanouse v. Stockbower*, 48 N. J. Eq. 42, 21 Atl. 197, holding maxim "falsa demonstratio non nocet" is without pertinency or utility except in cases where two or more descriptions of the same thing are given in a grant which are contradictory or inconsistent; *Country Homes Land Co. v. De Gray*, 71 N. J. Eq. 283, 71 Atl. 340; *American Surety Co. v. Great White Spirit Co.* 58 N. J. Eq. 526, 43 Atl. 579,—holding where there is a wholly inapplicable and false description it cannot be deemed to have been intended to limit the general description and should be rejected.

Cited in note in 6 L.R.A.(N.S.) 959, on boundaries and area of land devised in will misdescribing the land.

Words of specific description to limit devise.

Cited in *Howard v. Evans*, 24 App. D. C. 127, as to when they should be given effect.

36 AM. REP. 542, CITIZENS' COACH CO. v. CAMDEN HORSE R. CO. 33 N. J. EQ. 267.

Rights in use of streets by street railways.

Cited in *Snyder v. Ft. Madison Street R. Co.* 105 Iowa, 284, 41 L.R.A. 345, 75 N. W. 179, holding poles of an electric railway must not be so placed as to interfere unnecessarily with the right of abutting owners to use and enjoy their property.

— Exclusiveness of use of tracks.

Cited in *West Jersey Traction Co. v. Camden Horse R. Co.* 52 N. J. Eq. 452,

29 Atl. 333, holding the fact that the license granted the railway company did not fix any particular route was insufficient to deprive it of priority of right to such streets, when the license properly construed gave it the exclusive right to such route or routes, and to such only as it had made preparation to occupy and was in good faith proceeding to occupy when right of rival company accrued; *Orange & N. Horse R. Co. v. Ward*, 47 N. J. L. 560, 4 Atl. 331, as to street Car track being part of public street; *Camden & T. R. Co. v. United States Cast Iron Pipe & Foundry Co.* 68 N. J. Eq. 279, 59 Atl. 523; *Camden, G. & W. R. Co. v. Preston*, 59 N. J. L. 264, 35 Atl. 1119,—holding trolley companies by permission of the legislature may, in common with all persons, lawfully use that part of the highway over which their tracks are laid; *West Jersey & S. R. Co. v. Atlantic City & Suburban Traction Co.* 65 N. J. Eq. 613, 56 Atl. 890; *Fidelity Trust Co. v. Hoboken & M. R. Co.* 71 N. J. Eq. 14, 63 Atl. 273; *Burnet v. Crane*, 56 N. J. L. 285, 44 A. S. R. 395, 28 Atl. 591; *State ex rel. Bridgeton v. Bridgeton & M. Traction Co.* 62 N. J. L. 592, 45 L.R.A. 837, 43 Atl. 715; *Newark v. State Bd. of Taxation*, 66 N. J. L. 466, 49 Atl. 925,—as to right being exclusive.

Cited in reference note in 48 A. R. 545, on injunction restraining moving house along street railway.

—Railroad in street.

Cited in *Burlington v. Pennsylvania R. Co.* 56 N. J. Eq. 259, 38 Atl. 849, holding, without statutory authority expressly given or arising from necessary implication, a railroad placed longitudinally in a street is a nuisance.

Right of railroad company to exclude persons from premises.

Cited in reference notes in 9 A. S. R. 666, on carrier's right to forcibly eject hotel runner from premises; 18 A. S. R. 756, on railroad's right to exclude persons from station and station grounds.

Street railroads as burdens on fee of street.

Cited in *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007, holding electric street railway impose no new burden upon street; *Atty. Gen. ex rel. Brotherton v. Detroit*, 148 Mich. 71, 111 N. W. 860 (dissenting opinion), as to street railways not being additional servitude upon street; *Van Horne v. Newark Pass. R. Co.* 48 N. J. Eq. 332, 21 Atl. 1034, holding horse railway constructed in a public highway by authority of law does not impose a servitude upon land in the highway additional to that for which it was originally taken; *Heilman v. Lebanon & A. R. Co.* 10 Pa. Co. Ct. 241, 145 Pa. 23, as to use of street by street railway being legitimate use of street; *West Jersey R. Co. v. Camden, G. & W. R. Co.* 52 N. J. Eq. 31, 29 Atl. 423; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L.R.A. 374, 27 Atl. 1067; *State ex rel. Rutherford v. Hudson River Traction Co.* 73 N. J. L. 227, 63 Atl. 84; *Du Bois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co.* 10 Pa. Co. Ct. 401; *Taggart v. Newport Street R. Co.* 16 R. L. 668, 7 L.R.A. 205, 19 Atl. 326,—as to its operating in furtherance of its original uses instead of being an embarrassment; *New York & G. L. R. Co. v. New Jersey Electric R. Co.* 60 N. J. L. 52, 38 L.R.A. 516, 37 Atl. 627; *Cincinnati Street R. Co. v. Snell*, 54 Ohio St. 197, 32 L.R.A. 276, 43 N. E. 207,—holding so long as there is no unreasonable interference with the public right of passage the use is lawful; *Consolidated Traction Co. v. South Orange & M. Traction Co.* 56 N. J. Eq. 569, 40 Atl. 15, holding street railroad not entitled to compensation for construction of crossing over its tracks by another company; *Bremer v. St. Paul C. R. Co.* 107 Minn. 326, 21 L.R.A. (N.S.) 887, 120 N. W. 382, to point that

use of street for street cars creates no new servitude, but makes possible additional use of street.

Cited in notes in 25 A. S. R. 478, on right to construct railroad in street without compensation to abutting landowners; 25 A. S. R. 476, as to what extent street railroads are public highways.

Distinguished in *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L.R.A. 751, 74 N. W. 67, holding poles and wires additional servitude upon street.

Liability of municipalities to owners of property for damages caused by lawful public improvements.

Cited in *Clark v. Elizabeth*, 61 N. J. L. 565, 40 Atl. 737 (opinion of lower court), as to liability of municipality for change in grade of streets; *Newark v. Weeks*, 71 N. J. L. 448, 59 Atl. 901, holding no common law liability on municipality to pay damages for changes lawfully made in grades of streets.

Relief granted under special prayer in equity.

Cited in *Eustis Mfg. Co. v. Eustis*, 51 N. J. Eq. 565, 27 Atl. 439, holding under a special prayer relief of the same general character but less extensive than that asked by general prayer may be granted, or prayer may be amended if necessary.

Jurisdiction of court of equity.

Distinguished in *Delaware, L. & W. R. Co. v. Central Stock Yard & Transit Co.* 45 N. J. Eq. 50, 6 L.R.A. 855, 17 Atl. 146, holding equity may, in cases where no adequate remedy at law exists, enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract law or usage, but it cannot create the obligation.

When issue at law granted.

Cited in *Hagerty v. Lee*, 45 N. J. Eq. 255, 17 Atl. 826, as to question being reserved till final hearing.

36 AM. REP. 556, PILLSBURY v. KINGON, 33 N. J. EQ. 287.

Who may sue to set aside fraudulent conveyances.

Cited in *Voorhees v. Carpenter*, 127 Ind. 300, 26 N. E. 838, holding creditor cannot for his own benefit bring suit to set aside a fraudulent conveyance made by debtor who afterwards executes a voluntary assignment for benefit of creditors; *Lee v. Cole*, 44 N. J. Eq. 318, 15 Atl. 531; *White v. Davis*, 48 N. J. Eq. 22, 21 Atl. 187; *Loucheim v. Casperson*, 61 N. J. Eq. 529, 48 Atl. 1107,—holding where assignee for benefit of creditors is dead, or it is charged that in the conduct of the assignment the assignee has perpetrated a fraud, any creditor whose claim has been proved and admitted may bring suit to enforce the assignment for benefit of himself and of the other proving creditors; *Hamlen v. Bennett*, 52 N. J. Eq. 70, 27 Atl. 651; *Fidelity Nat. Bank v. Adams*, 38 Wash. 75, 80 Pac. 284,—holding creditor may bring action in his own name to set aside fraudulent conveyance made by debtor prior to making an assignment for benefit of creditors; *Brown v. Brown*, 57 N. J. Eq. 23, on right of parties in *pari delicto* to equitable relief.

Cited in notes in 3 A. S. R. 741, on administrator's right to set up fraud of his intestate as defense; 58 A. S. R. 95, on effect of fraud on assignment for benefit of creditors.

—Assignee or receiver in insolvency.

Cited in *Ruggles v. Cannedy*, 127 Cal. 290, 46 L.R.A. 371, 53 Pac. 911, holding

assignee in insolvency under code may maintain suit; *Graham Bottom Co. v. Speilmann*, 50 N. J. Eq. 120, 24 Atl. 571, holding receiver of insolvent corporation may bring suit; *Hasseld v. Seyfort*, 105 Ind. 534, 5 N. E. 675; *Symonds v. Lewis*, 94 Me. 501, 48 Atl. 121; *Brown v. Brabb*, 67 Mich. 17, 11 A. S. R. 549, 34 N. W. 403; *Shaw v. Glen*, 37 N. J. Eq. 32; *Arnold v. Hagerman*, 45 N. J. Eq. 186, 14 A. S. R. 712, 17 Atl. 93; *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 12 L.R.A. 588, 21 Atl. 298; *Martin v. Bowen*, 51 N. J. Eq. 452, 26 Atl. 823; *Watson v. Rowley*, 63 N. J. Eq. 195, 52 Atl. 160,—as to power of assignee for benefit of creditors to set aside fraudulent conveyances; *Schaller v. Wright*, 70 Iowa, 667, 28 N. W. 460; *Chapin v. Jenkins*, 50 Kan. 385, 31 Pac. 1084; *Grant v. Crowell*, 42 N. J. Eq. 524, 9 Atl. 201; *Smith v. Wood*, 42 N. J. Eq. 563, 7 Atl. 881; *Moore v. Williamson*, 44 N. J. Eq. 496, 1 L.R.A. 336, 15 Atl. 587; *Meeker v. Felts*, 49 N. J. Eq. 502, 23 Atl. 672; *Kalmus v. Ballin*, 52 N. J. Eq. 290, 46 A. S. R. 520, 28 Atl. 791; *Taylor v. Taylor*, 59 N. J. Eq. 86, 45 Atl. 440; *American Pin Co. v. Wright*, 60 N. J. Eq. 147, 46 Atl. 215; *Wimpfheimer v. Perrine*, 61 N. J. Eq. 126, 47 Atl. 769; *Wimpfheimer v. Perrine*, 67 N. J. Eq. 597, 50 Atl. 356; *Taylor v. Lauer*, 127 N. C. 157, 37 S. E. 197; *Mansfield v. First Nat. Bank*, 5 Wash. 665, 32 Pac. 789,—holding assignee for benefit of creditors may sue.

Cited in reference notes in 5 A. S. R. 826, on right of assignee for creditors to set fraudulent transfer by assignor aside; 46 A. S. R. 527, on setting aside fraudulent conveyance by assignee for creditors.

Distinguished in *Francisco v. Aguirre*, 94 Cal. 180, 29 Pac. 495; *Einstein v. Shouse*, 24 Fla. 490, 5 So. 380; *Fouche v. Brower*, 74 Ga. 251,—holding at common law or in absence of statutory authority a voluntary assignee cannot maintain suits for benefit of creditors.

—Validity as between parties and successors.

Cited in *Holt v. Creamer*, 34 N. J. Eq. 181, as to their being valid between the parties; *Brown v. Carpenter*, 57 N. J. Eq. 23, 41 Atl. 562, holding grantees of mortgagor with fraudulent intent cannot bring bill to cancel the mortgage.

Parties defendant to suit to foreclose mortgage.

Cited in *Hare v. Headley*, 52 N. J. Eq. 496, 28 Atl. 452, holding all those having interest in the object of suit should be made parties defendant.

Duties and powers of assignees.

Cited in *Seibert v. Milligan*, 110 Ind. 106, 10 N. E. 929, as to their duties and powers.

36 AM. REP. 570, *BALEY v. HOMESTEAD F. INS. CO.* 80 N. Y. 21.

Construction of conditions forfeiting insurance in case property becomes encumbered.

Cited in *Burleigh v. Gebhard F. Ins. Co.* 90 N. Y. 220; *Moulton v. Aetna F. Ins. Co.* 25 App. Div. 275, 49 N. Y. Supp. 570,—holding forfeitures are not favored, and in order to uphold a policy it will be construed most strongly against insurer; *Halpin v. Insurance Co. of N. A.* 120 N. Y. 73, 8 L.R.A. 79, 23 N. E. 989; *Webster v. Dwelling-House Ins. Co.* 53 Ohio St. 558, 53 A. S. R. 658, 30 L.R.A. 719, 42 N. E. 546,—holding provisions for forfeiture are to receive, where the intent is doubtful, a strict construction against those for whose benefit they are introduced; *Warren v. Springfield F. & M. Ins. Co.* 13 Tex. Civ. App. 406, 35 S. W. 810, on construction of forfeiture clauses of doubtful meaning in favor of the insured or beneficiaries.

—Involuntary encumbrance or lien.

Cited in *Lodge v. Capital Ins. Co.* 91 Iowa, 103, 58 N. W. 1089, holding policy conditioned to become void if encumbrance be placed on property insured, is not avoided by a judgment against the insured; *Georgia Home Ins. Co. v. Schild*, 73 Miss. 128, 19 So. 94, holding encumbrances, without consent of insurer, do not include judgment liens, but only such liens as may be created by consent of the insured; *Green v. Homestead F. Ins. Co.* 82 N. Y. 517, holding condition that insurer shall not be liable for loss of the property becomes in any way encumbered does not apply to a mechanic's lien; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 A. R. 297 (affirming 61 How. Pr. 144), on nonextension of such condition to liens obtained against the insured by judgment and execution; *Wood v. American F. Ins. Co.* 149 N. Y. 382, 52 A. S. R. 733, 44 N. E. 80 (affirming 78 Hun, 109, 29 N. Y. Supp. 250), holding execution sale of realty does not, before expiration of period for redemption, avoid fire insurance policy thereon, which provides that the policy shall be void "if any change takes place in the interest, title or possession of the subject of the insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise;" *Nassauer v. Susquehanna Mut. F. Ins. Co.* 109 Pa. 507, 42 Phila. Leg. Int. 384, on non-avoidance of policy for subjection of insured property to a mechanic's lien; *Gerling v. Agricultural Ins. Co.* 39 W. Va. 689, 20 S. E. 691, holding such condition does not extend to encumbrances created by law; *Small v. Westchester F. Ins. Co.* 51 Fed. 789; *Paul v. Travelers' Ins. Co.* 45 Hun, 313,—on same point; *Hammel v. Queen's Ins. Co.* 54 Wis. 72, 41 A. R. 1, 11 N. W. 349, on construction of condition prohibiting transfer or conveyance of insured property, as limited to a voluntary transfer, and not to sale or transfer by adverse legal proceedings; *Union Ins. Co. v. Barwick*, 36 Neb. 223, 54 N. W. 519, on same point; *Hill v. Pennsylvania Mut. F. Ins. Co.* 40 Phila. Leg. Int. 343; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 12 A. S. R. 393, 21 N. E. 546,—holding that provision in insurance policy against encumbrances does not apply to judgments; *Kennedy v. London & L. F. Ins. Co.* 157 Mich. 411, 122 N. W. 134, holding that lien created by outstanding taxes will not avoid policy of insurance under clause against encumbrances.

Cited in reference note in 53 A. S. R. 123, on judgments as lien within provision of insurance policy against encumbrances.

Construction of provision of insurance policies of doubtful meaning.

Cited in *Primeau v. National Life Asso.* 77 Hun, 418, 28 N. Y. Supp. 794, denying forfeiture of life insurance policy upon equivocal language; *Garretson v. Equitable Mut. Life & Endowment Asso.* 93 Iowa, 402, 61 N. W. 952; *Fitzgerald v. Supreme Council C. M. B. A.* 39 App. Div. 251, 56 N. Y. Supp. 1005,—holding where meaning of life insurance policy is ambiguous, it should be construed most favorably to the insured; *Healey v. Mutual Acci. Asso.* 133 Ill. 556, 23 A. S. R. 637, 9 L.R.A. 371, 25 N. E. 52, holding same as to accident insurance policy; *Sullivan v. Mercantile Town Mut. Ins. Co.* 20 Okla. 460, 129 A. S. R. 761, 94 Pac. 676, to point that party claiming forfeiture will not be permitted upon equivocal clauses contained in his own contract, to deprive other party of benefit.

Indisposition of law to enforce forfeitures.

Cited in *Genesee Valley & W. R. Co. v. Retsof Min. Co.* 15 Misc. 187, 36 N. Y. Supp. 896, on such indisposition.

Construction of clause for forfeiture in case property becomes encumbered.

Cited in *Fouts v. Millikan*, 30 Ind. App. 298, 65 N. E. 1050, holding condition in deed that mortgage or other encumbrance by grantee shall work forfeiture of the estate is limited to voluntary encumbrances, and does not include a lien for taxes; *Reeves & Co. v. Martin*, 20 Okla. 558, 94 Pac. 1058, holding that contract will not be construed to work forfeiture, if by reasonable construction it can be avoided.

Cited in reference note in 12 A. S. R. 405, on forfeiture of insurance policy.

36 AM. REP. 572, ABBOTT v. JOHNSTOWN, G. & K. HORSE R. CO. 80 N. Y. 27.

Statutory and charter limitations on corporate power.

Cited in *Warner v. Schoharie & S. Mut. Ins. Asso.* 39 N. Y. S. R. 649, 15 N. Y. Supp. 632, holding corporation bound by its charter and can act only as authorized by it; *Greene v. Walton*, 59 Hun, 102, 13 N. Y. Supp. 147, denying power of corporation to make contract forbidden by its charter.

Cited in notes in 1 L.R.A. 850, on constitutional and statutory provisions affecting combinations between railroad companies to prevent competition; 7 L.R.A. 606, on right of corporation to deal in stock of other corporations.

Power of quasi public corporations to lease their property.

Cited in notes in 35 A. S. R. 390, on nontransferability of franchises; 35 A. S. R. 395, on transfer of franchises without legislative authority; 35 A. S. R. 402, on leases of corporate franchise.

Distinguished in *Conklin v. Prospect Park Hotel Co.* 16 N. Y. S. R. 312, 1 N. Y. Supp. 406, holding lessor of hotel not liable for price of goods sold to its lessee on ground that it owed public duty to keep the hotel open, which duty it could not escape by leasing the hotel; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390, holding payment of rent may be enforced for occupation had under ultra vires lease by one corporation to another.

Effect and validity of lease of railroad.

Cited in *Troy v. B. R. Co. v. Boston, H. T. & W. R. Co.* 86 N. Y. 107, denying its power to lease or transfer its road unless authorized by statute; *State ex rel. Pearson v. Hayes*, 61 N. H. 264; *Marie v. Garrison*, 13 Abb. N. C. 210; *Milbank v. New York, L. E. & W. R. Co.* 64 How. Pr. 20,—on same point; *Berwind-White Coal Min. Co. v. Wadsworth*, 27 App. Div. 550, 50 N. Y. Supp. 501 (dissenting opinion), on such power, in absence of express legislative authority.

—Lease to corporation or individual.

Cited in *Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co.* 16 N. Y. S. R. 208, 1 N. Y. Supp. 363 (dissenting opinion), on power of one railroad company to lease its road to another railroad company; *Re New York, L. & W. R. Co.* 35 Hun, 220, holding fact that railroad company has leased its road to a foreign railroad corporation, does not prevent lessor company from applying to take lands necessary to carry on the business.

Distinguished in *Woodruff v. Erie R. Co.* 93 N. Y. 609 (reversing 25 Hun. 246), holding lessee, who under a lease from railroad company to an individual, has had possession and use of the road, is estopped from questioning validity of the lease in action to recover the rent; *Gere v. New York C. & H. R. R. Co.* 19 Abb. N. C. 193; *Fisher v. Metropolitan Elev. R. Co.* 34 Hun, 433,—holding, by statute, such company may lease its road to another railroad corporation.

— Continuation of charter obligations.

Cited in *Welden Nat. Bank v. Smith*, 30 C. C. A. 133, 57 U. S. App. 136, 86 Fed. 398, holding railroad leasing its road, rolling stock and franchises to another company remains responsible to public for acts and defaults of lessee in operating the road; *Lee v. Southern P. R. Co.* 116 Cal. 97, 58 A. S. R. 140, 38 L.R.A. 71, 47 Pac. 932, interpreting constitutional provision against discharge of franchise obligation by alienation of franchise as limitation and not a grant of power; *National Bank v. Atlantic & C. Air Line R. Co.* 25 S. C. 216, holding railroad cannot, by lease of its road to another company, release itself from liability for goods received by its line for carriage and not delivered; *Central & M. R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457, denying the power, in absence of legislative authority to cast off such obligations; *Clinger v. Chesapeake & O. R. Co.* 128 Ky. 736, 15 L.R.A. (N.S.) 998, 109 S. W. 315, holding that lease authorized by law will not release railroad from failure to discharge charter obligations, unless statute contains provision to that effect.

Liability of railroad company for injuries caused by lessee's or user's negligent operation of road.

Cited in *Murray v. Lehigh Valley R. Co.* 66 Conn. 512, 32 L.R.A. 639, 34 Atl. 506, holding railroad company cannot relieve itself from obligations to passengers by placing its engine and cars under control of employees of another railroad company, pursuant to contract between the two companies; *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 482, 21 A. S. R. 169, 11 S. E. 833, holding railroad company entrusting operation of railroad to construction companies is liable for injuries caused by construction company's negligent operation of the road; *A. Backus, Jr. & Sons v. Detroit Western Transit Junction R. Co.* 71 Mich. 645, 40 N. W. 60, holding the operation of a railroad by lessee does not change the relations of the original company to the public; *Palmer v. Utah & N. R. Co.* 2 Idaho, 382, 16 Pac. 553; *Aycock v. Raleigh & A. Air Line R. Co.* 89 N. C. 321,—holding railroad company leasing or permitting use of its road by another company is liable for mismanagement of train in charge of latter's servants; *Harden v. North Carolina R. Co.* 129 N. C. 354, 85 A. S. R. 747, 55 L.R.A. 784, 40 S. E. 184, holding lessor of railroad liable for lessee's negligent operation of the road; *Townsend v. Rackham*, 62 Hun, 231, 22 N. Y. Supp. 878, denying liability where the lease was authorized by statute; *Muntz v. Algiers & G. R. Co.* 111 La. 423, 100 A. S. R. 495, 64 L.R.A. 222, 35 So. 624; *McCoy v. Kansas City St. J. & C. B. R. Co.* 36 Mo. App. 445; *Latham v. Boston, H. T. & W. R. Co.* 38 Hun, 265; *Durfee v. Johnstown, G. & K. Horse R. Co.* 71 Hun, 279, 24 N. Y. Supp. 1016; *Lakin v. Willamette Valley & Coast R. Co.* 13 Or. 436, 67 A. R. 25, 11 Pac. 68,—sustaining the liability; *Ft. Worth Street R. Co. v. Ferguson*, 9 Tex. Civ. App. 610, 29 S. W. 61, holding street railway company liable for personal injury caused by lessee's negligence; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 745, holding where railroad leases its line, without legal authority, though the lease is void, a servant of the lessee railroad, whose rights depend only upon contract, and not upon any public duty, cannot recover against lessor for injuries caused by lessee's negligent operation of the road; *Johnson v. Southern P. R. Co.* 154 Cal. 285, 97 Pac. 520, holding that railroad can relieve itself from liability for negligence in operating road by showing lease made by legislative authority.

Cited in reference note in 62 A. D. 617, on liability of railroad company for negligence of its lessees.

Cited in notes in 71 A. D. 295, 296, on liability of railroads for torts of their

lessees; 44 L.R.A. 739; 66 L.R.A. 143; 48 A. R. 580,—on railroad's liability for lessee's negligence; 58 A. S. R. 148, on liability of lessor of railway to persons other than the lessee; 37 L.R.A. 83, on responsibility of grantee of public franchises for acts of servants of lessee in possession under unauthorized contract; 44 L.R.A. 742, 746, 748, on effect of authority to lease railroad on lessor's liability for injuries caused by negligence of lessee.

Distinguished in *Cain v. Syracuse, B. & N. Y. R. Co.* 27 App. Div. 376, 50 N. Y. Supp. 1, denying liability where contract allowing use of the road by another company was authorized by statute.

Duty of railroad to perform public functions.

Cited in *People v. New York, L. E. & W. R. Co.* 40 Hun, 570, holding duty to furnish suitable passenger and freight houses at a station may be enforced by mandamus; *People v. New York C. & H. R. R. Co.* 28 Hun, 543, 3 N. Y. Civ. Proc. Rep. 11, 2 N. Y. Civ. Proc. Rep. (McCarty) 345, upholding power of state to compel railroad corporation to discharge its duties by mandamus.

36 AM. REP. 575, FULLER v. JEWETT, 60 N. Y. 46.

Liability of master for his negligence to servant where negligence of fellow-servants contributed to the injury.

Cited in *Shiner v. Russell*, 6 N. Y. S. R. 78, holding the master liable; *Dougherty v. Rome, W. & O. R. Co.* 45 N. Y. S. R. 154, 18 N. Y. Supp. 841, holding if fellow servant's negligence contributed to servant's injury, that would not relieve the railroad company from result of its failure to keep its cars in safe condition for use of its employees; *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. 480, holding master furnishing dangerous and defective machine is not excused from liability for injury to servant, by the fact that the negligence of a fellow servant co-operated in producing the injury; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 549, holding in action against railroad by one of its employees for personal injuries sustained by dangerous enforcement of unreasonable order made by the company's superintendent as to management of a train, the fact that the employee's fellow servant caused the injury, is no defense to the action; *Chiavaroli v. Union Bag & Paper Co.* 131 App. Div. 372, 115 N. Y. Supp. 327, holding that co-operation of negligence of fellow servant with that of master does not excuse latter.

Delegability of duties of master towards servant.

Cited in *Glasso v. National S. S. Co.* 27 App. Div. 169, 50 N. Y. Supp. 417, denying the right to delegate absolute duty for safety; *Burns v. Merchants' & P. Oil Co.* 26 Tex. Civ. App. 223, 63 S. W. 1061, holding master's duty to protect servant is nonassignable and he is liable for the negligence of person entrusted with such duty.

Cited in notes in 41 L.R.A. 118, on nonassignability of employer's duty as to inspection; 41 L.R.A. 122, on assignability of master's duty of inspection as dependent upon distinction between the furnishing and the use of agencies; 54 L.R.A. 79, on nondelegable duties of master as to defective locomotives.

Liability of master for negligence of servants in providing for safety.

Cited with special approval in *O'Donnell v. East River Gas Co.* 91 Hun, 184, 36 N. Y. Supp. 288, holding master's duty to furnish his employees with proper appliances cannot be delegated so as to relieve the master from liability.

Cited in *Higgins v. Williams*, 114 Cal. 176, 45 Pac. 1040; *Denver & R. G. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093; *Hillis v. Hine*, 11 N. Y. S. R. 656;

Indiana Car Co. v. Parker, 100 Ind. 181,—holding master's duty of providing safe and suitable machinery for use of his employees, and of keeping it in safe condition, cannot be delegated to an agent so as to relieve himself of liability for injuries to employees caused by neglect of such duties; *Courtney v. Cornell*, 17 Jones & S. 286, holding master employing a foreman to rig a derriek is liable for injury to servant caused by foreman's negligence in so doing; *Dervin v. Herman*, 23 Jones & S. 274, holding master, employing person to repair defective elevator, is liable for injuries to servant caused by such person's leaving the elevator in unsafe condition; *Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634; *Mann v. Delaware & H. Canal Co.* 91 N. Y. 495,—holding master delegating his duty to use due care in selecting competent fellow servants to another is liable for the latter's negligent performance of such duty; *Fox v. LeComte*, 2 App. Div. 61, 37 N. Y. Supp. 316, holding master entrusting his duty to provide safe appliances for his servant to a machinist is liable for the latter's neglect; *Webber v. Piper*, 38 Hun, 353 (dissenting opinion), on same point; *Eaton v. New York C. & H. R. R. Co.* 163 N. Y. 391, 79 A. S. R. 600, 57 N. E. 609; *Kain v. Smith*, 25 Hun, 146,—holding master delegating his duty to furnish safe machinery or appliances to employees is liable for his agent's default of such duty; *Fraker v. St. Paul, M. & M. R. Co.* 32 Minn. 54, 19 N. W. 349; *Stauber v. McEntee*, 29 Jones & S. 338, 19 N. Y. Supp. 900,—on same point; *Re California Nav. & Improv. Co.* 110 Fed. 670; *Bagley v. Consolidated Gas Co.* 13 Misc. 6, 34 N. Y. Supp. 187,—holding if master delegates duty of providing safe place of work for servant to another servant, the master is liable for negligence in its performance; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 500; *Gerrish v. New Haven Ice Co.* 63 Conn. 9, 27 Atl. 235; *Ford v. Lake Shore & M. S. R. Co.* 124 N. Y. 493, 12 L.R.A. 454, 26 N. E. 1101; *Anderson v. Bennett*, 16 Or. 515, 8 A. S. R. 311, 19 Pac. 765,—holding master liable for negligent performance of duty he owes his servants, by person with whom he entrusts such duty; *Howard v. Denver & R. G. R. Co.* 26 Fed. 837; *Delaney v. Hilton*, 18 Jones & S. 341,—on same point; *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 A. S. R. 547, 55 L.R.A. 99, 61 N. E. 143, holding duties of mine boss cannot be delegated so as to relieve coal company from liability for negligence in discharge of duties of mine boss.

Cited in notes in 54 L.R.A. 134, on master's nonliability for negligence of fellow servants in transmission of master's orders; 63 L.R.A. 231, on official liability of receivers for torts or negligence of servants.

Distinguished in *Hart v. New York Floating Dry Dock Co.* 16 Jones & S. 460, denying master's liability for death of servant caused by negligence of fellow servant not acting as alter ego of the master.

—As to railroad engines and cars.

Cited in *Indiana, I. & I. R. Co. v. Snyder*, 140 Ind. 647, 39 N. E. 912, holding railroad company liable for injuries to a section hand caused by defective hand car handle made and put in place by the company's carpenter with knowledge of its defect; *McDonald v. Michigan C. R. Co.* 108 Mich. 7, 65 N. W. 597, on liability of railroad company appointing engineer to apprise it of defective condition of locomotive for injuries to engineer's fellow servant caused by such engineer's neglect of such duty; *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 329, 37 A. S. R. 348, 22 L.R.A. 292, 56 N. W. 756, on liability of railroad company to brakeman injured by neglect of the company's inspector to inspect brakes and appliances on the cars.

Distinguished in *McDonald v. New York C. & H. R. R. Co.* 63 Hun, 587, 18 N. Y. Supp. 609, holding railroad company not liable for death of its flagman caused by negligence of engineer in failing to have his engine repaired, if the engineer is a fellow servant of the flagman, and the engine was inspected by the company's expert on the same day and found in good condition; *Slater v. Jewett*, 85 N. Y. 61, 39 A. R. 627, holding negligent transmission of train orders was fellow servant's act and rule as to provision of safety did not apply.

— Duty of inspection.

Referred to as leading case in *McKnight v. Brooklyn Heights R. Co.* 23 Misc. 527, 51 N. Y. Supp. 738, holding master's duty to inspect harness of street car horse driven by its servant cannot be delegated to "head changer" and his assistants, although competent persons, and the master is liable for negligent performance of such duty by such employees.

Cited in *Byrne v. Eastmans Co.* 163 N. Y. 461, 57 N. E. 738, holding master committing his duty to inspect appliance used by servant to another is liable for the latter's default; *Franck v. American Tartar Co.* 91 App. Div. 571, 87 N. Y. Supp. 219, holding master cannot delegate duty of inspection to an employee, so as to relieve himself from liability for such employee's failure to properly perform that duty; *Dittman v. Edison Electric Illuminating Co.* 87 App. Div. 68, 83 N. Y. Supp. 1078, on same point; *Union P. R. Co. v. Daniels*, 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756, holding railroad company delegating duty to inspector of seeing that wheels of train of freight cars are in safe condition is liable to its brakeman injured by inspector's negligent performance of such duty.

— Inspection of boilers for safety.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Ward*, 147 Ind. 256, 45 N. E. 325, holding it for jury on the evidence to say whether an inspection for broken stay bolts was a fulfillment of proper care by master; *Woods v. Chicago & G. T. R. Co.* 108 Mich. 396, 66 N. W. 328, holding railroad company liable for injuries to engineer caused by explosion of locomotive boiler because of the failure of the company's inspector to properly inspect the boiler; *Egan v. Dry Dock, E. B. & B. R. Co.* 12 App. Div. 556, 42 N. Y. Supp. 188, holding if master's duty of inspection of a boiler was negligently performed, even by a competent inspector, the master would still be liable.

Who are fellow-servants.

Cited in *The City of Alexandria*, 17 Fed. 390, denying liability of owners of a vessel for injury to a seaman caused by negligence of his associates of unequal grade; *Fink v. Des Moines Ice Co.* 84 Iowa, 321, 51 N. W. 155, holding person to whom master delegates duty of providing his employees with suitable appliances for their work is not a fellow servant of the employees within rule applicable to injuries caused by fellow servants; *Jaques v. Great Falls Mfg. Co.* 66 N. H. 482, 13 L.R.A. 824, 22 Atl. 552, holding a loom-fixer in a cotton mill, whose duty is to keep looms in repair, is not fellow servant of the weavers employed at the looms, within rule that master is not liable for injuries caused by fellow servant's negligence; *Gunter v. Graniteville Mfg. Co.* 18 S. C. 262, 44 A. R. 573, holding a workman, employed by cotton manufacturer to keep machinery of mill in order and repair, is not a fellow servant with a weaver in the factory so as to exempt the employer from liability for injury to the weaver caused by negligence of such workman; *Cadden v. American Steel Barge Co.* 88 Wis. 409, 60 N. W. 800, holding a riveter on whaleback vessel and scaffold builders emp-

plied for the riveters by defendant and who placed the scaffolds in position under his direction without assistance from the riveters, are not fellow servants; *Clavin v. William Tinkham Co.* 29 R. I. 599, 132 A. S. R. 836, 73 Atl. 392, holding that loom-fixer was not fellow servant of person running loom.

Cited in notes in 53 A. R. 46; 1 A. S. R. 33; 36 A. D. 289,—on who are fellow servants; 75 A. S. R. 596, on persons performing master's duties as vice principals; 75 A. S. R. 636, on superintendents as vice principals; 54 L.R.A. 164, on employees engaged in repairing as coservants of each other.

Liability of master for unsafe machinery or facilities furnished for use of servant.

Followed in *Millott v. New York & N. E. R. Co.* 46 N. Y. S. R. 145, 19 N. Y. Supp. 122, sustaining recovery by brakeman pinched between drawheads of unequal height.

Cited in *Smith v. Peninsular Car Works*, 60 Mich. 501, 1 A. S. R. 542, 27 N. W. 662, holding if employee received no notice or had no knowledge of perils incident to his employment, he cannot be charged with contributory negligence in case of injury; *Herbert v. Northern P. R. Co.* 3 Dak. 38, 13 N. W. 349; *Tierney v. Minneapolis & St. L. R. Co.* 33 Minn. 311, 53 A. R. 35, 23 N. W. 229,—holding it is railroad company's duty to provide safe and proper machinery and instrumentalities for its employees, and to keep them so; *Rigdon v. Allegany Lumber Co.* 37 N. Y. S. R. 514, 13 N. Y. Supp. 871, holding employees have right to assume that, so far as ordinary diligence can accomplish it, the master's premises and appliances are safe; *Kain v. Smith*, 80 N. Y. 458, holding master liable; *Dervin v. Herman*, 23 Jones & S. 274, holding master liable for injuries to servant caused by defective condition of an elevator used by the servant in performance of his duties; *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 54 A. R. 718, 4 N. E. 752, on duty of employer to exercise reasonable care in providing safe machinery and appliances for his servant's use; *Goodrich v. New York C. & H. R. R. Co.* 116 N. Y. 398, 15 A. S. R. 410, 5 L.R.A. 750, 22 N. E. 397, holding railroad liable for injuries to its brakeman caused by defects in cars of another company which it used upon its road if such defects would be discovered by ordinary inspection; *Jones v. New York C. & H. R. Co.* 28 Hun, 364, holding railroad liable for death of its brakeman caused by defective rung used in ladder at side or end of a freight car; *Near v. Delaware & H. Canal Co.* 32 Hun, 557, holding railroad company liable for death of its brakeman caused by its failure to keep its track in good repair; *Bailey v. Delaware & H. Canal Co.* 27 App. Div. 305, 50 N. Y. Supp. 87, denying master's liability to an employee crushed, while coupling two cars, by timber projecting over one of them, through negligence in loading it; *Van Tassell v. New York, L. E. & W. R. Co.* 1 Misc. 299, 20 N. Y. Supp. 708, 48 N. Y. Supp. 767, holding it duty of railroad company to maintain foot rest of brakestep on freight car in a condition fit and suitable for purpose of its use; *Umbach v. Lake Shore & M. S. R. Co.* 83 Ind. 191; *Kerrigan v. Hart*, 40 Hun, 389; *Griffiths v. New Jersey & N. Y. R. Co.* 5 Misc. 320, 25 N. Y. Supp. 812,—denying liability of master insurer of sufficiency or safety of the machinery or facilities furnished for servant's work, but holding him liable for exercise of reasonable care in that respect; *Pennsylvania Co. v. Long*, 94 Ind. 250; *Probst v. Delamater*, 100 N. Y. 266, 3 N. E. 186,—on same point; *Devlin v. Smith*, 89 N. Y. 470, 42 A. R. 311, 11 Abb. N. C. 322 (reversing 25 Hun, 206 in part), holding if injury to an employee results from defective implements used in his work, knowledge of the defects must be brought

home to employer, or proof given that he omitted exercise of proper care to discover it, in order to render him liable; *Hotis v. New York C. & H. R. R. Co* 2 Silv. Sup. Ct. 598, 6 N. Y. Supp. 606, 25 N. Y. S. R. 525, holding railroad company not liable for injury to brakeman caused by defective brake, if there is no showing that the defect was known, or could have been discovered before the accident occurred; *Norfolk & W. R. Co. v. Ampey*, 93 Va. 106, 25 S. E. 226, holding if master knows, or by use of ordinary care would have known of defects in the machinery, in consequence of which the servant is injured, he is liable. *Preschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269 (dissenting opinion), on duty of master to furnish employees with suitable and safe machinery with which to do their work; *Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 772, on same point.

Cited in reference note in 10 A. S. R. 752, on liability of master for injury to servant from defective machinery.

Cited in notes in 59 A. R. 75, 79, on master's duty to furnish safe appliances; 1 L.R.A. 699, on master's duty to furnish safe machinery and tools. 13 L.R.A. 376, on master's duty to furnish safe tools not absolute; 54 L.R.A. 41. 45, on master's responsibility for negligence involving breach of one of his personal duties.

Distinguished in *Cregan v. Marston*, 126 N. Y. 568, 22 A. S. R. 854, 27 N. E. 952, denying master's liability if the defects in the machinery or appliances arise in its daily use, and do not require help of skilled mechanics to repair, but which may be easily repaired by the workman with materials with which he is supplied; *Stowrbridge v. Brooklyn City R. Co.* 9 App. Div. 129, 41 N. Y. Supp. 128, on liability of master for breaking of defective beam on an elevated railroad structure, used by a workman as a support from which to work; *McCam v. Gallagher*, 16 App. Div. 272, 44 N. Y. Supp. 697, denying master's liability for injuries to employee by fall of scaffold built by employees as part of their work; *Hanrahan v. Brooklyn Elev. R. Co.* 17 App. Div. 588, 45 N. Y. Supp. 474, holding master not liable for death of its car inspector by a car "kicked" against car he was inspecting through failure of brakes on the colliding car to work where latter car was properly inspected before leaving the yard and found to be in good condition; *Pickett v. Atlas S. S. Co.* 1 N. Y. City Ct. Supp. 48, denying master's liability in absence of proof that servant's injury was caused by unsafe machinery and appliances; *W. R. Trigg Co. v. Lindsay*, 101 Va. 193, 43 S. E. 349, denying liability of master for negligence of plaintiff's fellow servant while assisting plaintiff in the erection of machinery, and not in its use.

—Injury from defective steam boiler.

Cited in *McDonough v. Clonbrock Steam Boiler Co.* 113 App. Div. 432, 99 N. Y. Supp. 263, on liability of master for injury to servant by the giving away of an iron gallery which is a constructive part of a boiler which servant is employed to construct where the accident was caused by defective riveting done at another period of time by other servants.

Distinguished in *Murphy v. Boston & A. R. Co.* 88 N. Y. 146, 42 A. R. 260, holding railroad company not liable for death of its servant caused by explosion of locomotive boiler through the negligence of fellow servants where the locomotive was placed in the servant's hands for repair and not for use.

—Liability of receiver operating railroad or plant.

Cited in *Graham v. Chapman*, 33 N. Y. S. R. 349, 11 N. Y. Supp. 319, holding receiver of railroad company cannot escape liability for injuries to employees

owing to employment of insufficient number of trackmen to keep track in good repair because of lack of funds in his hands.

Cited in note in 15 L.R.A. 262, on liability of receiver of railroad for personal injuries or death caused by its operation.

36 AM. REP. 579, SPINETTI v. ATLAS S. S. CO. 80 N. Y. 71.

Theft of property on vessel by crew as barratry.

Cited in *The Saratago*, 20 Fed. 869, on theft committed by ship's employees as being within exemption from loss by "thieves or robbers;" *The Manitoba*, 104 Fed. 145, holding unsuccessful attempt by crew at theft is not barratry.

Right of carrier to limit its liability.

Cited in *Pearsall v. Western U. Teleg. Co.* 124 N. Y. 256, 21 A. S. R. 662, 26 N. E. 534, on such right.

Cited in notes in 32 A. D. 497, on power of common carrier to limit his liability; 38 A. D. 425, on effect of particular stipulations in bill of lading; 42 L. ed. U. S. 689, on validity of contracts exempting carriers from liability for their own negligence or that of their servants.

Disapproved in *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, holding carrier by sea cannot, by stipulation with shipper, exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the officers or crew.

36 AM. REP. 582, PATTISON v. SYRACUSE NAT. BANK, 80 N. Y. 82.

Power of national banks to act as gratuitous bailees of deposits.

Cited in *Movius v. Lee*, 30 Fed. 298, on the liberal rule of construction of the powers under national bank act; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263, 23 N. E. 875; *Ouderkirk v. Central Nat. Bank*, 52 Hun, 1, 4 N. Y. Supp. 734,—sustaining the power.

Liability of bank for loss of special deposit received by it as gratuitous bailee.

Cited in *Merchants' Nat. Bank v. Guilmartin*, 88 Ga. 797, 17 L.R.A. 322, 15 S. E. 831, on liability of bank for gross negligence of its cashier in respect to the deposit.

Cited in notes in 38 A. S. R. 778, 780, 784, on liability of banks as bailees of special deposits; 38 A. S. R. 786, on liability of bank when officer misappropriates special deposit; 32 L.R.A. 775, on care required of bank in keeping special deposit; 3 E. R. C. 624, on liability of bank for loss of property received for gratuitous safe keeping.

Liability of gratuitous bailee for loss of property.

Cited in *Patriska v. Kronk*, 57 Misc. 552, 109 N. Y. Supp. 1092, holding gratuitous bailee of money for its loss through his gross negligence.

Distinguished in *McKillop v. Reich*, 76 App. Div. 334, 78 N. Y. Supp. 485, holding him liable for value of goods left with him which he failed to give up on demands and gives no reason for such refusal.

Bank as bound by acts of its officers.

Cited in reference note in 53 A. D. 586, as to when bank is bound by acts of its officers.

Liability of bailee for loss or nondelivery of bailed property.

Cited in *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520, 22 So. 976, on liability of bailee for failure to redeliver the property where he has not used due care in respect to it; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263, 23 N. E. 875, holding he must redeliver to owner upon request when purpose of the bailment is satisfied.

Theft of bailees property with that of bailor as evidence against negligence.

Cited in *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263, 23 N. E. 875, on such circumstances as not conclusive evidence of bailee's exercise of due care; *Patriaka v. Kronk*, 57 Misc. 552, 109 N. Y. Supp. 1092, on same point.

Laws relating to national banks.

Cited in *National Bank v. Burr*, 27 Hun, 109, on identity of laws relating to state and national banks.

36 AM. REP. 595, FISHKILL SAV. INST. v. NATIONAL BANK, 80 N. Y. 162.**Liability of bank for unauthorized act of its officers.**

Cited in *Binghamton Trust Co. v. Auten*, 68 Ark. 299, 82 A. S. R. 295, 57 S. W. 1105, holding bank liable for false representations of its president as to solvency of maker of certain notes, made during course of his employment to induce sale of the notes; *Smith v. Anderson*, 57 Hun, 72, 10 N. Y. Supp. 278, affirming liability of a bank whose president deposits in the bank, and thereafter draws out and converts to his own use, the money of a third person.

Cited in reference notes in 8 A. S. R. 636, on binding effect on bank of cashier's acts and declarations; 9 A. S. R. 471, on liability of national bank to savings bank for bonds of latter pledged for advances to former by officer common to both banks.

Cited in note in 29 L.R.A.(N.S.) 563, on imputation of knowledge of personally interested officers to bank.

—Savings and exchange banks conducted together.

Cited in *Kelley v. Chenango Valley Sav. Bank*, 21 Misc. 240, 45 N. Y. Supp. 651, holding where savings bank and a national bank had offices in same room and treasurer of the former was cashier of latter, and former issued a black pass-book for deposits and the latter a white one, and the treasurer gave depositors black pass-books at first and later white ones with assurance that they were part of same management, the savings bank was liable for such deposits.

Liability of principal for wrongful acts of agent.

Cited in *McCord v. Western Union Teleg. Co.* 39 Minn. 181, 12 A. S. R. 636, 1 L.R.A. 143, 39 N. W. 315, holding telegraph company liable for fraud and misfeasance of agent, in sending false and fraudulent message, prepared by himself, over its line; *Kolzen v. Broadway & S. Ave R. Co.* 1 Misc. 148, 20 N. Y. Supp. 700; *Duffus v. Schwinger*, 7 Misc. 499, 27 N. Y. Supp. 949,—holding principal liable for tortious acts of agent done in course of his agency; *Lowndes v. City Nat. Bank*, 82 Conn. 8, 22 L.R.A.(N.S.) 408, 72 Atl. 150, to the point that where there is duty of finding out and knowing negligent ignorance has same effect in law as actual knowledge.

Cited in note in 1 L.R.A. 145, on principals' liability for agents' fraudulent acts.

— **In action of deceit for fraud of agent.**

Cited in *Trankla v. McLean*, 18 Misc. 221, 41 N. Y. Supp. 385, holding principal liable.

— **Acts within scope of agency.**

Cited in *Kolzem v. Broadway & S. Ave. R. Co.* 48 N. Y. S. R. 656, 20 N. Y. Supp. 700, holding street railway company liable for acts of its servants in causing a tortious arrest; *Nash v. Minnesota Title Ins. & T. Co.* 159 Mass. 437, 34 N. E. 625, holding title insurance and trust company bound by representations of its president and trust officer as to title of certain realty; *Guilleaums v. Rowe*, 63 How. Pr. 175, 16 Jones & S. 169, holding client liable for illegal issuance of execution against the body by his attorney; *Riley v. New York, L. E. & W. R. Co.* 34 Hun, 97, holding railroad company bound by a special contract as to shipping freight made by its agent within scope of his authority.

Liability of corporation for acts of its agents.

Cited in *Bank of Batavia v. New York, L. E. & W. R. Co.* 33 Hun, 589, on identity of its liability with that of individuals.

Cited in reference note in 47 A. S. R. 303, on liability of corporation for tort of agent.

Cited in note in 1 L.R.A. 607, on corporation's liability for its agents' acts.

— **Fraud of agents.**

Cited in *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 A. S. R. 290, 38 N. E. 208, holding corporation liable for the fraudulent representations of its president as to value of its stock and its solvency.

36 AM. REP. 600, McVEANY v. NEW YORK, 80 N. Y. 185.

Right of de jure officer to emoluments of office.

Cited in *Skinner v. Cowley County*, 63 Kan. 557, 66 Pac. 635, holding an unauthorized appointment of special sheriff and execution of process wrongfully issued to him will not deprive the sheriff of the emoluments of his office, and he may recover from county the compensation earned in execution of the process, and for which payment has not been made; *Kreitz v. Behrensmeyer*, 149 Ill. 496, 24 L.R.A. 59, 36 N. E. 983; *Nichols v. MacLean*, 101 N. Y. 526, 54 A. R. 730, 5 N. E. 347,—holding right to office carries with it right to its emoluments; *Andrews v. Portland*, 79 Me. 484, 1 A. S. R. 280, 10 Atl. 458, holding person holding legal title to office of city marshall has legal right to salary.

Cited in note in 13 L.R.A. 178, on right of officer de jure to salary when wrongfully prevented from performing duty.

Right of de facto officer to fees of office.

Cited in *Stephens v. Campbell*, 67 Ark. 484, 55 S. W. 856, holding person who has acted as night watchman de facto of a city, but without legal title to the office, cannot recover fees for services performed as such night watchman.

Liability of municipal corporation to de jure officer for salary, fees and emoluments of his office.

Cited in *People ex rel. Harper v. Adams*, 46 N. Y. S. R. 150, 18 N. Y. Supp. 896, on right of skilled laborer in city water works department, who was legally discharged to recover back pay between dates of his discharge and reinstatement; *Cross v. New York*, 123 App. Div. 917, 107 N. Y. Supp. 942, holding city liable for salary of inspector of police from date of order of his reinstatement.

Am. Rep. Vol. XVII.—73.

— Where no service was performed.

Cited in *O'Hara v. New York*, 46 App. Div. 518, 62 N. Y. Supp. 146, sustaining right of a veteran of civil war to recover his salary for period during which he was illegally removed from his position where no one was appointed in his place and his salary had not been paid to any one else; *Hogan v. Brooklyn*, 4 Silv. Ct. App. 426, 27 N. E. 265; *Sullivan v. New York*, 33 Misc. 314, 67 N. Y. Supp. 599,—holding an officer illegally removed from office who took no steps to obtain reinstatement, and who performed no services while out of office, but whose duties were performed by another who was paid therefor, cannot recover salary for period he was out of office; *Hogan v. Brooklyn*, 126 N. Y. 643, 27 N. E. 265, same as to a fireman; *Van Valkenburgh v. New York*, 49 App. Div. 208, 63 N. Y. Supp. 6, holding same as to clerk in municipal department; *Beard v. Decatur*, 64 Tex. 7, 53 A. R. 735, holding where city authorities, having a duly appointed and unqualified city treasurer, place the city money with the mayor for disbursement, the treasurer has right of action for the amount of commissions he would have received had he disbursed it.

Distinguished in *People ex rel. Ryan v. French*, 91 N. Y. 265, holding board of police have no power by its charter to make deductions from patrolman's salary, while detained from duty for sickness or injury caused by discharge of official duty, such board not having authority to fix salary; *People ex rel. Nugent v. Police Comrs.* 27 Hun, 261, upholding right of police officer to recover salary for time during which, by reason of his being imprisoned he was prevented from discharging the duties of his office; *Higgins v. New York*, 38 N. Y. S. R. 400, 14 N. Y. Supp. 554, holding laborer in city employ, who was discharged and later reinstated because he was a civil war veteran may recover his wages for time he was deprived of such employment.

— Necessity of establishment of right to office or salary.

Cited in *Walters v. New York*, 119 App. Div. 464, 105 N. Y. Supp. 950, holding a clerk who has not established by some direct proceeding the invalidity of reduction of his salary by which he fell to lower grade in civil service classification, and was reinstated to his former office, cannot recover amount his salary was reduced.

Liability of municipal corporation to de jure officer for salary of an office it has paid to de facto officer.

Cited in *Coughlin v. McElroy*, 74 Conn. 397, 92 A. S. R. 224, 50 Atl. 1025, holding city paying de facto officer the fees of his office before judgment of ouster, is not liable for the same fees to the de jure officer after his title is legally established; *State ex rel. McDonald v. Newark*, 58 N. J. L. 12, 32 Atl. 384, denying the liability; *El Paso County v. Rohde*, 41 Colo. 258, 124 A. S. R. 134, 16 L.R.A.(N.S.) 794, 95 Pac. 551; *Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265; *Chandler v. Hughes County*, 9 S. D. 24, 67 N. W. 946; *Brown v. Tama County*, 122 Iowa, 745, 101 A. S. R. 296, 98 N. W. 562; *State ex rel. Greeley County v. Milne*, 36 Neb. 301, 38 A. S. R. 724, 19 L.R.A. 689, 54 N. W. 521; *Gibbs v. Manchester*, 73 N. H. 265, 61 Atl. 128; *Terhune v. New York*, 88 N. Y. 247, 42 A. R. 248; *People ex rel. Swinburne v. Nolan*, 101 N. Y. 539, 5 N. E. 446; *McManus v. Brooklyn*, 25 N. Y. S. R. 938, 5 N. Y. Supp. 424; *Demarest v. New York*, 147 N. Y. 203, 41 N. E. 405 (affirming 74 Hun, 517, 25 N. Y. Supp. 585),—holding payment of salary of office to de facto officer discharging its duties, is defense to action by de jure officer against municipality to recover the same salary; *Martin v. New York*, 176 N. Y. 371, 68 N. E. 640

(affirming 82 App. Div. 35, 81 N. Y. Supp. 412), holding payment to de facto clerk is good defense to action by de jure clerk for salary accruing between dates of his removal and reinstatement; *Stemmler v. New York*, 179 N. Y. 473, 72 N. E. 581; *Monroe v. New York*, 28 Hun, 258,—denying liability where salary was paid to de facto officer who performed the duties of the office; *Re Grady*, 15 App. Div. 504, 44 N. Y. Supp. 578, holding where fiscal officer of municipality has paid a salary to person de facto in office under color of title he cannot be compelled by mandamus to pay the salary again to another person claiming it; *Grant v. New York*, 111 App. Div. 160, 97 N. Y. Supp. 685, denying liability to police officer for amount of his salary during period of his dismissal where such salary was paid to de facto encumbent of the office; *People ex rel. Blair v. Grout*, 45 Misc. 505, 92 N. Y. Supp. 742, holding payment to de facto officer is a good defense to an action brought against city by de jure officer to recover the same salary after he has acquired or regained possession; *Walden v. Headland*, 156 Ala. 562, 47 So. 79; *Stearns v. Sims*, 24 Okla. 623, 24 L.R.A.(N.S.) 475, 104 Pac. 44; *Sutcliffe v. New York*, 132 App. Div. 831, 117 N. Y. Supp. 813,—holding that if salary is paid to de facto officer de jure officer cannot recover from city but may from de facto officer.

Cited in reference note in 41 A. R. 134, on right of officer de jure to salary.

Distinguished in *People ex rel. Blair v. Grout*, 44 Misc. 526, 90 N. Y. Supp. 122, holding by statute, that civil war veterans are excepted from general rule that city officer illegally removed cannot recover the salary paid to his successor before city had knowledge that the removal was illegal; *Ransom v. Boston*, 192 Mass. 299, 78 N. E. 481, 7 A. & E. Ann. Cas. 733, holding rule that public officer de jure whose salary has been paid to officer de facto must establish his right by mandamus to recover salary does not apply to action by veteran against city for its refusal to employ him as a laborer and employing nonveterans to his exclusion.

— Where payment was after establishment of title.

Cited in *Scott v. Crump*, 106 Mich. 288, 58 A. S. R. 478, 64 N. W. 1, holding municipality liable for payment of salary to de facto officer after judgment of ouster against him; *Jones v. Buffalo*, 178 N. Y. 45, 70 N. E. 99 (affirming 79 App. Div. 328, 79 N. Y. Supp. 754), holding city liable for salary of officer illegally removed if it pays the salary to a person after order of court vacating the officer's discharge and adjudging such person to be a usurper; *Fylpaa v. Brown County*, 6 S. D. 634, 62 N. W. 962, holding person adjudged to be a legally elected public officer and who has qualified and demanded possession of his office, may recover salary from municipality although it has been paid to a person in possession of the office; *Rasmussen v. Carbon County*, 8 Wyo. 277, 45 L.R.A. 295, 56 Pac. 1098, holding county liable to de jure officer for salary of office to which he has been declared legally entitled from commencement of the term.

Noncontractual nature of relation existing between officer and government.

Cited in *Truesdale v. Rochester*, 33 Hun, 574, holding relation between city and its police justice is not that of contracting parties in respect to compensation so as to preclude common counsel from altering his salary; *Metz v. Maddox*, 121 App. Div. 147, 105 N. Y. Supp. 702, on office as not being the property of the office holder, or held by contract, but as being a public trust; *Erie County v. Jones*, 17 N. Y. S. R. 512, 1 N. Y. Supp. 557, holding unearned salary of public

officer is in no sense property, and it may be changed at any time during his term, if legislative power in that respect is unrestricted by Constitution; *Steinson v. Board of Education*, 49 App. Div. 143, 63 N. Y. Supp. 128 (dissenting opinion), on necessity of rendition of official services in order to recover compensation; *Wilson v. New York*, 31 Misc. 693, 65 N. Y. Supp. 328, holding prospective salary of New York city department clerk may be reduced.

Distinguished in *People ex rel. Murray v. McClave*, 3 How. Pr. N. S. 8, sustaining power of legislature which fixes salary of police officers to deduct two dollars from each policeman's salary to establish life insurance fund for the police department.

Effect of judgment of ouster against incumbent of public office.

Cited in *State ex rel. Craig v. Woodson*, 128 Mo. 497, 31 S. W. 105, holding judgment of ouster divests tenant of office of all official authority so long as the judgment remains in force.

Necessity of qualification to constitute person chosen to fill office an officer de jure.

Cited in *State ex rel. Keifer v. Wheatley*, 160 Ind. 183, 66 N. E. 684, holding an information in nature of quo warranto seeking removal of incumbent of county office and its possession by relator which fails to show that relator has taken oath of office and given bond as required by law is fatally defective; *Minnick v. State*, 154 Ind. 379, 56 N. E. 851, holding if person appointed school trustee fails to qualify within statutory time and another is appointed in his place, the title of former to the office is thereby forfeited.

Jurisdiction of courts as to offices.

Cited in *Osgood v. State*, 69 Wis. 472, 25 N. W. 529, holding unless statute conferring upon city council jurisdiction to judge of the election of its own members unequivocally excludes jurisdiction of the courts, such jurisdiction remains in the courts, and that conferred upon council is only concurrent or temporary.

Cited in notes in 16 A. S. R. 222, on jurisdiction of law courts to review proceedings of bodies having power to judge of the election and qualifications of members; 26 L.R.A.(N.S.) 208, on provision for testing election of officer before municipal body as exclusive remedy.

36 AM. REP. 608, WASMER v. DELAWARE, L. & W. R. CO. 86 N. Y. 212.

Duty of railroad company to maintain crossings over public highway in proper condition.

Cited in *Voisin v. Commercial Mut. Ins. Co.* 125 N. Y. 120, 9 L.R.A. 612, 25 N. E. 325, holding lessee is not liable for negligence of its lessee in reference to repair of railroad trestle; *Atchison, T. & S. F. R. Co. v. Henry*, 57 Kan. 154, 45 Pac. 576, on liability of railroad company for defective crossings; *Moberly v. Kansas City, St. J. & C. B. R. Co.* 17 Mo. App. 518, holding company liable for negligent performance of statutory duty to maintain planks on sides of rails at crossing; *Schild v. Central Park, N. & E. River R. Co.* 41 N. Y. S. R. 795, 16 N. Y. Supp. 701, holding street-railway company allowing one of its track rails to project three inches above surface of street cross-walk is liable to person injured by falling over it; *Bell v. New York C. & H. R. R. Co.* 29 How. 560, holding company liable for failure to restore street to such a state as not unnecessarily to impair its usefulness; *Sibbald v. Grand Trunk R. Co.* 18 Ont.

App. 184, to the point that railroad cannot escape liability for condition of crossing because it is simply lessee of road.

Distinguished in *Wood v. Third Ave. R. Co.* 13 Misc. 308, 34 N. Y. Supp. 698, denying liability to plaintiff who was thrown down and injured by his crutch going into hole in manhole cover between defendant's tracks, where such hole was made when originally constructed as a means of speedily lifting the cover when required.

—Duty of successor.

Cited in *Moundville v. Ohio River R. Co.* 37 W. Va. 92, 20 L.R.A. 161, 16 S. E. 514, on duty of successor to maintain safety of crossing; *Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.* 27 N. Y. S. R. 216, 7 N. Y. Supp. 604, holding the statutory duty of lessor to build form crossings became the duty of the lessee under a lease providing that lessee should do the things which lessor "would be bound by law to do had this indenture not been made."

Duty of those interfering with public street to restore it to its original condition.

Cited in note in 52 L.R.A. 459, on liability of street railway company for defects in street not caused by the company.

Distinguished in *Nolan v. King*, 97 N. Y. 565, 49 A. R. 561, holding if person removing sidewalk of city street and excavating for purpose of building a vault, builds a bridge over the excavation which it necessarily raised above level of street, he need not make the same as safe and convenient as was the sidewalk removed; *Fredericks v. Illinois C. R. Co.* 46 La. Ann. 1180, 15 So. 413, holding there is no duty of possessor of premises to keep them in a safe condition for other persons than those whom he invites, and he is not liable to trespassers for defects not amounting to traps in such premises.

Negligence under imposed peril.

Cited in *Pullman's Palace Car Co. v. Laack*, 41 Ill. App. 34, holding employer cannot escape consequences of his own negligence, and defeat an employee's claim for personal injury, by urging against him his faithful endeavor to protect his employer's property from a danger which such negligence created; *Mitchell v. Union Terminal R. Co.* 122 Iowa, 237, 97 N. W. 1112, holding driver of wagon, injured by his team which became frightened by a passing train is not guilty of contributory negligence as matter of law in attempting to prevent the escape of the frightened horses; *Sherry v. New York C. & H. R. R. Co.* 104 N. Y. 652, 10 N. E. 128, 1 Silv. Ct. App. 319, holding person killed while crossing six tracks with her view obstructed by defendant's cars standing on side track, where locomotive appeared suddenly without warning amidst steam and smoke driven by the wind cannot as matter of law be held guilty of contributory negligence; *Harnett v. Bleeker Street & F. Ferry R. Co.* 17 Jones & S. 185 (dissenting opinion), on mistake in judgment by person in perilous situation, where had he remained quiet, he would have escaped injury, as not barring his action; *Northrup v. New York, O. & W. R. Co.* 37 Hun, 295, holding a person whose view of defendant's main track was obstructed by cars on next track is not as matter of law guilty of contributory negligence in recrossing main track while trying to get out of way of train backing down main track.

—Encountering danger in protection of imperilled property as contributory negligence.

Cited in *Illinois C. R. Co. v. Siler*, 229 Ill. 390, 15 L.R.A.(N.S.) 819, 82 N. E. 363, 11 A. & E. Ann. Cas. 368 (affirming 133 Ill. App. 2), holding railroad com-

pany liable for the burning to death of person whose clothing ignited while she was endeavoring to save her dwelling house from fire which was spreading toward house from railroad right of way, where it was started by the company's negligence; *Liming v. Illinois C. R. Co.* 81 Iowa, 246, 47 N. W. 66, holding person acting with reasonable prudence who exposes himself to danger in attempt to protect his own property may recover from the person whose wrong caused the injury to himself and the danger to his property; *Lorenz v. Burlington, C. R. & N. R. Co.* 115 Iowa, 377, 56 L.R.A. 752, 88 N. W. 835, holding person killed by train at street crossing while attempting to drive back a cow which had escaped from him is not guilty of contributory negligence as matter of law, for failure to look and listen, but the question was for the jury; *Chattanooga Light & P. Co. v. Hodges*, 109 Tenn. 331, 97 A. S. R. 844, 60 L.R.A. 469, 70 S. W. 616, on recovery of damages by person where his effort to save property was such as a reasonably prudent man would have made under similar circumstances. *Christensen v. Oregon Short Line R. Co.* 29 Utah, 193, 80 Pac. 746, holding boy between eight and nine years old killed while trying to keep cow he was driving to pasture from going upon railroad tracks at crossing is not, as matter of law, guilty of contributory negligence.

Negligent failure to avert injury to person negligently in danger.

Distinguished in *Harnett v. Bleecker Street F. Ferry R. Co.* 17 Jones & S. 185 (dissenting opinion); *Gray v. Weir*, 113 App. Div. 479, 99 N. Y. Supp. 252. —on liability for such negligence.

—Towards negligent person on railroad tracks.

Cited in *Texas & P. R. Co. v. Roberts*, 2 Tex. Civ. App. 111, 20 S. W. 960, holding railroad liable for such negligence; *Jones v. Probasco*, 18 Tex. Civ. App. 699, 45 S. W. 1036, holding it for jury to say whether engineer saw plight of negligent person and failed to avert injury; *Demand v. New York C. & H. R. Co.* 198 N. Y. 102, 91 N. E. 259, holding that railroad is bound to use reasonable care to avoid injuring trespasser seen upon tracks.

Distinguished in *Rider v. Syracuse Rapid Transit R. Co.* 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836, holding rule that railroad company may not run train into a person who is on track through his own negligence is not applicable where a driver attempts to cross track diagonally when an approaching electric car is so near as to render the attempt dangerous.

Leaving horse untied in city street as negligence.

Cited in *Moulton v. Lewiston, B. & B. Street R. Co.* 102 Me. 186, 102 L.R.A. (N.S.) 845, 66 Atl. 388, holding it is not negligence per se to leave horse attached to carriage in the street unhitched; *Belles v. Kellner*, 66 N. J. L. 561, 48 Atl. 1010, holding it not negligence, per se, to leave horse untied upon street while driver is on sidewalk loading or unloading his wagon; *Belles v. Kellner*, 67 N. J. L. 255, 91 A. S. R. 429, 57 L.R.A. 627, 51 Atl. 700, holding it not negligence to leave quiet, gentle horse standing untied, free from presence of anything likely to frighten him, the driver being within from five to eight feet of the wagon to which the horse was hitched; *Potter & P. Co. v. New York C. & H. R. Co.* 22 Misc. 10, 48 N. Y. Supp. 446, holding driver leaving gentle horse untied while he is near it at time it is run over by locomotive is not guilty of contributory negligence.

Liability of continuer of a nuisance.

Cited in *Dukes v. Eastern Distilling Co.* 51 Hun, 605, 4 N. Y. Supp. 562:

Marine Ins. Co. v. St. Louis, I. M. & S. R. Co. 41 Fed. 643,—holding he is just as guilty as person creating it.

Necessity of knowledge by continuer of nuisance to render him liable therefor.

Cited in *Haggerty v. Thomson*, 45 Hun, 398, holding purchaser of premises is not liable for a nuisance thereon until notified of its existence; *Timlin v. Standard Oil Co.* 54 Hun, 44, 7 N. Y. Supp. 158, holding tenants maintaining structure with knowledge of its dangerous condition are liable for death of person caused by its fall; *Kuechenmeister v. Brown*, 13 Misc. 139, 34 N. Y. Supp. 180, holding a lessee of premises to which a nuisance is appurtenant, is liable therefor if he knowingly acquiesces in its existence or maintenance; *Pitcher v. Lennon*, 16 Misc. 609, 38 N. Y. Supp. 1007, holding the continuer is not liable without proof of scienter.

Distinguished in *Wenzlick v. McCotter*, 87 N. Y. 122, 41 A. R. 358, holding the omission of person acquiring title to land upon which there is a nuisance to abate it does not render him liable therefor, if he does not actually use it, or there is no request made to him to abate it.

What constitutes contributory negligence.

Cited in *Gerlach v. Edelmeyer*, 15 Jones & S. 292, holding it consists in a want of ordinary care by person injured, which want of care is the immediate and proximate cause of the injury complained of; *Thompson v. Seaboard Air Line R. Co.* 81 S. C. 333, 20 L.R.A.(N.S.) 426, 62 S. E. 396, holding that is not contributory negligence for one charged with protection of property to manifest risk to save it unless risk was wanton or unreasonable; *Grant v. Oregon R. & Nav. Co.* 54 Wash. 678, 25 L.R.A.(N.S.) 925, 103 Pac. 1126, to point that it is not contributory negligence not to stop, look, and listen before crossing railroad if done because of sudden fright from runaway team; *Sullivan v. McWilliam*, 20 Ont. App. 627, holding that it is not negligence for driver of gentle horse to lay down reins while he alights in street; *Connell v. Prescott*, 20 Ont. App. 49, holding person not guilty of contributory negligence by acting as reasonable man would in hope of saving property from probable injury; *Prescott v. Connell*, 22 Can. S. C. 147, holding plaintiff not guilty of contributory negligence in trying to stop his team from running away when frightened by blast.

Cited in notes in 55 A. D. 676, on act in discharge of legal duty to save life or the like as contributory negligence preventing recovery for injury; 2 L.R.A. (N.S.) 955, on contributory negligence by railroad servant in attempting to save property; 10 L.R.A.(N.S.) 855, on ordinances and statutes as to negligence in leaving horse unhitched in highway; 28 L.R.A.(N.S.) 346, as to going on railroad crossing to rescue property as negligence.

Proximate cause of an injury.

Cited in *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 A. R. 168, where the result of an injury is such as might have been expected to occur in the ordinary or natural course of events, the carrier causing the injury is not relieved from responsibility although there is some intervening agency contributing to the result; *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166, 40 A. R. 230, holding the negligent and wanton sounding of a steam whistle, so that horses lawfully near are caused to run off and inflict an injury, renders railroad company liable to one injured by intervening agency; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 A. R. 71, on the negligence of a person accidentally setting his own building on fire as not being the proximate cause of destruction of another's

property where the fire is carried by the wind from the former's building to the latter's property.

Cited in note in 36 A. S. R. 833, on remote and proximate consequences of frightening animals.

Liability of lessee of railroad for injuries to persons caused by its negligence.

Cited in *Jacksonville, T. & K. W. R. Co. v. Penninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661, affirming lessee's liability.

Contributory negligence as question for jury.

Cited in *Williams v. Syracuse Iron Works*, 31 Hun, 392, holding whether person killed by door falling upon him from above while sitting smoking in the doorway was guilty of contributory negligence in not obeying rule that "no smoking would be allowed during working hours" and where he was instructed "not to leave his engine during working hours" is question of fact for jury.

36 AM. REP. 612, SEAMAN v. NEW YORK, 30 N. Y. 239.

Duty of municipalities as to safety of navigable rivers within limits.

Cited in *Faust v. Cleveland*, 58 C. C. A. 194, 121 Fed. 810; *Coonley v. Albany*, 132 N. Y. 145, 30 N. E. 382 (affirming 57 Hun, 327, 10 N. Y. Supp. 512); *O'Donnell v. Syracuse*, 184 N. Y. 1, 112 A. S. R. 558, 3 L.R.A. (N.S.) 1053, 76 N. E. 738, 6 A. & E. Ann. Cas. 173,—holding there is no duty to keep in safe condition as in case of ordinary highways.

Cited in note in 39 L.R.A. 684, on municipal power over water and water courses as nuisances.

Liability for safety of wharf or dock.

Cited in note in 61 L.R.A. 953, on liability for safety of wharf or dock as between owner and lessee.

Negligence in leaving horse unhitched.

Cited in reference note in 91 A. S. R. 432, on negligence in leaving horse unhitched in street.

36 AM. REP. 615, MILKS v. RICH, 30 N. Y. 269.

Original undertakings as distinguished from guaranty.

Cited in *Swenson v. Stoltz*, 36 Wash. 318, 78 Pac. 999, 2 A. & E. Ann. Cas. 504, holding guaranty on negotiation of note is distinct from maker's undertaking; *Seligman v. Hahn*, 7 Misc. 65, 27 N. Y. Supp. 405, holding law of guaranty inapplicable to retiring partner's promise as to assumed claims.

— Validity of parol promise.

Cited in *Smith v. Corege*, 53 Ark. 295, 14 S. W. 93; *Swenson v. Stoltz*, 36 Wash. 318, 78 Pac. 999, 2 A. & E. Ann. Cas. 504,—upholding parol guaranty of note on negotiation; *Carroll v. Nodine*, 41 Or. 412, 93 A. S. R. 743, 69 Pac. 51, on same point; *Brookline Nat. Bank v. Moers*, 19 App. Div. 155, 45 N. Y. Supp. 997, holding same in case of a check; *Newell v. Chapman*, 74 Hun, 111, 26 N. Y. Supp. 361, holding same in case of a bond and mortgage; *Mead v. Parker*, 111 N. Y. 259, 18 N. E. 727, 22 Abb. N. C. 129 (affirming 41 Hun, 577), on whether a guaranty on negotiation of bond and mortgage was required to be in writing; *McCraith v. National Mohawk Valley Bank*, 104 N. Y. 414, 10 N. E. 862, holding promise by mortgagee on premature payment to procure release of other liens may rest in parol; *Myers v. Dorman*, 34 Hun, 115, holding same as to promise

to secure other lien holders in consideration of their absence from sale; Goodman v. Cohen, 132 N. Y. 205, 30 N. E. 399, holding same as to promise by purchaser of damaged goods to pay part of price to insured in case of insurer's insolvency.

Cited in reference note in 38 A. R. 145, on validity of oral guaranty of genuineness of note.

Cited in note in 95 A. D. 255, 258, 260, on original promise to pay another's debt not being within statute.

Distinguished in Dows v. Swett, 134 Mass. 140, 45 A. R. 310, holding guaranty of note, given in payment of debt, is within the statute.

36 AM. REP. 617, GRATTAN v. METROPOLITAN L. INS. CO. 80 N. Y. 281.

Waiver of proofs by insurer's denial of liability.

Cited in Covenant Mut. Ben. Asso. v. Spies, 114 Ill. 463, 2 N. E. 482, holding waiver established by assertion that insurance had been cancelled on like inquiry; Parsons v. Grand Lodge, A. O. U. W. 108 Iowa, 6, 78 N. W. 676, holding waiver established by assertion of delinquency of insured on inquiry as to method of proof; Winter v. Supreme Lodge, K. P. 96 Mo. App. 1, 69 S. W. 662, holding waiver established by repudiation of all liability; Hutchinson v. Supreme Tent, K. M. 68 Hun, 355, 22 N. Y. Supp. 80, holding proof of a disability was waived by reply that it would be futile; Payn v. Mutual Relief Soc. 6 N. Y. S. R. 365, (affirming 2 How. Pr. N. S. 230), holding waiver established by assertion that insurance had been cancelled, on demand for blanks being made; People ex rel. Deister v. Wintermute, 134 App. Div. 65, 118 N. Y. Supp. 712, holding that insurance company which denies liability on policy cannot rely upon omission to present proofs of loss; Hicks v. British America Assur. Co. 162 N. Y. 284, 48 L.R.A. 424, 56 N. E. 743 which reverses 13 App. Div. 444, 43 N. Y. Supp. 623 (dissenting opinion), prevailing opinion holding that proofs of loss are not waived by denials in answer.

Cited in reference notes in 59 A. R. 607, as to when proofs of death unnecessary in cases of life insurance; 74 A. S. R. 123, on waiver of proof of death of insured.

— By refusal to furnish blank forms.

Cited in Stephenson v. Bankers' Life Asso. 108 Iowa, 637, 79 N. W. 459, holding waiver established by failure to respond to request for blanks and by absence of objection to proofs as made; Hoffman v. Manufacturers' Accident Indemnity Co. 56 Mo. App. 301, holding both proofs of accident and death were waived by a refusal to furnish blanks; Baker v. New York State Mut. Ben. Asso. 9 N. Y. S. R. 653, holding waiver established by refusal of blanks and statement that they would be sent only in case claim was accepted.

Liability of insurers for errors of agents on correct information by insured.

Cited in Miaghan v. Hartford F. Ins. Co. 24 Hun, 58, upholding liability for form of fire policy issued after insured had disclosed nature of title; Bennett v. Agricultural Ins. Co. 106 N. Y. 243, 12 N. E. 609 (affirming 15 Abb. N. C. 234), holding an insured without knowledge, not liable for incorrect setting down of answer as to vacancy of building; Sawyer v. Equitable Acci. Ins. Co. 42 Fed. 30, holding insured, without knowledge, not liable for act of accident agent in setting down figures as to earning capacity.

Cited in note in 20 L. ed. U. S. 617, on effect of agent's filling in untrue answers in application without knowledge of assured.

—Answers prepared or withheld by agent taking application for life insurance.

Cited in *Kenyon v. Knights Templars & M. Mut. Aid. Asso.* 48 Hun, 378; *Bentley v. Owego Mut. Ben. Asso.* 1 Silv. Sup. Ct. 177, 5 N. Y. Supp. 223, 23 N. Y. S. R. 470,—holding insurer estopped to set up false answers in application written by agent with knowledge of condition, there being no collusion; *Miller v. Phoenix Mut. L. Ins. Co.* 107 N. Y. 292, 14 N. E. 271, holding same where agent put down an affirmative answer instead of lack of knowledge; *O'Brien v. Home Ben. Soc.* 117 N. Y. 310, 22 N. E. 954 (affirming 51 Hun, 495, 4 N. Y. Supp. 275); *Corbitt v. Metropolitan L. Ins. Co.* 10 Misc. 221, 30 N. Y. Supp. 1069,—holding insurer liable for fraud or mistake in setting down answers correctly given; *New York L. Ins. Co. v. Russell*, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94, holding insurer could not set up examiner's and agent's failure to report facts disclosed; *Shanahan v. Metropolitan L. Ins. Co.* 87 Me. 385, 32 Atl. 993, on estoppel to repudiate an agent's assertion that medical examination was unnecessary.

Cited in note in 16 L.R.A. 37, on effect of agent's perversion of information by the insured.

Distinguished in *Wilkins v. Mutual Reserve Fund Life Asso.* 54 Hun, 294, 7 N. Y. Supp. 589, where insured expressly assumed all risk as to truth of application; *Sanders v. Cooper*, 115 N. Y. 279, 12 A. S. R. 801, 5 L.R.A. 638, 22 N. E. 212, holding subject of fire insurance contract cannot be changed by proof that agent described wrong property; *McCullum v. Mutual L. Ins. Co.* 55 Hun, 103, 8 N. Y. Supp. 249, holding fire agent's representations as to interpretation of question cannot be relied on in face of express limitation on powers.

Criticized in *Dimick v. Metropolitan L. Ins. Co.* 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291, holding limitation on powers of life agents prevented avoidance of warranty on ground that facts were known and incorrectly inserted.

—Errors or misstatements of medical examiners.

Cited with special approval in *Mutual Ben. L. Ins. Co. v. Robison*, 22 L.R.A. 326, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723, holding receipt of premium precluded insurer from contradicting interpretation of facts, truthfully detailed by insured; *Ames v. Manhattan L. Ins. Co.* 31 App. Div. 180, 52 N. Y. Supp. 759; *Ames v. Manhattan L. Ins. Co.* 40 App. Div. 465, 58 N. Y. Supp. 244, holding insured, without knowledge, not liable for incorrect setting down of a truthful answer; *Bennett v. Massachusetts Mut. L. Ins. Co.* 107 Tenn. 371, 64 S. W. 758, on same point; *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 528, 25 S. W. 835, holding receipt of premium precludes insurer from claiming benefit of like act, provided insured did not know facts; *Grattan v. Metropolitan L. Ins. Co.* 24 Hun, 43; *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 A. R. 372,—holding an insured's alleged lack of knowledge that false answers had been inserted made a question for jury; *Sternaman v. Metropolitan L. Ins. Co.* 170 N. Y. 13, 88 A. S. R. 625, 57 L.R.A. 318, 62 N. E. 763 (reversing 49 App. Div. 473, 63 N. Y. Supp. 674), holding insurer liable for examiner's knowledge, his interpretation of answers and his errors, notwithstanding agreement to contrary; *Koenig v. United L. Ins. Asso.* 16 Misc. 531, 38 N. Y. Supp. 506, on character of regular medical examiner as agent of insurer.

Misrepresentations affecting insurance policy.

Cited in note in 3 A. S. R. 634, on invalidity of life insurance policy on ground of existence of disease affecting applicant.

Insurance agent as agent of assured.

Cited in notes in 20 L.R.A. 278, as to when insurance agent is agent of the assured; 77 A. D. 725, on effect of stipulations seeking to make agent of insurer agent of assured.

Privileged knowledge acquired by physicians.

Cited in *Krapp v. Metropolitan L. Ins. Co.* 143 Mich. 369, 114 A. S. R. 651, 106 N. W. 1107, holding physician's testimony as to information acquired during treatment of an assured's relatives was incompetent; *Davis v. Supreme Lodge*, K. H. 165 N. Y. 159, 58 N. E. 891 (affirming 35 App. Div. 354, 54 N. Y. Supp. 1023, 31 N. Y. Civ. Proc. Rep. 798), holding same as to like evidence and also as to certificate filed with board of health; *Wilcox v. Wilcox*, 46 Hun, 32, holding physician's testimony as to information acquired during treatment of a deceased was incompetent on objection of claimant of dower; *Re Coleman*, 111 N. Y. 220, 19 N. E. 71, holding like testimony was incompetent on objection from a proponent of a will; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119, holding like testimony was incompetent on objection by beneficiary in policy on life in question; *MERCHANTS' Life Asso. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251, on nature of statute prohibiting testimony by physicians; *Pearsall v. Elmer*, 5 Redf. 181, on extent to which physician's testimony is privileged in a probate case.

Cited in note in 17 A. S. R. 566, 568, on when testimony of physician will be received.

Distinguished in *Steele v. Ward*, 30 Hun, 555 (dissenting opinion), on right of physician to testify as to information, not necessary to treatment; *Whelpley v. Loder*, 1 Dem. 368, holding a physician called by executor could testify on an issue as to testamentary capacity; *Griffiths v. Metropolitan Street R. Co.* 171 N. Y. 106, 63 N. E. 808, where objecting party failed to show the existence of relation of physician and patient.

Explained in *Brown v. Rome, W. & O. R. Co.* 45 Hun, 439, holding physician can be compelled to disclose information not necessary to treatment.

—As dependent on mode of information.

Cited in *Masonic Mut. Ben. Asso. v. Beck*, 77 Ind. 203, 40 A. R. 295; *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 A. R. 372; *Brigham v. Gott*, 20 N. Y. S. R. 420, 3 N. Y. Supp. 518; *McGillicuddy v. Farmers' Loan & T. Co.* 26 Misc. 55, 55 N. Y. Supp. 242, 28 N. Y. Civ. Proc. Rep. 381,—holding information, obtained directly from patient or from observation will be protected; *Jones v. Brooklyn, B. & W. E. R. Co.* 21 N. Y. S. R. 169, 3 N. Y. Supp. 253; *Renihan v. Dennin*, 103 N. Y. 573, 57 A. R. 770, 9 N. E. 320,—holding prohibition not confined to information of a confidential nature; *Grattan v. Metropolitan L. Ins. Co.* 24 Hun, 43, holding information, obtained by percussing and listening to action of lungs will be protected; *Kling v. Kansas City*, 27 Mo. App. 231, holding same as to information as to condition in regard to subriety; *State v. Depoister*, 21 Nev. 107, 25 Pac. 1000 (dissenting opinion), on protection of information received either from observation or statements of others.

Cited in note in 52 A. R. 5, on prohibition of insurance company to introduce evidence of deceased's statement to physician in last sickness as to previous ailments.

—Presumption that information was necessary.

Cited in *Dambmann v. Metropolitan Street R. Co.* 55 Misc. 60, 106 N. Y. Supp. 221, holding establishment of relation raises presumption that communications were necessary in treatment; *McGillicuddy v. Farmers' Loan & T. Co.* 26 Misc. 55, 55 N. Y. Supp. 242, 28 N. Y. Civ. Proc. Rep. 381, on same point.

Construction of statutes prohibiting testimony by physicians.

Referred to as a leading case in *Corey v. Bolton*, 31 Misc. 138, 63 N. Y. Supp. 915 (dissenting opinion), on enforcement of statute with vigor; *McRae v. Erickson*, 1 Cal. App. 326, 82 Pac. 209; *Re Bruendl*, 102 Wis. 45, 78 N. W. 169; *Kling v. Kansas City*, 27 Mo. App. 231,—holding reason of enactment should be considered.

Waiver of the privilege of physician.

Cited in *Blair v. Chicago & A. R. Co.* 89 Mo. 383, 1 S. W. 350, holding patient may waive the prohibition; *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56, 52 A. R. 1, 1 N. E. 104, 2 How. Pr. N. S. 184, holding executor could not waive the privilege.

—Effect of death of patient as release of privilege.

Cited in *Drier v. Continental L. Ins. Co.* 24 Fed. 670, on whether prohibition continues after death; *Re Myer*, 184 N. Y. 54, 76 N. E. 920, 6 A. & E. Ann. Cas. 26, 35 N. Y. Civ. Proc. Rep. 329, holding prohibition not annulled by fact that patients were without interest or since deceased; *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56, 52 A. R. 1, 1 N. E. 104, 2 How. Pr. N. S. 184, holding prohibition not annulled by fact that patient had since died; *Boyle v. Northwestern Mut. Relief Asso.* 95 Wis. 312, 70 N. W. 351, holding statute did not remove it or permit physician to waive privilege after patient's death; *Drier v. Continental L. Ins. Co.* 24 Fed. 670, on whether there is right to waive the privilege after death of patient.

Proof to establish relation of physician and patient.

Cited in *Numrich v. Supreme Lodge K. & L. H.* 24 N. Y. S. R. 287, 3 N. Y. Supp. 552, holding relationship may be proved by physician's testimony as to fact of attendance.

Competency of nonexpert opinion on cause of death.

Disapproved in *Krapp v. Metropolitan L. Ins. Co.* 143 Mich. 369, 114 A. S. R. 651, 106 N. W. 1107, holding nonexperts may testify that death was caused by consumption.

Equitable reformation or relief in code action on insurance policy.

Cited in *Koenig v. United L. Ins. Asso.* 16 Misc. 531, 38 N. Y. Supp. 506, holding actual transaction may be shown by parol without asking for equitable relief; *Bennett v. Agricultural Ins. Co.* 15 Abb. N. C. 234, holding fact that actual statements were correct may be shown without asking for a reformation.

Parol evidence to vary insurance contracts.

Cited in notes in 16 L.R.A.(N.S.) 1200, on grounds for relaxation of parol evidence rule as to varying or contradicting written contract for purpose of avoiding forfeiture in insurance policy; 16 L.R.A.(N.S.) 1170, on distinction between action at law and action in equity in respect to parol evidence rule as to varying or contradicting written contracts, as applied to policies of insurance.

Requisites of proofs of death to insurers.

Cited in *Buffalo Loan, Trust & S. D. Co. v. Knights Templars & M. Mut. Aid Asso.* 126 N. Y. 450, 22 A. S. R. 839, 27 N. E. 942, holding fact of death but not causes could be demanded in case of provision calling for satisfactory proof of death.

Cited in reference note in 12 A. S. R. 873, on insufficiency of notice where policy requires notice and proof of death as condition precedent to payment.

Construction of complex applications for insurance.

Cited in *Merchants' Life Asso. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251, on presumption as to exhaustiveness of injuries in absence of statute regulating forms.

Right of appeal.

Cited in note in 29 L.R.A. (N.S.) 25, on right to appeal from unfavorable while accepting favorable part of decree, judgment, or order.

36 REP. 624, DRINKWATER v. DINSMORE, 80 N. Y. 390.**Mitigation of damages in tort actions.**

Cited in *Ephland v. Missouri P. R. Co.* 57 Mo. App. 147, holding receipt of wages precluded claim for loss of time in action for personal injuries; *Lee v. Western U. Teleg. Co.* 51 Mo. App. 375, holding same in action for negligence as to transmission of telegram.

Cited in notes in 67 L.R.A. 89, on mitigation of damages for personal injury in action by injured person by fact that he has received wages; 8 E. R. C. 443, on right to reduce damages for negligence by sum paid by insurer.

Disapproved in *Nashville, C. & St. L. R. Co. v. Miller*, 120 Ga. 453, 67 L.R.A. 87, 47 S. E. 959, 1 A. & E. Ann. Cas. 210; *Illinois C. R. Co. v. Porter*, 117 Tenn. 13, 94 S. W. 666, 10 A. & E. Ann. Cas. 789,—holding salary received as a gratuity, cannot be deducted in action for personal injuries.

Elements of damages in tort action.

Cited in *Schmitt v. Dry Dock, E. B. & B. R. Co.* 2 N. Y. City Ct. 359, holding only amount paid or bound to be paid can be recovered.

Cited in note in 12 L.R.A. 698, on pain and suffering as element of damages for personal injury.

36 AM. REP. 627, BACON v. FRISBIE, 80 N. Y. 394.**Privileged communications between attorney and client.**

Cited in *Austin, T. & W. Mfg. Co. v. Heiser*, 6 S. D. 429, 61 N. W. 455; *Loveridge v. Hill*, 96 N. Y. 222,—holding an attorney could not testify as to communications made in course of employment; *Smith v. Bradhurst*, 18 Misc. 546, 41 N. Y. Supp. 1002, holding declarations as to what client said in reference to suit were incompetent; *Seldon v. State*, 74 Wis. 271, 17 A. S. R. 144, 42 N. W. 218, holding attorney could not be required to produce letters received in course of employment; *Pearsall v. Elmer*, 5 Redf. 181, holding attorney could not testify as to conversation in relation to an unexecuted codicil against objection of executor; *Richards v. Moore*, 37 N. Y. S. R. 953, 14 N. Y. Supp. 851, on incompetency of an attorney's testimony as to conversations and circumstances attending execution of bill of sale.

Cited in reference notes in 38 A. R. 495, on attorney's right to testify to statements made to him by client; 45 A. R. 62, on right of client to disclose communication of his attorney; 58 A. R. 662; 43 A. R. 604; 17 A. S. R. 148; 34 A. S. R. 261; 65 A. S. R. 818,—on privileged communications to attorney.

Cited in notes in 66 A. S. R. 214, 216, on attorney as witness to facts communicated by client; 66 A. S. R. 217; 218, 220, 224; 6 L.R.A. 491,—on privileged communications between attorney and client; 9 E. R. C. 600, on right to compel discovery of papers intrusted to attorney.

Distinguished in *Wadd v. Hazleton*, 62 Hun, 602, 17 N. Y. Supp. 410; *Mowell v. Van Buren*, 77 Hun, 569, 28 N. Y. Supp. 1035,—holding mere casual remark, not calling for advice, not privileged; *Martin v. Platt*, 51 Hun, 429, 4 N. Y. Supp. 359, holding direction by executors to attorney to employ person in connection with suit was not privileged; *Wheeply v. Loder*, 1 Dem. 368, holding an attorney could testify as to instructions by testatrix, when called by executor; *Re Mellen*, 45 N. Y. S. R. 349, 18 N. Y. Supp. 515, holding attorney could not assert privilege after communicant had disclaimed existence of the relationship; *Brown v. Jefferson County Nat. Bank*, 19 Blatchf. 315. 9 Fed. 258, where communicant was allowed to testify in regard to communications.

—Tests as to character of communication.

Cited in *Wade v. Ridley*, 87 Me. 368, 32 Atl. 975, holding a test is whether statement was made in good faith for purpose of obtaining professional advice; *Bartlett v. Bunn*, 56 Hun, 507, 10 N. Y. Supp. 138, holding a test is whether communication is so connected with employment as to afford presumption that it was incident thereto.

—Nature of employment to sustain privilege.

Cited in *Kennedy v. Custer*, 98 C. C. A. 584, 174 Fed. 972, to the point that communication made to attorney as such is privileged though no fee is paid; *Myers v. Dorman*, 34 Hun, 115, holding it sufficient that communication was induced by fact of existing relationship; *People v. Patrick*, 182 N. Y. 131, 74 N. E. 843 (dissenting opinion), on same point; *Davis v. Morgan*, 19 Mont. 141, 47 Pac. 793, holding a fee need not have been paid; *Bruley v. Garvin*, 105 Wis. 625, 48 L.R.A. 839, 81 N. W. 1038, holding neither actual retainer or payment of fee absolutely necessary; *Peek v. Boone*, 90 Ga. 767, 17 S. E. 66, holding fact that employment was merely anticipated is immaterial; *Alexander v. United States*, 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350, holding there need not be payment of fee on pendency of litigation; *Kitz v. Buckmaster*, 45 App. Div. 283, 61 N. Y. Supp. 64; *Mowell v. Van Buren*, 77 Hun, 569, 28 N. Y. Supp. 1035,—on same point; *State v. Snowden*, 23 Utah, 318, 65 Pac. 479, holding undue importance given to question as to existence of absolute contract was error.

Distinguished in *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, where there was no evidence of intention to take advice or employ the attorney.

—Communications overheard by others.

Cited in *Hartness v. Brown*, 21 Wash. 655, 59 Pac. 491, holding presence of third person does not allow attorney to testify as to communications.

—Extent of the privilege.

Annotation cited in *Re Ruos*, 159 Fed. 252, holding refusal to identify documents witnessed or to testify to facts obtained from third person not justified. Privilege of attorney as a rule of public policy.

Cited in *State v. Barrows*, 52 Conn. 323, holding an accused could object to a communication, though client was not a party.

— Power of client to control the privilege.

Cited in *Sleeper v. Abbott*, 60 N. H. 162, holding client may waive the privilege, and citing annotation also on this point.

Privileged nature of communication as question for court.

Cited in *Griffiths v. Metropolitan Street R. Co.* 171 N. Y. 106, 63 N. E. 808, 33 N. Y. Civ. Proc. Rep. 106, holding question as to privilege of physician is for court.

— As to privilege of attorneys.

Cited in *Kitz v. Buckmaster*, 45 App. Div. 283, 61 N. Y. Supp. 64; *People v. Hess*, 8 App. Div. 143, 40 N. Y. Supp. 486,—holding question is for court on facts appearing; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336, on same point.

Privileged communications generally.

Cited in reference notes in 1 A. S. R. 571, on what are privileged communications; 66 A. S. R. 213, on confidential communications.

36 AM. REP. 634, *YOUNG v. YOUNG*, 80 N. Y. 428.

Gift of choses in action.

Cited in *Hopkins v. Manchester*, 16 R. I. 663, 7 L.R.A. 387, 19 Atl. 243, holding inter vivos gift of note may be made by delivery without indorsement; *Brunn v. Schuett*, 59 Wis. 260, 48 A. R. 499, 18 N. W. 260, holding a release of an indebtedness, retained until death, was ineffective as a gift; *Slee v. Kings County Sav. Inst.* 78 App. Div. 534, 79 N. Y. Supp. 630, holding a deposit in name of husband and wife and subsequent taking of the book by wife did not constitute gift; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119, holding mere fact of deposit to credit of another does not justify finding that gift was intended; *Montignani v. Blade*, 145 N. Y. 111, 39 N. E. 719, on ineffectiveness of a certain unexecuted transaction as a gift.

Cited in notes in 39 A. R. 311, on effect of deposit of money in bank in name of another as gift or trust; 11 L.R.A. 686, on deposit of money as gift; 21 L.R.A. 693, 695, on undelivered written transfer of property as a gift by unsealed instrument; 12 E. R. C. 435, on sufficiency of gift inter vivos.

Distinguished in *Hutchins v. Van Vechten*, 66 Hun, 69, 20 N. Y. Supp. 751, where no question as to gifts was involved.

— Declarations of memorandums of purpose of disposal at death.

Cited in *Millard v. Clark*, 7 Misc. 366, 27 N. Y. Supp. 631, holding memorandum on bonds and mortgages as to their disposition at death was ineffective as a gift; *Keyl v. Westerhaus*, 42 Mo. App. 49, holding blank indorsement of note and execution of power of attorney to collect and pay proceeds to church in case of death was ineffective as a gift inter vivos.

Delivery as requisite of gift.

Referred to as leading case in *Gannon v. McGuire*, 22 App. Div. 43, 47 N. Y. Supp. 870; *Re Taber*, 30 Misc. 172, 63 N. Y. Supp. 728,—holding delivery with intention to give is absolutely necessary.

Cited in *Williams v. Guile*, 117 N. Y. 343, 6 L.R.A. 366, 22 N. E. 1071 (affirming 46 Hun, 645), holding present right to property must be parted with; *Tyrrel v. Emigrant Industrial Sav. Bank*, 77 App. Div. 131, 79 N. Y. Supp. 49; *Matson v. Abbey*, 70 Hun, 475, 24 N. Y. Supp. 284; *Simpson v. Harris*, 21 Nev. 353, 31 Pac. 1009; *Re Paris*, 16 Misc. 405, 39 N. Y. Supp. 722,—hold-

ing delivery, divesting title and possession, essential; *Re Timerson*, 39 Misc. 675, 80 N. Y. Supp. 639; *Hamer v. Sidway*, 57 Hun, 229, 11 N. Y. Supp. 182; *Beaver v. Beaver*, 117 N. Y. 421, 15 A. S. R. 531, 6 L.R.A. 403, 22 N. E. 940,—holding proof of clear intention to make gift does not dispense with necessity of delivery; *Williams v. Chamberlain*, 165 Ill. 210, 46 N. E. 250; *Johnson v. Williams*, 63 How. Pr. 233; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Kirk v. McCusker*, 3 Misc. 277, 22 N. Y. Supp. 780,—holding delivery essential in either a gift *causa mortis* or in a gift *inter vivos*; *Pritchard v. Hirt*, 39 Hun, 378, holding delivery with intent to give essential in a gift *inter vivos*; *Boon v. Castle*, 61 Misc. 474, 115 N. Y. Supp. 583, holding that to constitute valid gift there must be renunciation by donor and acquisition by donee of all interest in and title to subject of gift; *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458; *Robb v. Washington & J. College*, 185 N. Y. 485, 78 N. E. 359,—on delivery as an element in gifts.

Cited in reference note in 38 A. R. 325, on sufficient delivery of gift.

Cited in notes in 34 A. S. R. 213, 214, on effect of retention of subject of settlement; 21 L.R.A. 695, on sufficiency of delivery of written transfer or assignment of property as a gift.

Distinguished in *McElroy v. Albany Sav. Bank*, 8 App. Div. 46, 40 N. Y. Supp. 422, where a deposit by husband to credit of wife, or himself or the survivor was held effective without delivery.

—Where donor executes writing.

Cited in *Liebe v. Battmann*, 33 Or. 241, 72 A. S. R. 705, 54 Pac. 179, holding necessity of delivery not avoided by declaration of gift in writing.

—Sufficiency of delivery.

Cited in *Brown v. Crafts*, 98 Me. 40, 56 Atl. 213, holding delivery of a gift was rendered ineffective by donee's execution of power of attorney giving donor control during his life; *Re Rose*, 35 Misc. 21, 71 N. Y. Supp. 172, holding delivery, not to be operative until death, was ineffectual; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 A. R. 781, holding transfer cannot rest in mere intention; *Millard v. Millard*, 123 Ill. App. 264; *Rosenburg v. Rosenburg*, 40 Hun, 91; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054; *Re Munson*, 25 Misc. 586, 56 N. Y. Supp. 151,—holding all title must pass absolutely and without retention of dominion in a gift *inter vivos*; *De Puy v. Stevens*, 37 App. Div. 289, 55 N. Y. Supp. 810, holding actual or constructive delivery with intent to divest all dominion essential in a gift *inter vivos*; *O'Gara's Estate*, 15 N. Y. S. R. 737, holding all possession and dominion over subject of gift *causa mortis* must be parted with; *Conway's Estate*, 18 Lane. L. Rev. 129, to point that to effect gift title must pass out of donor in his lifetime.

Distinguished in *Loucks v. Johnson*, 70 Hun, 565, 24 N. Y. Supp. 267; *Re Bullard*, 37 Misc. 663, 76 N. Y. Supp. 309,—where there was an actual delivery; *Re Townsend*, 5 Dem. 147, where there were acts equivalent to a delivery.

—Where gift is to member of family.

Cited in *West v. McCullough*, 123 App. Div. 846, 108 N. Y. Supp. 493 (dissenting opinion), on nonrelaxation of rules in cases of gifts between spouses.

—Delivery to agent or intermediary.

Cited in *Hurlbut v. Hurlbut*, 49 Hun, 189, 1 N. Y. Supp. 854, denying that delivery had to be made directly to donee; *Bump v. Pratt*, 84 Hun, 201, 32 N.

Y. Supp. 538, holding delivery of bonds to third person for a donee was effective in a gift inter vivos; *Luther v. Hunter*, 7 N. D. 544, 75 N. W. 916, holding delivery to third person, without instruction or statements ineffective in gift inter vivos.

— **Effect of creating a joint possession.**

Cited in *Kelly v. Home Sav. Bank*, 44 Misc. 102, 89 N. Y. Supp. 776, holding gift not established by making of deposit in names of both parties.

— **Effect of declarations by donor as to ownership.**

Cited in *Porter v. Gardner*, 60 Hun, 571, 15 N. Y. Supp. 398, holding declarations as to ownership of article in possession of donee at time of gift justified inference of delivery.

Necessity that gift be in presenti.

Cited in *McCartney v. Ridgway*, 160 Ill. 129, 32 L.R.A. 555, 43 N. E. 826 (affirming 57 Ill. App. 453), holding gift inter vivos cannot be made to take effect in possession in futuro; *Krummel v. Thomas*, 5 Misc. 535, 25 N. Y. Supp. 833, holding gift inter vivos must be accompanied by delivery in presenti.

Gifts reserving interest to accrue.

Cited with special approval in *Buswell v. Fuller*, 156 Mass. 309, 31 N. E. 294, holding gift cannot be effected if donor retains possession in order to collect interest.

Cited in *Beatty v. Western College*, 177 Ill. 280, 69 A. S. R. 242 42 L.R.A. 797, 52 N. E. 432, holding reservation of annuity to donor did not invalidate an executed gift; *Ackerman v. Herrick*, 71 Hun, 190, 24 N. Y. Supp. 606, holding gift may be effected by delivery of indorsed bank book and donee's agreement to pay interest to donor; *Funston v. Twining*, 202 Pa. 88, 51 Atl. 736, holding gift may be effected by absolute delivery of bond and mortgage and donee's agreement to pay interest to donor; *Gallagher v. Donahy*, 65 Kan. 341, 69 Pac. 330, holding that retention of control of notes proposed to be donated, coupled with declaration of payee that interest payments would be expected from payor does not evidence purpose to make gift in presenti.

— **Written transfer reserving interest to accrue.**

Cited with special approval in *Durland v. Durland*, 83 Hun, 174, 31 N. Y. Supp. 596, holding an assignment of bonds construed as reserving interest during life time may be effective as a gift.

Cited in *Re Wirt*, 5 Dem. 179, holding delivery of an assignment of a mortgage reserving title to principal and interest for life was ineffective as a gift; *Smith v. Ossipee Valley Ten Cents Sav. Bank*, 64 N. H. 228, 10 A. S. R. 400, 9 Atl. 792, holding deposit in name of daughter with intention to make gift subject to reservation of interest for life was effective; *Sullivan v. Sullivan*, 39 App. Div. 99, 56 N. Y. Supp. 693, on effect of a bank deposit, reserving interest during life and providing for the remainder at death.

Trusts in choses in action or in money.

Cited in *Barker v. Harbeck*, 17 N. Y. S. R. 678, 2 N. Y. Supp. 425, holding money deposited in bank for beneficiary made the depositor a trustee; *Todd v. Vaughan*, 90 Hun, 70, 35 N. Y. Supp. 457, holding a trust created by delivery of money to third person for specified purposes.

Cited in notes in 34 A. S. R. 215, 216, on declarations of trust testamentary in character; 34 A. S. R. 204, on sufficiency of trustor's declaration of intention evidenced by ineffectual attempt to assign property; 34 A. S. R. 206, on voluntary Am. Rep. Vol. XVII.—74.

trusts arising from declaration of trustor; 38 A. R. 501, on validity of payment by savings bank of deposit in trust, to depositor's administrator.

Explained in *Wadd v. Hazleton*, 62 Hun, 602, 17 N. Y. Supp. 410, holding execution of an assignment of bond and mortgage and its delivery to executor together with declarations established a trust.

—Necessity of vesting of title or equity.

Referred to as a leading case in *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 A. R. 781, holding a deposit merely registered in name of another did not create trust where there was retention of control and change of entry giving right to it at death.

Cited in *Brown v. Spohr*, 180 N. Y. 201, 73 N. E. 14 (affirming 87 App. Div. 522, 84 N. Y. Supp. 995), holding there must be a fund, a trustee and a beneficiary designated as well as a delivery or assignment; *Paine v. Paine*, 28 R. I. 307, 12 L.R.A. (N.S.) 547, 67 Atl. 127, holding that settlor must do every thing essential to make settlement binding; *Ridgway v. McCartney*, 57 Ill. App. 453, holding mere intention to give or transfer does not create a trust; *Re Small*, 27 App. Div. 438, 50 N. Y. Supp. 341; *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571, 33 Am. St. Rep. 944, 25 Atl. 487; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 A. R. 781,—holding act constituting transfer must be consummated; *Montignani v. Blade*, 145 N. Y. 111, 39 N. E. 719, on ineffectiveness of a certain unexecuted transaction as a trust.

—Postponement of operation till death of settlor.

Cited in *Re Walker*, 45 N. Y. S. R. 21, 17 N. Y. Supp. 666, holding money, deposited as a trust for certain beneficiaries, became their property at death; *Brunn v. Schuett*, 59 Wis. 260, 48 A. R. 499, 18 N. W. 260, holding a release of indebtedness, retained until death, did not operate as a trust.

Explained in *Phipard v. Phipard*, 55 Hun, 433, 8 N. Y. S. R. 728, holding declarations and memorandum attached to policy created trust in favor of insured's children.

Sufficiency of proof of trust.

Cited in *McKee v. Allen*, 204 Mo. 655, 103 S. W. 76; *Hamer v. Sidway*, 57 Hun, 229, 11 N. Y. Supp. 182; *Webb's Academy v. Hidden*, 118 App. Div. 711, 103 N. Y. Supp. 659; *Beaver v. Beaver*, 117 N. Y. 421, 15 A. S. R. 531, 6 L.R.A. 403, 22 N. E. 940,—holding explicit declaration or circumstances, showing a clear intention, essential; *Hamilton v. Hall*, 111 Mich. 291, 69 N. W. 494; *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458; *Wadd v. Hazleton*, 137 N. Y. 215, 33 A. S. R. 707, 21 L.R.A. 693, 33 N. E. 143; *Millard v. Clark*, 7 Misc. 364, 27 N. Y. Supp. 631; *Re Small*, 27 App. Div. 438, 50 N. Y. Supp. 341; *Re Crise*, 2 Connolly, 59, 7 N. Y. Supp. 202; *Butler v. Duprat*, 19 Jones & S. 77; *Smith's Estate*, 144 Pa. 428, 27 A. S. R. 641, 22 Atl. 916, 28 W. N. C. 565; *Leary v. Corvin*, 29 Misc. 68, 60 N. Y. Supp. 563, 30 N. Y. Civ. Proc. Rep. 38,—holding acts or words must be unequivocal; *Barry v. Lambert*, 98 N. Y. 300, 50 A. R. 677, holding trust may be created by unequivocal words or acts implying intent to hold for another; *Robb v. Washington & J. College*, 185 N. Y. 485, 78 N. E. 359 (modifying 103 App. Div. 327, 93 N. Y. Supp. 92), holding execution and delivery of declaration under seal established trust; *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571, 25 Atl. 487; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 A. R. 781,—holding trust may be established by unequivocal declaration by writing, or by parol; *Gegan v. Union Trust Co.* 129 App. Div. 184, 113 N. Y. Supp. 595, to the point that declaration of trust must at least be evinced by acts

that admit of no other interpretation than that such legal right as he retains is held by him as trustee for donee.

Trust of personalty in possession of donor.

Cited in *Miller v. Clark*, 40 Fed. 15, holding rule requiring cessation of control inapplicable.

—Effect of retaining legal title.

Cited in *Locke v. Farmers' Loan & T. Co.* 140 N. Y. 135, 35 N. E. 578, holding it consistent with creation of trust; *Mitchell v. Bilderback*, 159 Mich. 483, 124 N. W. 557, holding that to create trust where donor retains property, words and acts relied upon must be unequivocal.

Cited in notes in 34 A. S. R. 212, on effect of grantor's retention in instrument creating voluntary trust; 12 L.R.A.(N.S.) 552, 554, on sufficiency of declaration to establish voluntary trust where legal title is retained by settler.

Voluntary executory agreements to transfer property.

Cited in *Everdell v. Hill*, 58 App. Div. 151, 68 N. Y. Supp. 719, holding agreement to make a gift will not be enforced; *Norway Sav. Bank v. Merriam*, 88 Me. 146, 33 Atl. 840; *Bennett v. Littlefield*, 177 Mass. 294, 58 N. E. 1011,—holding same as to agreement for creation of a trust.

Cited in note in 11 L.R.A. 118, on enforcement of executory voluntary trust.

Defective gifts as predicate for trust.

Cited with special approval in *Re Soulard*, 141 Mo. 642, 43 S. W. 617, holding an imperfect gift will not be converted into a trust.

Cited in *Norway Sav. Bank v. Merriam*, 88 Me. 146, 33 Atl. 840; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054,—holding trust will not be built up from fragments of an incomplete gift; *Marcy v. Amazeen*, 61 N. H. 131, 60 A. R. 320; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 A. R. 781; *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571, 25 Atl. 487; *Beeman v. Beeman*, 88 Hun. 14, 34 N. Y. Supp. 484,—holding intent to give, ineffective as a gift cannot be regarded as a trust; *Wadd v. Hazleton*, 137 N. Y. 215, 33 A. S. R. 707, 21 L.R.A. 693, 33 N. E. 143; *Govin v. De Miranda*, 79 Hun. 286, 29 N. Y. Supp. 345; *Re King*, 51 Misc. 375, 101 N. Y. Supp. 279,—holding gift defective for want of delivery will not be construed as a declaration of trust; *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 401, 129 Fed. 287, holding an absolute assignment, defective as a gift, will not be regarded as a trust; *Barnum v. Reed*, 136 Ill. 388, 26 N. E. 572; *McCartney v. Ridgway*, 160 Ill. 129, 32 L.R.A. 555, 43 N. E. 826; *Godard v. Conrad*, 125 Mo. App. 165, 101 S. W. 1108; *Millard v. Clark*, 7 Misc. 366, 27 N. Y. Supp. 631,—holding imperfect gift will not be rendered perfect or construed as a declaration of trust; *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339, holding that trust is created where husband gives earnings to wife to maintain home and keep remainder for his benefit; *Organized Charities Asso. v. Mansfield*, 82 Conn. 504, 135 A. S. R. 385, 74 Atl. 781, to point that trust arises where owner of specific property without making transfer declares that he holds it for donee's benefit; *Ashman's Estate*, 223 Pa. 543, 72 Atl. 899; *Trubey v. Pease*, 240 Ill. 513, 88 N. E. 1005, 16 A. & E. Ann. Cas. 370,—to point that incomplete gift cannot be enforced as declaration of trust.

Distinguished in *Harris Bkg. Co. v. Miller*, 190 Mo. 640, 1 L.R.A.(N.S.) 790, 89 S. W. 629, holding inability to establish a perfect gift does not necessarily preclude proof of a valid trust.

Explained in *O'Neil v. Greenwood*, 106 Mich. 572, 64 N. W. 511, holding

undelivered bill of sale may be construed as a declaration of trust, where there was other evidence of intent.

—Effect of meritorious consideration of kinship.

Cited in *Priester v. Hohloch*, 70 App. Div. 256, 75 N. Y. Supp. 405, holding fact of kinship does not permit trust to be imputed from voluntary gift; *Pennell v. Ennis*, 126 Mo. App. 355, 103 S. W. 147, holding such fact does not operate as a consideration except in case of defective execution of power.

Voluntary executed transfers or trusts.

Cited in *Norway Sav. Bank v. Merriam*, 88 Me. 146, 33 Atl. 840; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 A. R. 781; *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571, 25 Atl. 487; *Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257,—holding objection as to voluntary character of a trust will be disregarded; *Westlake v. Wheat*, 43 Hun, 77, holding executed gift or voluntary settlement will be enforced.

Possession by trustee as an element in trusts.

Cited in *Von Hesse v. MacKaye*, 62 Hun, 458, 17 N. Y. Supp. 55, holding law satisfied by fact that property went into possession and was under control.

Dissimilarity between gifts and trusts.

Cited in *Grafing v. Heilmann*, 1 App. Div. 260, 37 N. Y. Supp. 253, holding in trusts interest can be retained; *Robb v. Washington & G. College*, 185 N. Y. 485, 78 N. E. 359, holding in trusts same delivery is not required as in gifts; *Bray v. O'Rourke*, 89 App. Div. 400, 85 N. Y. Supp. 907, holding evidence tending to the creation of trust cannot sustain a gift; *Schwind v. Ibert*, 69 App. Div. 378, 69 N. Y. Supp. 921, holding trust and gift theories of a case must be separately considered; *Flanders v. Blandy*, 45 Ohio St. 108, 12 N. E. 321, holding trust and gift are antagonistic to each other; *West v. McCullough*, 123 App. Div. 846, 108 N. Y. Supp. 493 (dissenting opinion), on inapplicability of rules of gifts to trusts.

Defective gifts as assets in hands of legal representatives.

Cited in *Frost v. Craig*, 28 N. Y. S. R. 157, 9 N. Y. Supp. 437, on inclusion of an endowment policy as assets, notwithstanding indorsement thereon.

36 AM. REP. 643, JESSUP v. CARNEGIE, 80 N. Y. 441.

State decisions as rule for construction of its statutes when involved in foreign court.

Cited in *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 A. R. 491; *Matthews v. Dickinson*, 36 Misc. 187, 73 N. Y. Supp. 190,—holding construction already given statute should be adopted; *Savings Asso. v. O'Brien*, 51 Hun, 45, 3 N. Y. Supp. 764; *Angell v. Van Schaick*, 56 Hun, 247, 9 N. Y. Supp. 568,—holding same as a general rule; *Johnson v. State*, 91 Ala. 70, 9 So. 71; *Hannaher v. St. Paul, M. & M. R. Co.* 5 Dak. 1, 37 N. W. 717,—holding construction already given Constitution and statutes should be adopted; *Dodge v. Platte County*, 82 N. Y. 218, on same point; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184, holding same as a general rule.

Distinguished in *Harrison v. Wallis*, 44 Misc. 492, 90 N. Y. Supp. 44, where particular section of statute under review had not been construed; *Faulkner v. Hart*, 82 N. Y. 413, 37 A. R. 574, refusing to follow a sister state decision on a question of commercial law.

Basis of shareholder's liability for corporate debts.

Cited in *Marshall v. Sherman*, 148 N. Y. 9, 51 A. S. R. 654, 34 L.R.A. 757, 42 N. E. 419, holding voluntary purchase of stock does not of itself create any liability; *Molson's Bank v. Boardman*, 47 Hun, 135, holding liability is purely a creation of statute and cannot be based on law of partnership.

Liability of shareholders for failure to comply with statutes.

Cited in *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398, holding failure to file certificate as to stock exchanged for property at an excessive valuation creates liability where there is fraud.

— Partnership theory.

Cited in *Rutherford v. Hill*, 22 Or. 218, 29 A. S. R. 596, 17 L.R.A. 549, 29 Pac. 546, holding partner's liability not created by failure to complete corporate organization.

Cited in note in 17 L.R.A. 553, on partnership liability of stockholders in case of defective or illegal incorporation.

Enforcement of shareholder's liability under sister state laws.

Cited in *Russell v. Pacific R. Co.* 113 Cal. 258, 34 L.R.A. 747, 45 Pac. 323, holding liability under statute, providing a special remedy not existing in forum, could not be enforced.

Cited in notes in 37 A. S. R. 171, on remedy for enforcement of stockholders' liability in foreign tribunal; 34 L.R.A. 738, on right to enforce stockholder's liability outside of state of incorporation; 13 L.R.A. 458, as to when *lex fori* governs.

Exclusiveness of remedy given in statute creating rights or liabilities.

Cited in *Ryan v. Ray*, 105 Ind. 101, 4 N. E. 214; *Central Trust Co. v. New York C. & N. R. Co.* 47 Hun, 587; *Briggs v. Knickerbocker*, 11 Misc. 197, 32 N. Y. Supp. 95,—holding remedies, provided in statute, are exclusive; *Mairs v. Baltimore & O. R. Co.* 73 App. Div. 265, 76 N. Y. Supp. 838, holding a statute constituting a given act a crime and providing a punishment, precluded an action for damages.

Cited in note in 34 L.R.A. 758, on conditions prescribed by statutes in state of incorporation as to enforcement of stockholder's liability by creditor in other state after stock is fully paid for.

Distinguished in *Graham v. Delaware & H. Canal Co.* 46 Hun, 386, where statute created a new duty but left it to be enforced by old remedies.

Construction of statutes creating right and providing remedies.

Cited in *Central Trust Co. v. New York C. & N. R. Co.* 47 Hun, 587, holding enactment will not be enlarged by an unwarranted construction.

Law governing corporate contracts.

Cited in reference note in 26 A. S. R. 244, on conflict of laws as affecting corporation's contracts.

What constitutes a partnership.

Cited in note in 19 E. R. C. 404, on what constitutes a partnership.

Validity of injunction without notice.

Cited in *Meier v. Fidelity Nat. Bank*, 43 Wash. 324, 86 Pac. 574, holding injunction without notice or showing of emergency void.

Effect of statutory enactment.

Cited in note in 13 L.R.A. 56, on effect of statutory enactment.

36 AM. REP. 654, HEEG v. LICHT, 80 N. Y. 570.**What constitutes a nuisance.**

Cited in *Wheeler v. Pullman Palace Car Co.* 131 Ill. App. 262, holding absence of railing along front of platform on demised house was not a nuisance; *Jarvis v. Baxter*, 20 Jones & S. 109, holding the building of a house so that it fell and injured adjoining property was a nuisance; *Wittleder v. Citizens' Electric Illuminating Co.* 50 App. Div. 478, 64 N. Y. Supp. 114, holding placing of live electric wire so that persons in thoroughfare were liable to come in contact with it was a nuisance; *Olmsted v. Rich*, 3 Silv. Sup. Ct. 447, 6 N. Y. Supp. 826, 25 N. Y. S. R. 271, holding keeping of large number of hives of bees on lot next to dwelling could be permanently enjoined; *Holke v. Herman*, 87 Mo. App. 125, holding a petition to abate a pond as nuisance was faulty in alleging predictions instead of facts; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, on whether an improperly constructed grandstand was a nuisance.

Cited in note in 9 L.R.A. 712, as to when conduct of business is a nuisance.

— Definition of a nuisance.

Cited in *Catlin v. Patterson*, 10 N. Y. S. R. 724; *Morison v. New York Elev. R. Co.* 74 Hun, 398, 26 N. Y. Supp. 641,—holding anything done to hurt or annoyance of lands, tenements or hereditaments of another is a nuisance.

Keeping or use of explosives or inflammables as nuisance.

Cited in *McDonough v. Roat*, 8 Kulp, 433, holding keeping of dynamite in store is a nuisance or otherwise according to the facts; *Reilly v. Erie R. Co.* 72 App. Div. 476, 76 N. Y. Supp. 620, holding a dynamite magazine may constitute nuisance so as to create liability without negligence; *Lounsbury v. Foss*, 80 Hun, 296, 30 N. Y. Supp. 89, holding same as to a dynamite manufactory; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730, holding powder house will constitute a nuisance where there is constant menace to neighborhood; *Rudder v. Koopman*, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601, holding storage of gunpowder and dynamite in thickly settled portion of town was a nuisance; *Wilson v. Phoenix Powder Mfg. Co.* 40 W. Va. 413, 52 A. S. R. 890, 21 S. E. 1035, holding maintenance of powder mill in highway traveled by thousands, was nuisance, regardless of care; *Lafin & R. Powder Co. v. Tearney*, 131 Ill. 322, 19 A. S. R. 34, 7 L.R.A. 262, 23 N. E. 389, holding averments of declaration brought a powder magazine within definition of a nuisance; *O'Hara v. Nelson*, 71 N. J. Eq. 161, 63 Atl. 836, holding question as to gasoline in a garage is dependent on circumstances of each case; *Lee v. Vacuum Oil Co.* 54 Hun, 156, 7 N. Y. Supp. 426, holding facts in relation to an oil pipe in street did not sustain charge of being a nuisance; *Van Fleet v. New York C. & H. R. R. Co.* 27 N. Y. S. R. 76, 7 N. Y. Supp. 636, holding frame shanty filled with oil, etc., and located close to a dwelling, may become nuisance; *Spier v. Brooklyn*, 45 N. Y. S. R. 261, holding city created a nuisance by licensing exhibition of fireworks in public street; *Morgan v. Bowes*, 42 N. Y. S. R. 791, 17 N. Y. Supp. 22, holding blasting with explosives so powerful as to injure neighbors by atmospheric concussion was a nuisance.

Cited in reference notes in 36 A. R. 508, on keeping a powder magazine as a nuisance; 31 A. S. R. 438, on keeping dangerous explosives as nuisance.

Cited in notes in 41 A. D. 747, on keeping gunpowder in large quantities near dwelling house as a nuisance; 107 A. S. R. 243, on manufacture or storage of

explosive materials as public nuisance; 29 L.R.A. 718, on negligence in manufacture and storage of gunpowder, nitroglycerine, dynamite, and other explosives; 16 L.R.A.(N.S.) 693, on storage of explosives as a nuisance.

Distinguished in *Booth v. Rome*, W. & O. T. R. Co. 140 N. Y. 287, 37 A. S. R. 552, 24 L.R.A. 105, 35 N. E. 592, holding temporary use of explosives in blasting for needed improvement was not a nuisance; *Ft. Worth & D. C. R. Co. v. Beauchamp*, 95 Tex. 496, 93 A. S. R. 864, 58 L.R.A. 716, 68 S. W. 502, holding mere fact of transportation of explosives by carrier does not establish a nuisance; *Piehl v. Albany R. Co.* 30 App. Div. 166, 51 N. Y. Supp. 755, holding operation of engine and flywheel in power house was not a nuisance in action for explosion of wheel.

Explained in *Kinney v. Koopman*, 116 Ala. 310, 67 A. S. R. 119, 37 L.R.A. 497, 22 So. 593, holding storage of gunpowder or dynamite in thickly settled portion of town was not a nuisance per se.

— In absence of municipal regulation.

Cited in *Chicago, W. & V. Coal Co. v. Glass*, 34 Ill. App. 364, holding recovery for injuries not dependent on fact of prohibition by-law, or ordinance.

Nuisance as a question of fact.

Cited in *Morison v. New York Elev. R. Co.* 74 Hun, 398, 26 N. Y. Supp. 641, holding question was properly left to jury.

— As to nuisances in relation to explosives.

Cited in *Reilly v. Erie R. Co.* 72 App. Div. 476, 76 N. Y. Supp. 620, holding question as to a dynamite magazine within 1000 feet of houses in outskirts of village was a question for jury on the facts; *Prussak v. Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761, holding same in case of a powder magazine within limits of city and about 300 or 400 feet away; *Melker v. New York*, 190 N. Y. 481, 16 L.R.A.(N.S.) 621, 83 N. E. 565, 13 A. & E. Ann. Cas. 544, holding same in case of firing, in remote place, of a cannon loaded with grape shot; *Kleebauer v. Western Fuse Explosives Co.* 138 Cal. 497, 94 A. S. R. 62, 60 L.R.A. 377, 71 Pac. 617, holding question as to powder magazines should be left to jury on facts of each case.

Explosion of powder magazine as evidence that it was dangerous.

Cited in *Lafin & R. Powder Co. v. Tearney*, 131 Ill. 322, 19 A. S. R. 34, 7 L.R.A. 262, 23 N. E. 389, holding it shows that it was dangerous.

Liability to civil suit for injuries from nuisances.

Cited in *Cameron v. Kenyon-Connell Commercial Co.* 22 Mont. 312, 74 A. S. R. 602, 44 L.R.A. 508, 56 Pac. 358, on right to maintain suit for injuries against corporation maintaining nuisance; *Southern R. Co. v. Adkins*, 133 Ky. 219, 117 S. W. 321, holding that railroad is liable for injury caused by explosion of car of dynamite, if they failed to exercise care to prevent it.

Cited in notes in 42 A. S. R. 541, on liability of railroad for storing explosive; 67 A. S. R. 136, 137, on liability for keeping explosives.

Municipal power over nuisances.

Cited in note in 38 L.R.A. 309, on municipal power over nuisances as to electricity, steam, and explosives.

Negligence as element in nuisance.

Cited in *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246, holding negligence need not be proved in action for use of property, producing destructive vapors; *Frost v. Berkeley Phosphate Co.* 42 S. C. 402,

46 A. S. R. 736, 26 L.R.A. 693, 20 S. E. 280, holding proof of care no defense to like action; *Reilly v. Erie R. Co.* 72 App. Div. 476, 76 N. Y. Supp. 620, holding there may be liability as respects a dynamite magazine regardless of negligence; *Lounsbury v. Foss*, 80 Hun, 296, 30 N. Y. Supp. 89, holding same as to a dynamite manufactory; *Lafin & R. Powder Co. v. Tearney*, 131 Ill. 322, 19 A. S. R. 34, 7 L.R.A. 262, 23 N. E. 389, holding liability for actual injuries from keeping of gunpowder not dependent on negligence; *Weston Paper Co. v. Pope*, 155 Ind. 394, 56 L.R.A. 899, holding absence of negligence or malice does not relieve from liability from depositing refuse in stream; *Pittsburgh, C. & St. L. R. Co. v. Hood*, 36 C. C. A. 423, 94 Fed. 618, holding no question of negligence arises in actions for injuries against railroad using street without authority.

Torts not dependent on negligence.

Cited in *Van Norden v. Robinson*, 45 Hun, 567, holding navigation of vessel with uninspected boiler dispensed with necessity of proving negligence; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 298, 25 L.R.A. 161, 24 S. W. 591, holding legislature could make railroads liable for escape of fire from locomotive regardless of question of care; *Colton v. Onderdonk*, 69 Cal. 155, 58 A. R. 556, 10 Pac. 395, holding exercise of care does not permit injury of neighbors by blasting on a city lot; *Klepsch v. Donald*, 4 Wash. 436, 31 A. S. R. 236, 30 Pac. 991, holding liability for blasting, not claimed to be unlawful, is dependent on proof of negligence; *Albee v. Chappaqua Shoe Mfg. Co.* 62 Hun. 223, 16 N. Y. Supp. 687, holding liability for blowing powerful whistle near highway not affected by negligence of injured party.

Direct injuries from wrongful acts.

Cited in *Booth v. Rome, W. & O. Terminal R. Co.* 44 N. Y. S. R. 9, 17 N. Y. Supp. 336, holding injuries from repeated concussions from railroad blasting were direct.

Rights of others as a limitation on use of property.

Cited in *Rafter v. Tagliabue*, 29 Abb. N. C. 1, 21 N. Y. Supp. 107, holding lawful acts must not be done in an unlawful manner; *Kerbaugh v. Caldwell*, 80 C. C. A. 470, 151 Fed. 194, 10 A. & E. Ann. Cas. 453; *Catlin v. Patterson*, 10 N. Y. S. R. 724; *Lee v. Vacuum Oil Co.* 54 Hun, 156, 7 N. Y. Supp. 428.—holding nuisance, to injury of neighbors, cannot be maintained even in pursuit of a lawful trade; *Albee v. Chappaqua Shoe Mfg. Co.* 62 Hun, 223, 16 N. Y. Supp. 687, holding acts, detracting from safety of travelers, cannot be done on own premises; *Ketcham v. Cohn*, 2 Misc. 427, 22 N. Y. Supp. 181, holding enjoyment of right to excavate on own land is limited by rights of others; *Engel v. Eureka Club*, 59 Hun, 593, 14 N. Y. Supp. 184, holding owner of dangerous building cannot escape liability by contracting for removal; *Taylor v. Metropolitan Elev. R. Co.* 8 Jones & S. 311, on superiority of rights of others as a basis of maxim "sic utere tuo."

Cited in reference note in 51 A. D. 286, on liability for injuries by acts done on one's own land.

Cited in notes in 51 A. D. 283, on liability for damages to others from acts done on one's own land; 1 E. R. C. 272, on liability for injury due to escape of anything likely to do harm.

—Blasting on own land.

Cited in *Blackwell v. Lynchburg & D. R. Co.* 111 N. C. 151, 32 A. S. R. 796, 17 L.R.A. 729, 16 S. E. 12, holding an abutter can recover of railroad for

negligent use of explosives in blasting; *Sullivan v. Dunham*, 161 N. Y. 290, 76 A. S. R. 274, 47 L.R.A. 715, 55 N. E. 923, holding a traveler on highway could recover for injuries from careful blasting on abutting land.

36 AM. REP. 659, HOY v. HOLT, 91 PA. 88.

Liability to replace destroyed property under contract to keep in repair.

Cited in *Gettysburg Electric R. Co. v. Electric Light, Heat & Power Co.* 200 Pa. 372, 49 Atl. 952, holding lessee, under covenant to keep leased premises in good repair and restore them to lessor in good condition, bound to rebuild in case of destruction by fire; *Phillips v. Epp*, 9 Lanc. L. Rev. 197, 6 Kulp, 405; *Lee's Estate*, 18 Phila. 2, 42 Phila. Leg. Int. 488, 17 W. N. C. 110,—on the same point; *Priest v. Foster*, 69 Vt. 417, 38 Atl. 78, holding one contracting to keep property in repair and to return it in as good condition as he receives it, liable for its value where destroyed by fire or other accident; *Moore v. Sun Printing & Pub. Asso.* 41 C. C. A. 506, 101 Fed. 591, holding charterer of vessel under contract to return it in good condition liable for its loss though occurring without fault on his part; *Meriwether v. Lowndes County*, 89 Ala. 362, 7 So. 198, holding that covenant to keep bridge in repair and in safe condition includes liability to rebuild if destroyed by unusual and unprecedented flood; *Smith American Organ Co. v. Abbott*, 1 Pa. Dist. R. 174, 11 Pa. Co. Ct. 319, holding that where lessee covenants to insure and fails to do so he is liable for loss by fire; *Jenkins v. Stone*, 14 Montg. Co. L. Rep. 27, holding that under covenant of tenant to repair fences, material to be taken from trees on premises, tenant was not relieved from paying rent because of burning of trees; *Link v. Hathway*, 143 Mo. App. 502, 127 S. W. 913, to point that where bailee agrees to keep premises in repair he is liable for damage to property by fire.

Cited in reference notes in 40 A. R. 814, on lessee's covenant for restoration as including loss by fire; 2 A. S. R. 368, on liability of lessee for restoration of premises destroyed by fire; 61 A. S. R. 566, on tenant's duty to rebuild on destruction of leased premises.

Cited in notes in 95 A. D. 121, on tenant's covenants to repair; 61 A. S. R. 567, on tenant's duty to rebuild on destruction of leased premises; 22 L.R.A. 615, on liability of tenant to rebuild on destruction of leased building; 64 L.R.A. 658, on tenant's duty to leave premises in good condition under express covenants as to fire or unavoidable accident; 124 A. S. R. 707, on meaning of word "repair" as distinguished from or synonymous with the word "rebuild" or "reconstruct."

Distinguished in *Van Wormer v. Crane*, 51 Mich. 363, 47 A. R. 582, 16 N. W. 686, holding lessee not liable for loss by accidental fire under lease to keep in repair and return in good condition, excepting damage by the elements; *Dixon v. Breon*, 22 Pa. Super. Ct. 340, holding that where under contract to cut and manufacture certain lumber and deliver to another, the timber is accidentally destroyed by fire after being cut but before made into lumber, vendor is released from his contract; *Sampson v. Grogan*, 21 R. I. 174, 44 L.R.A. 711, 42 Atl. 712, holding life tenant not bound to rebuild house accidentally destroyed by fire, though held under devise providing that he shall keep it in repair.

Excuse for nonperformance.

Cited in *Mitchell v. Hancock County* (*Mitchell v. Weston*), 91 Miss. 414,

124 A. S. R. 706, 15 L.R.A.(N.S.) 833, 45 So. 571, holding that act of God will not excuse nonperformance of duty created by contract.

36 AM. REP. 662, MANSFIELD COAL & COKE CO. v. McENERY, 91 PA. 185.

Measure of damages for death by wrongful act.

Cited in *McGowan v. St. Louis Ore & Steel Co.* 109 Mo. 518, 19 S. W. 199; *Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 450, 28 Pac. 497,—holding that measure of damages for death by wrongful act is the pecuniary loss sustained without any addition for physical pain of the injured or mental suffering of survivors; *Missouri, K. & T. R. Co. v. McLaughlin*, 73 Kan. 248, 84 Pac. 989, on same point; *St. Louis, I. M. & S. R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *McHugh v. Schlosser*, 159 Pa. 480, 39 A. S. R. 699, 23 L.R.A. 574, 28 Atl. 291, 34 W. N. C. 33, 24 Pittsb. L. J. N. S. 285,—holding that in fixing damages for death by wrongful act, the age of deceased, his habits and capacity for work and his expenditures may be considered; *O'Reilly v. Monongehela Street R. Co.* 17 Pa. Super. Ct. 626, on same point; *Palmer v. Philadelphia, B. & W. R. Co.* 218 Pa. 114, 66 Atl. 1127, holding that exemplary damages cannot be recovered by surviving parties for injuries causing death; *Atlanta & W. P. R. Co. v. Newton*, 85 Ga. 517, 11 S. E. 776, holding evidence of what deceased might have earned in occupations other than that in which he was always engaged inadmissible on measure of damages.

Cited in notes in 48 A. D. 639, on damages for death of relative; 1 A. S. R. 632; 12 A. S. R. 375, 378, 380,—on measure of damages for causing death; 8 E. R. C. 426, on measure of damages for death of person negligently killed.

—Death of father.

Cited in *St. Louis, I. M. & S. R. Co. v. Maddy*, 57 Ark. 306, 21 S. W. 472, holding that loss to minor child of the training by his father is proper element in fixing damages for death by wrongful act; *McCabe v. Narragansett Electric Lighting Co.* 27 R. I. 272, 61 Atl. 667, holding that in action for death by wrongful act, loss of parental care to infant cannot be considered as an element of damages; *Duzan v. Myers*, 30 Ind. App. 227, 96 A. S. R. 341, 65 N. E. 1046, holding invalid adult daughter entitled to part of fund recovered for death of father by wrongful act.

Contributory negligence and assumption of risk.

Cited in *Durst v. Carnegie Steel Co.* 173 Pa. 162, 33 Atl. 1102, on nonliability of master to workmen for injury from danger arising during, and caused by the progress of the work.

Cited in reference note in 13 A. S. R. 94, giving instances of contributory negligence.

Cited in notes in 55 A. D. 672, on knowledge of or reason to apprehend danger as essential to contributory negligence which will defeat recovery for injury; 92 A. D. 219, on duty of employer to furnish safe premises and conditions in and under which to work; 59 A. R. 75, on master's duty to furnish safe appliances; 59 A. D. 739, on effect of contributory negligence on liability of owner of defective bridge; 49 L.R.A. 54, on contributory negligence in respect to risks assumed by servant entering or remaining in employment; 54 L.R.A. 66, on master's duty to see that unintelligent instrumentalities of the work are reasonably safe; 37 L. ed. U. S. 729, on master's duty to furnish suitable and safe machinery and appliances.

— **Continuing at work under known dangerous conditions.**

Cited in *Wannamaker v. Burke*, 111 Pa. 423, 2 Atl. 500, 17 W. N. C. 225, 43 Phila. Leg. Int. 331, holding that employee continuing to work in room known to be in unsafe condition, assumes the risk of injury therefrom; *Diehl v. Lehigh Iron Co.* 140 Pa. 487, 21 Atl. 430, 27 W. N. C. 552, 48 Phila. Leg. Int. 321, holding that servant voluntarily undertaking dangerous employment with knowledge of the danger assumes the risk of injury; *Patnode v. Harter*, 20 Nev. 303, 21 Pac. 679; *Dooner v. Delaware & H. Canal Co.* 164 Pa. 17, 30 Atl. 269,— holding that employee using defective machinery with knowledge of such defect assumes the risk of injury therefrom; *New York, L. E. & W. R. Co. v. Lyons*, 119 Pa. 324, 13 Atl. 205, 21 W. N. C. 277, 45 Phila. Leg. Int. 275, 18 Pittsb. L. J. N. S. 515, holding that switchman with knowledge of defective condition of step on engine, is guilty of contributory negligence in attempting to step upon such engine while in motion; *Wilkinson v. H. W. Johns Mfg. Co.* 198 Pa. 634, 48 Atl. 810, holding plaintiff guilty of contributory negligence as matter of law where injury was caused by instrumentality used by employee a long time prior thereto without any complaint as to its being defective; *Baldwin v. Urner*, 18 Montg. Co. L. Rep. 21, holding master not liable for injury to servant where latter voluntarily assumes danger manifest to him.

Cited in notes in 41 L.R.A. 41, on effect of actual knowledge on employer's liability to injured servant; 47 L.R.A. 185, on fact that servant complained of dangerous condition as affecting applicability of maxim, *volenti non fit injuria*.

Distinguished in *Pennsylvania R. Co. v. Zink*, 126 Pa. 288, 17 Atl. 614, holding that where defective condition of track is not palpably evident, a brakeman is not guilty of contributory negligence as a matter of law by continuing his work; *Hammer v. Pressed Steel Car Co.* 204 Pa. 594, 54 Atl. 355, holding that where danger is not plainly evident, employee is not guilty of contributory negligence as a matter of law, from continuing his work as usual.

Liability of master for negligence of coemployee.

Cited in *Walton v. Bryn Mawr Hotel Co.* 160 Pa. 3, 28 Atl. 438, holding that one erecting a structure is not liable for injury to workman thereon if he has exercised reasonable care in employing competent persons to do the work; *Anderson v. Hays Mfg. Co.* 207 Pa. 106, 63 L.R.A. 540, 56 Atl. 345, holding that test as to liability for work done by employees is whether or not the master exercised reasonable care in employing them; *Snodgrass v. Carnegie Steel Co.* 173 Pa. 228, 33 Atl. 1104, 37 W. N. C. 544, 27 Pittsb. L. J. N. S. 37, holding that burden of showing want of care in the selection of employees is upon him who alleges it; *McGuire v. Lehigh Calley R. Co.* 215 Pa. 618, 64 Atl. 825, on same point; *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. 431, 37 A. R. 699, on admissibility of evidence that driver was incompetent to attend to his duties at time of an accident.

Cited in note in 54 L.R.A. 165, on master's liability where his own negligence intervenes as a proximate cause between a delinquent coservant's negligence and the injury.

Distinguished in *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 351, 39 A. R. 787, on difference in care required as to passengers on railroad from that as to employees.

Liability for negligence of independent contractor.

Cited in *Galatia Coal Co. v. Harris*, 116 Ill. App. 70, holding employer not liable for injury resulting from negligence of independent contractor.

Cited in notes in 76 A. S. R. 386, 387, 389, on nonliability for negligence and other torts of independent contractors; 76 A. S. R. 422, on liability for negligence of independent contractors in cases concerning bridges.

Who is independent contractor.

Cited in *Hanna v. Gresh*, 16 Montg. Co. L. Rep. 182, holding that fact that plumbers were paid ordinary wages for work done instead of stipulated sum for whole job did not take away character of independent contractor.

Negligence when question for jury.

Cited in *Philadelphia & R. R. Co. v. Schertle*, 97 Pa. 450, holding that where there is no evidence of negligence, the question should not be submitted to the jury.

Burden of proof of negligence.

Cited in *Mensch v. Pennsylvania R. Co.* 150 Pa. 598, 17 L.R.A. 450, 25 Atl. 31, holding that employee suing for damages for personal injury must prove the fact of negligence which establishes liability.

Assignability of duty of inspection.

Cited in note in 41 L.R.A. 111, on assignability of master's duty of inspection.

36 AM. REP. 668, POTTER v. WARNER, 91 PA. 362.

Duty and liability of physician for maltreatment of patient.

Cited in *Force v. Gregory*, 63 Conn. 167, 38 A. S. R. 371, 22 L.R.A. 343, 27 Atl. 1116, holding that physicians are bound to exercise reasonable and ordinary care, skill and diligence in the treatment of their patients; *McKee v. Allen*, 94 Ill. App. 147; *Wohlert v. Seibert*, 23 Pa. Super. Ct. 213,—holding that implied contract of physician with his patient is not to cure, but to treat his case with reasonable skill and diligence; *Carpenter v. McDavitt*, 53 Mo. App. 393, on liability of physician as to treatment of his patient; *Giberson v. Kinard*, 25 Lanc. L. Rev. 380, holding that no presumption of negligence of physician arises because he fails to effect cure.

Cited in notes in 48 A. D. 481, 482, 484, on civil liability of physicians and surgeons for negligence; 93 A. S. R. 665, on liability of physicians and surgeons for mismanagement by those in charge of patient; 2 L.R.A. 588, on care and skill required of physicians and surgeons in treatment of patient; 37 L.R.A. 833, on liability of physician or surgeon for acts of others.

—Results contributed to by patient's disregard of instructions.

Cited in *Young v. Mason*, 8 Ind. App. 264, 35 N. E. 521, holding that no recovery can be had for injury resulting from negligence of physician, where the conduct of the patient in disregarding instructions contributed to the injury: *Jones v. Angell*, 95 Ind. 376, on same point.

Cited in reference note in 8 A. S. R. 796, on effect of contribution by patient to injury on recovery of damages for malpractice.

Cited in notes in 17 L.R.A. (N.S.) 1246, on patient's own negligence or failure to follow instructions as affecting liability of physician or surgeon for malpractice; 49 L.R.A. 828, on effect of disobeying orders of physician on remedy of injured person against one who injured him.

Distinguished in *Brown v. Marshall*, 47 Mich. 576, 41 A. R. 723, 11 N. W. 392, holding that druggist negligently selling one medicine for another is liable for injuries resulting therefrom, though negligent treatment following its taking may have contributed to the injury.

Comparative negligence.

Cited in reference note in 64 A. D. 675, on comparing contributory negligence and negligence.

Cited in note in 55 A. D. 671, on rule as to comparative negligence.

36 AM. REP. 671, FOLL'S APPEAL, 91 PA. 434.

Specific performance of contracts relating to stocks or personality.

Cited in *Eckstein v. Downing*, 64 N. H. 248, 10 A. S. R. 404, 9 Atl. 626, denying specific performance of contract for exchange of shares of stock for other property; *Spotts v. Eisen Hauer*, 31 Pa. Super. Ct. 89, holding that equity will not decree specific performance of contract for purchase of a chose in action where performance would result in injustice; *Rigg v. Reading & S. W. Street R. Co.* 191 Pa. 298, 43 Atl. 212, holding that equity will not decree specific performance of contract for sale of stock in the absence of circumstances making remedy at law inadequate; *Paxton Fire Co. v. McCormick*, 27 Pa. Co. Ct. 553; *Philadelphia & R. R. Co. v. Stichter*, 11 W. N. C. 325,—on general rule that equity will not decree specific performance of contract relating to chattels; *Cunningham's Appeal*, 108 Pa. 546, 16 W. N. C. 430, 42 Phila. Leg. Int. 103; *DeLaCuesta v. Insurance Co. of N. A.* 136 Pa. 62, 9 L.R.A. 631, 20 Atl. 508, 26 W. N. C. 377, 47 Phila. Leg. Int. 466, on contract for sale of specific shares of stock not being enforceable by specific performance; *Edelman v. Latahaw*, 159 Pa. 644, 28 Atl. 475, on exceptions to rule denying specific performance of contracts relating to sale of chattels; *Smith v. Smith*, 38 Pa. Super. Ct. 251, to point that equity will not enforce contract to deliver stock where adequate remedy at law exists.

Cited in reference notes in 2 A. S. R. 703, on specific performance of contract to sell shares of national bank; 10 A. S. R. 409, on specific performance of contract to sell bank stock; 74 A. S. R. 690, on specific performance of contract to convey corporate stock.

Cited in notes in 50 L.R.A. 502, on jurisdiction over specific performance of contract for sale of stock in corporation; 6 E. R. C. 646, on specific performance of contracts concerning chattels.

Distinguished in *Lafferty's Estate*, 2 Pa. Dist. R. 217, on decree of specific performance to enforce execution of power granted to trustee to vote stock; *Northern C. R. Co. v. Walworth*, 193 Pa. 207, 44 Atl. 253, holding that specific performance is proper remedy upon contract for purchase of stock of a railroad company by another railroad, the two not being parallel and competing lines.

— Agreements looking to control of corporate property.

Cited in *Cage v. Fisher*, 5 N. D. 297, 31 L.R.A. 557, 65 N. W. 809, holding that equity will not decree specific performance of contract for voting stock of another purpose of obtaining control of the corporation.

Cited in note in 50 L.R.A. 506, on jurisdiction over specific performance of contract for sale of corporate stock to enable purchaser to secure control of corporation.

Distinguished in *Morris v. Tuskaloosa Mfg. Co.* 83 Ala. 565, 3 So. 689; *Ryan v. McLane*, 91 Md. 175, 80 A. S. R. 438, 50 L.R.A. 501, 46 Atl. 340; *Morgan v. Hartley Oil & Gas Co.* 30 Pa. Co. Ct. 22, 35 Pittsb. L. J. N. S. 53; *Carter v. Producer's Oil Co.* 182 Pa. 551, 39 L.R.A. 100, 38 Atl. 571,—on specific performance of contract for sale of stock where purchaser intends thereby to obtain control of corporation.

Contracts against public policy.

Cited in *People v. North River Sugar Ref. Co.* 54 Hun, 355, 5 L.R.A. 386, 27 N. Y. S. R. 386, 7 N. Y. Supp. 406, on invalidity of contract to do a thing clearly injurious to the public; *State ex rel. Wilderman v. Kidd*, 63 Wis. 337, 23 N. W. 703, on invalidity of agreement based upon consideration of performance of statutory duty.

Cited in note in 8 L.R.A. 497, on validity of contracts against public policy.

— For control of corporations.

Cited in *Moses v. Scott*, 84 Ala. 608, 4 So. 742, holding that agreement as to control of stock which acts as a restraint on right of alienation is against public policy and void; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847, holding agreement to vote shares in a certain way for five years invalid as against public policy where purpose was to keep a certain man in charge as manager; *Tomlin v. Farmers' & M. Bank*, 52 Mo. App. 430, on validity under public policy of agreement between certain stockholders to vote only for certain parties and to sell no stock except as to such as would do likewise.

Cited in note in 56 A. S. R. 140, on agreements to control future voting of stock at corporate election.

Adequate remedy at law.

Cited in *Kaul v. Henke*, 2 Pa. Dist. R. 236, holding that equity will not enforce restitution of promissory note fraudulently obtained, the remedy at law being adequate; *Philadelphia & R. R. Co.'s Appeal*, 12 Pittsb. L. J. N. S. 379, 39 Phila. Leg. Int. 98, holding that equity will not specifically enforce contract relating to personalty, if remedy at law exists.

National bank as quasi public institution.

Cited in *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L.R.A.(N.S.) 1199, 67 S. E. 770, to point that national bank is quasi public institution.

36 AM. REP. 675, DUFF v. ALLEGHENY R. CO. 91 PA. 458.**Liability for injury to trespassers and licensees on railroad trains.**

Cited in *Richmond & D. R. Co. v. Burnsed*, 70 Miss. 437, 35 A. S. R. 656, 12 So. 958, holding railroad not liable for injury to trespasser on its cars, where not inflicted wantonly or wilfully; *Springer v. Byram*, 137 Ind. 15, 45 A. S. R. 159, 23 L.R.A. 244, 36 N. E. 361, on right of trespasser or licensee to recover for injury sustained through negligence of railroad.

Cited in notes in 52 A. R. 436, on right to recover for injuries received while riding free because of fraud on carrier; 59 A. R. 604, on railroad's liability for injuries to child while stealing ride on train; 13 L.R.A. 248, on railroad's duty to avoid injury to trespassers on its premises; 12 L.R.A. 338, on liability of carrier for removing trespasser from train; 27 L.R.A. 171, on master's liability for negligent ejection from train by servant acting within scope of employment.

Distinguished in *Kelly v. Hestonville, M. & F. Pass. R. Co.* 39 Phila. Leg. Int. 168, holding that it is negligence of railroad to permit child of tender years to ride upon platform of car.

— To persons riding by permission or invitation of trainman.

Cited in *Hot Springs R. Co. v. Dial*, 58 Ark. 318, 24 S. W. 500, holding railroad not liable for injury sustained by one called by conductor to assist in setting brakes on train, the conductor having no authority to employ him. *Reary v. Louisville, N. O. & T. R. Co.* 40 La. Ann. 32, 8 A. S. R. 497. 3 C

390, holding the same though trespasser was riding in baggage car by permission of baggageman; *Rathbone v. Oregon R. Co.* 40 Or. 225, 66 Pac. 909, denying right, of one riding on hand car contrary to rules of company but upon invitation of foreman, to recover for injury sustained; *Darwin v. Charlotte, C. & A. R. Co.* 23 S. C. 531, 55 A. R. 32, holding railroad not liable for injury to trespasser riding on pilot of engine, though permitted by engineer to remain there; *Virginia Midland R. Co. v. Roach*, 83 Va. 375, 5 S. E. 175, holding railroad not liable for injury to one riding upon its engine, though permitted to do so by engineer or conductor; *Fischer v. Columbia & P. S. R. Co.* 52 Wash. 462, 100 Pac. 1005, holding railroad not liable for injury to one riding on engine of freight train at invitation of engineer; *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875, on liability of railroad for injury to one permitted to ride on its work train.

Cited in reference not. in 118 A. S. R. 805, on liability of railroad company for death of boy permitted by conductor, against rules, to ride gratuitously.

Cited in note in 8 L.R.A.(N.S.) 1241, on carrier's duty to one whom it permits to enter its cars upon his own business and not as a passenger.

Distinguished in *Albion Lumber Co. v. DeNobra*, 19 C. C. A. 168, 44 U. S. App. 347, 72 Fed. 739, holding logging road liable for injury to one carried as passenger by permission of superintendent.

Children as trespassers.

Cited in *Feehan v. Dobson*, 44 W. N. C. 65, 10 Pa. Super. Ct. 6; *Gillespie v. McGowan*, 100 Pa. 144, 45 A. R. 365, 39 Phila. Leg. Int. 313; *Rodgers v. Lees*, 140 Pa. 475, 23 A. S. R. 250, 12 L.R.A. 216, 21 Atl. 399, 27 W. N. C. 441, 48 Phila. Leg. Int. 329, 22 Pittsb. L. J. N. S. 34,—holding that child of tender years may be a trespasser so as to preclude recovery for injury sustained by him; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013, holding railroad not liable for injury to child trespassing on its track; *McMullen v. Pennsylvania R. Co.* 132 Pa. 107, 19 A. S. R. 591, 19 Atl. 27, 25 W. N. C. 308, 47 Phila. Leg. Int. 269, holding that child 10 years old cannot recover for injury sustained while trespassing on railroad track; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 A. R. 664, holding injury while trespassing on flat cars not actionable.

— Riding on cars.

Cited in *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 38 A. S. R. 254, 21 S. W. 1062, denying right of recovery for injury to child stealing ride on train; *Lott v. New Orleans City & Lake R. Co.* 37 La. Ann. 337, 55 A. R. 500, holding railroad not liable for injury to boy sustained while jumping off car upon which he had been permitted to ride by the driver; *Feingold v. Philadelphia Traction Co.* 21 Pa. Co. Ct. 183, 7 Pa. Dist. R. 445, 4 Lack. Leg. News, 292, holding street railway not liable for injury sustained by child trespassing on car, who is told by driver to get off and does so before car stops and is thereby injured.

Distinguished in *Biddle v. Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485, 17 W. N. C. 436, 43 Phila. Leg. Int. 306, holding street car company liable for injury to child caused by his being ejected from car, on which he was trespassing, while it was in motion.

— Newsboy on train.

Cited in *Raming v. Metropolitan Street R. Co.* 157 Mo. 477, 57 S. W. 268, holding that newsboy jumping on street car for purpose of selling papers, without permission and without payment of fare is not a passenger thereon.

Who is passenger.

Cited in notes in 82 A. D. 293; 61 A. S. R. 161,—on who are passengers; 61 A. S. R. 92, on who are passengers on freight trains; 104 A. S. R. 589, as to whether persons entering or being upon a street car without intending to become passengers are such.

36 AM. REP. 676, ARMENIA INS. CO. v. PAUL, 91 PA. 520.

Effect of omissions in application upon validity of insurance policy.

Cited in *Farmers' Mut. F. & Lighting Ins. Co. v. Lecroy*, 91 Ill. App. 41, holding that incomplete answer to material question in application for insurance will not avoid policy issued thereunder; *Hey v. Guarantors' Liability Indemnity Co.* 181 Pa. 220, 59 A. S. R. 664, 37 Atl. 402, 40 W. N. C. 423, 28 Pittsb. L. J. N. S. 1, holding that in suit on policy of insurance on property destroyed by flood in river, it is no defense that applicant did not specify in application that property was located near the river.

Cited in reference notes in 39 A. R. 584, on effect of unanswered inquiry as warranty; 8 A. S. R. 902, on effect of entire omission to answer question in written application for insurance; 56 A. S. R. 423, on effect of partial answers in application for insurance.

Cited in note in 16 L.R.A.(N.S.) 1244, on estoppel to avoid policy because of fraud or mistake of agent preparing application where no answers were given by applicant.

36 AM. REP. 678, REYNOLDS v. WITTE, 13 S. C. 5.

Liability of principal for acts of his agent.

Cited in *Whaley v. Duncan*, 47 S. C. 139, 25 S. E. 54, holding that principal is bound by acts of his agent in performing work intrusted to him, unless party dealing with him has notice of special instructions; *Hutchison v. Rock Hill Real Estate & Loan Co.* 65 S. C. 45, 43 S. E. 295, holding directors of corporation bound by act of secretary and treasurer within scope of his employment, though unauthorized by them; *Mitchell v. Leech*, 69 S. C. 413, 104 A. S. R. 811, 66 L.R.A. 723, 48 S. E. 290, holding Sovereign Camp of Woodmen of America liable for injury caused by use of mechanical goat in initiation by local camp though its use was unauthorized; *Williams v. Tolbert*, 76 S. C. 211, 56 S. E. 908; *Rucker v. Smoke*, 37 S. C. 377, 34 A. S. R. 758, 16 S. E. 40,—holding principal liable for act of his agent in seizure of personal property though act complained of was neither authorized nor ratified; *Lewis v. Mammoth Min. Co.* 33 Utah, 273, 15 L.R.A.(N.S.) 439, 93 Pac. 732, holding master liable for acts of his servant done in the furtherance of his master's business though done in violation of instructions; *Cobb v. Columbia & G. R. Co.* 37 S. C. 194, 15 S. E. 878; *Burns v. Southern R. Co.* 63 S. C. 46, 40 S. E. 1018 (dissenting opinion), on same point; *Fitzgerald v. Fitzgerald & M. Constr. Co.* 44 Neb. 463, 62 N. W. 899, holding corporation not liable for acts of its officers where not within the scope of their authority as officers.

Cited in note in 88 A. S. R. 795, on liability of principal in tort for fraud of agent.

—**Fraud, misrepresentation, or deceit by agent.**

Cited in *Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto*, 54 L.R.A. 711, 48 C. C. A. 413, 109 Fed. 369 (affirming 103 Fed. 841), holding telegraph company liable for loss to bank by payment of message forged by telegraph operator;

Wolfe v. Paugh, 101 Ind. 293, holding principal liable for fraudulent representations of his agent in making deal for exchange of lands; **Hollingsworth v. Holbrook**, 80 Iowa, 151, 20 A. S. R. 411, 45 N. W. 561, holding that alteration of chattel mortgage by agent with authority to take security for the debt, avoids the mortgage in the hands of the principal; **John Gund Brewing Co. v. Peterson**, 130 Iowa, 301, 106 N. W. 741, holding principal bound by representations of his agent made within apparent scope of his authority; **Brown v. American Teleph. & Teleg. Co.** 82 S. C. 173, 63 S. E. 744, holding principal liable for fraudulent act of agent done in course of employment, though it is contrary to instructions; **Matteson v. Rice**, 116 Wis. 328, 92 N. W. 1109, holding landlord bound by representations of his agent, with authority to exhibit premises and execute lease therefor, in regard to condition of premises in a matter not open to inspection; **McIntire v. Pryor**, 173 U. S. 38, 43 L. ed. 606, 19 Sup. Ct. Rep. 352; **Trankla v. McLean**, 18 Misc. 221, 41 N. Y. Supp. 385,—on liability of principal for fraud and deceit of his agent.

Cited in notes in 32 A. S. R. 724, on liabilities of holders of collateral security for nonappropriation by agent; 12 E. R. C. 307, on imputing servant's or agent's fraud to master or principal.

Distinguished in **Myers v. Whiteheart**, 24 S. C. 196, holding property of principal not liable to statutory attachment for acts done by his agent without his knowledge or authority.

Disapproved in **Kingan v. Silvers**, 13 Ind. App. 80, 37 N. E. 413, holding that alteration of note by agent of principal does not invalidate it, where agent had no authority to take notes or make settlements.

Liability of one signing incomplete instrument and placing it in hand of another.

Cited in **Charleston v. Ryan**, 22 S. C. 339, 53 A. R. 713, holding that mortgagee signing and sealing his name in blank on back of mortgage is bound by a satisfaction of mortgage written over it, as against subsequent innocent purchaser; **J. C. Stevenson Co. v. Bethea**, 79 S. C. 478, 61 S. E. 99, holding maker of note who place it in hands of agent for a certain purpose, bound by the note though his agent negotiated it for another purpose; **Bank of Spartanburg v. Bahun**, 75 S. C. 255, 55 S. E. 529, on liability of indorser who delivers note to maker with name of payee blank.

Measure of damages for conversion.

Cited in **Gregg v. Bank of Columbia**, 72 S. C. 458, 110 A. S. R. 633, 52 S. E. 195, on measure of damages for conversion.

36 AM. REP. 687, McGRATH v. BARNES, 13 S. C. 328, Later appeal in 18 S. C. 606.

Admissibility of parol evidence as to written instrument.

Cited in **Kaphan v. Ryan**, 16 S. C. 352, holding that where written instrument constitutes only part of an agreement parol evidence is admissible to show whole agreement; **Moffatt v. Hardin**, 22 S. C. 9, holding parol evidence admissible to show what use was to be made of a mortgage and the conditions upon which it was executed; **Willis v. Hammond**, 41 S. C. 153, 19 S. E. 310, holding that where written contract is incomplete in itself, parol evidence is admissible to explain and supply the missing parts.

—As to matter collateral to note or bill.

Cited in **Bulwinkle v. Cramer**, 27 S. C. 376, 13 A. S. R. 645, 3 S. E. 776, *Am. Rep. Vol. XVII.—75.*

holding that in suit on note taken by payee in his own name for goods sold by him, parol testimony is inadmissible to show that he acted as agent for another and was not liable to indorser of the notes; *Groesbeck v. Marshall*, 44 S. C. 538, 22 S. E. 743, holding parol testimony admissible to show illegality of consideration for a note; *Cline v. Farmers' Oil Mill*, 83 S. C. 204, 65 S. E. 272, holding parol evidence inadmissible to show that note for \$150 in payment of purchase price of mule, was only to be paid in case maker could collect \$50 from another man.

Cited in notes in 3 L.R.A. 808, on admissibility of parol evidence to show condition affecting commercial paper; 43 L.R.A. 454, on contemporaneous parol agreement that payment is to be conditional as defense to note; 4 E. R. C. 207, on admissibility of parol evidence to vary bill of exchange.

Distinguished in *Doyle v. Hill*, 75 S. C. 261, 55 S. E. 446, holding parol evidence inadmissible to show want of consideration for note given for premium on insurance policy which would be valid though the testimony offered were true and admitted.

Effect of contract by administrator.

Cited in *Carpenter v. Lindauer*, 12 N. M. 388, 78 Pac. 57, holding that contract of administrator binds him personally to the extent of the assets of the estate in his lands.

Cited in reference note in 38 A. R. 661, on administrator's liability on personal note for money borrowed for estate.

Cited in note in 15 L.R.A. 851, on effect of qualifying words "as executor" or "as administrator" in contracts.

36 AM. REP. 694, CAROLINA NAT. BANK v. WALLACE, 13 S. C. 347.

Sufficiency of demand and notice.

Cited in reference note in 1 A. S. R. 602, on sufficiency of notice of protest by mail.

Cited in notes in 38 A. D. 614, on usage of banks and notaries to give notice of dishonor through postoffice; 21 L.R.A. 441, on banking custom as to demand and notice; 21 L.R.A. 45, on necessity of knowledge of banking customs.

36 AM. REP. 700, OURETON v. MILDS, 13 S. C. 409.

Administration of estate in foreign jurisdiction.

Cited in *Langsdale v. Woollen*, 120 Ind. 78, 21 N. E. 541, holding that where assets of an estate are found within the jurisdiction the court may appoint an administrator thereof.

Cited in notes in 35 A. D. 484, on ancillary administration; 9 L.R.A. 946, on capacity of foreign executors or administrators; 27 L.R.A. 116, on judgments of another state or country rendered against executor or administrator.

—Disposition of ancillary assets.

Cited in *Graveley v. Graveley*, 25 S. C. 1, 60 A. R. 478, holding that ancillary administrator in foreign state may pay a legacy to resident there out of assets of estate remaining after all local debts are paid; *Hamilton v. Levy*, 41 S. C. 374, 19 S. E. 610, holding that after debts of intestate are paid, the law of his domicile governs the distribution of his personal estate; *Jones v. Jones*, 39 S. C. 247, 17 S. E. 587, on same point.

— **Collection of ancillary assets by domiciliary representative.**

Distinguished in *Stevenson v. Dunlap*, 33 S. C. 350, 11 S. E. 1017, holding that administrator of an estate in one state can not maintain action for personal property in a foreign state.

36 AM. REP. 716, ALLEN v. ALLEN, 13 S. C. 512.

Ademption of legacies by advancement.

Cited in *Swails v. Swails*, 98 Ind. 511; *Re Youngerman*, 136 Iowa, 488, 114 N. W. 7,—holding that presumption as to ademption of legacy by subsequent payment to legatee has no application where testator does not stand in loco parentis to legatee; *Carmichael v. Lathrop*, 108 Mich. 473, 32 L.R.A. 232, 66 N. W. 350, holding residuary bequest to child adeemed pro tanto by conveyance of real estate where such intent clearly appears; *McFall v. Sullivan*, 17 S. C. 504, holding that doctrine of advancements applies only to cases of intestacy, or when directed by will; *Pratt v. McGhee*, 17 S. C. 428, on ademption of devise by gift of personalty.

Cited in notes in 95 A. S. R. 343, on meaning of ademption; 95 A. S. R. 353, on ademption by advancement of devise of real estate; 95 A. S. R. 350, on requisites for ademption by advancement to children; 1 L.R.A. 203, on ademption by advancement to or provision for legatee; 2 E. R. C. 54, on presumption of ademption raised by subsequent gift; 2 E. R. C. 272, on competency of parol evidence to show ademption of legacy.

— **Effect of release of expectancy.**

Cited in *Low v. Low*, 77 Me. 37, holding that where son received an amount in cash and duly executed a release and discharge of all claims under the will, he is estopped to set up any further claim.

Revocation or ademption of devise.

Cited with special approval in *Gregg v. McMillan*, 54 S. C. 378, 32 S. E. 447, as admirably discussing question of revocation of devise by change in the property itself or in the relation of testator to the property.

Cited in *Fisher v. Keithley*, 142 Mo. 244, 64 A. S. R. 560, 43 S. W. 650; *Burnham v. Comfort*, 108 N. Y. 535, 2 A. S. R. 562, 15 N. E. 710 (affirming 37 Hun, 216); *Godbold v. Vance*, 14 S. C. 458,—holding that doctrine of ademption does not apply to devises; *Re Brown*, 139 Iowa, 219, 117 N. W. 260, to point that doctrine of ademption applies to residuary legatees.

When heirs take per capita.

Cited in *Auger v. Tatham*, 191 Ill. 296, 61 N. E. 77, holding that under devise of specific sum to each of the heirs of a certain person such heirs take per capita.

Words of equality implying per capita gift.

Cited in *Ramsey v. Stephenson*, 34 Or. 408, 56 Pac. 520, holding that under direction to convert residuary estate into cash to be "divided equally among the heirs at law" such heirs take per capita; *Kerngood v. Davis*, 21 S. C. 183; *Dukes v. Falk*, 37 S. C. 255, 34 A. S. R. 745, 16 S. E. 122,—holding that under devise to "heirs of the body share and share alike" lineal descendants only take and they take per capita as purchasers; *Brantle v. Bittle*, 72 S. C. 179, 51 S. E. 561, holding that heirs take per capita under devise using words "equally divided" and share and share alike."

Who stand "In loco parentis."

Cited in note in 2 E. R. C. 38, on relationship placing parties in loco parentis.

36 AM. REP. 725, HALL v. HALL, 52 TEX. 294.**Powers and rights of wife as to her separate property.**

Cited in *Martin Brown Co. v. Perrill*, 77 Tex. 199, 13 S. W. 795; *Swearingen v. Reed*, 2 Tex. Civ. App. 364, 21 S. W. 383; *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Tex. Civ. App. 380, 23 S. W. 520,—on interest paid to wife on her money borrowed by her husband, being her separate property; *Hall v. Levy*, 31 Tex. Civ. App. 360, 72 S. W. 263, on wife's right as owner of money turned over to her by her husband being proceeds of an insurance policy in her favor.

Distinguished in *Braden v. Gose*, 57 Tex. 37, holding that interest received by wife upon loan of her money is not her separate property unless made so by contract.

Contracts or transfers between husband and wife.

Cited in *Adoue v. Spencer*, 6 N. J. Eq. 782, 90 A. S. R. 484, 56 L.R.A. 817, 49 Atl. 10, on validity of conveyance, by husband to wife, of community property; *Alexander v. Alexander*, 85 Va. 353, 1 L.R.A. 125, 7 S. E. 335, sustaining validity of confession of judgment by husband in favor of wife and her right to sue thereon.

Cited in notes in 76 A. D. 108, on husband's gift of community property to wife without intervention of trustees; 86 A. D. 642, on conveyances of community property from husband to wife; 69 L.R.A. 356, on effect of gifts of personalty by husband to wife; 69 L.R.A. 378, on homestead and community in property conveyed by husband to wife.

— Notes and bills.

Cited in *McCormick v. McNeel*, 53 Tex. 15, on validity of promissory note given by husband to wife after marriage.

Action against husband.

Cited in *Ryan v. Ryan*, 61 Tex. 473, holding that wife may maintain suit against her husband for the protection of her separate estate; *Dority v. Dority*, 96 Tex. 215, 60 L.R.A. 941, 71 S. W. 950; *Bennett v. Lindsey*, 37 W. Va. 396, 38 A. S. R. 47, 16 S. E. 638, on power of wife to contract with, and to sue her husband under statute.

What is community property.

Cited in note in 86 A. D. 628, as to what is community property.

36 AM. REP. 727, KESSLER v. DRAUB, 52 TEX. 575.**Termination of homestead generally.**

Cited in reference notes in 36 A. S. R. 578, on termination of homestead; 74 A. S. R. 103, as to when homestead is not lost.

Cited in note in 60 A. D. 609, on temporary absence from homestead as abandonment.

Dissolution of family as affecting homestead.

Cited in *Griffin v. Nichols*, 51 Mich. 575, 17 N. W. 63, holding that abandonment by wife and beginning of divorce proceedings by her does not of itself destroy the husband's homestead rights; *Zapp v. Strohmeier*, 75 Tex. 638, 13 S. W. 9, holding divorced husband entitled to his homestead where decree did not provide for disposition of the minor children; *Stone v. McClellan*, 36 Tex. Civ. App. 344, 81 S. W. 751, holding husband entitled to homestead rights where he had been divorced from wife who with minor children remained on the homestead and

upon her death, he resumed custody of the children and took up residence with them.

Distinguished in *Fullerton v. Sherrill*, 114 Iowa, 511, 87 N. W. 419, holding that widow purchasing home and residing there with her daughters cannot hold it exempt as homestead after daughters move away.

Right of surviving husband or wife to homestead when left alone.

Cited in *Stanley v. Snyder*, 43 Ark. 429; *Schneider v. Bray*, 59 Tex. 668,—holding that surviving husband or wife is entitled to homestead as long as he or she chooses to occupy it, though residing alone; *Rollings v. Evans*, 23 S. C. 316, on same point; *Stults v. Sale*, 92 Ky. 5, 36 A. S. R. 575, 13 L.R.A. 743, 17 S. W. 148; *Blum v. Gaines*, 57 Tex. 119; *Reed v. Tally*, 13 Tex. Civ. App. 286, 35 S. W. 805,—holding husband entitled to homestead though he is the only surviving member of the family so long as he continues occupying it; *Bahn v. Starcke*, 89 Tex. 203, 59 A. S. R. 40, 34 S. W. 103, on same point; *Watkins v. Davis*, 61 Tex. 414, holding the same as to surviving wife; *Evans v. Pace*, 21 Tex. Civ. App. 368, 51 S. W. 1094, holding that business homestead continues exempt to widow as long as she continues the business though she be the sole survivor of the family; *Childers v. Henderson*, 76 Tex. 664, 13 S. W. 481, on right of sole survivor of family to homestead.

Cited in reference notes in 87 A. S. R. 305, on loss of homestead right by death, marriage, or removal of some of members of family; 87 A. S. R. 711, on effect on homestead of death or removal of some members of family.

Cited in notes in 13 L.R.A. 743, as to how far homestead is defeated by loss of family; 4 L.R.A. (N.S.) 390, on rights acquired by widower under homestead and exemption laws; 16 L.R.A. (N.S.) 113, on continuance of homestead after death of spouse and arrival at majority or removal from home of all the children.

36 AM. REP. 730, WILLIAMS v. BALL, 52 TEX. 603.

Collateral attack on judgments of justice of the peace.

Cited in *Burns v. Baker*, 31 Tex. Civ. App. 82, 71 S. W. 328, holding that justice court is court of general jurisdiction under the constitution and its judgments are not subject to collateral attack any further than those of other courts; *Collins v. Hines*, 100 Tex. 304, 99 S. W. 400, on variations from statute in justice court proceedings rendering executions irregular only and not void; *H. & T. C. R. Co. v. McGlasson*, 1 Tex. App. Civ. Cas. (Willson) 631, holding that complaint in forcible entry and detainer must show that premises are within jurisdiction of justice's precinct.

Cited in reference notes in 32 A. S. R. 256; 59 A. S. R. 117,—on collateral attack on judgments of justices of the peace.

— Presumption as to validity of judgments.

Cited in *Koehler v. Earl*, 77 Tex. 188, 14 S. W. 28; *Stephens v. Turner*, 9 Tex. Civ. App. 623, 29 S. W. 937,—holding that as against collateral attack, it will be presumed that justice court had jurisdiction to render the judgment; *Smith v. Ridley*, 30 Tex. Civ. App. 158, 70 S. W. 235, holding justice court judgment regular on its face, presumed to be valid as against collateral attack; *Heck v. Martin*, 75 Tex. 469, 16 A. S. R. 915, 13 S. W. 51, on presumptions as to validity of judgment of justice court; *Davis v. Bargas*, 12 Tex. Civ. App. 59, 33 S. W. 548, on liberality and indulgence extended to judgments of courts of justices of the peace.

Cited in reference note in 16 A. S. R. 919, on presumption in favor of jurisdiction of justices' courts.

Distinguished in *Wilkerson v. Schoonmaker*, 77 Tex. 615, 19 A. S. R. 803, 14 S. W. 223, holding evidence aliunde the record admissible to show want of notice of justice court proceeding, the record being silent in collateral attack upon judgment.

Sufficiency of record of judgment before justice of the peace.

Cited in *Long v. Brenneman*, 59 Tex. 210; *Hance v. Galveston Wharf Co.* 70 Tex. 115, 8 S. W. 76,—holding that fact that transcript of record in justice court does not set forth all facts necessary to jurisdiction, does not invalidate the judgment; *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. 452, holding judgment of justice court not subject to collateral attack because not showing on its face that service had been had upon defendants; *Yarbrough v. Chamberlin*, 1 Tex. App. Civ. Cas. (Willson) 632, holding suit in justice court properly dismissed where complaint failed to show that premises in issue were within jurisdiction of the court.

Validity of judgments as against collateral attack.

Cited in *Loyd v. Waller*, 20 C. C. A. 548, 41 U. S. App. 381, 74 Fed. 601, holding that judgment of court having jurisdiction is presumed to be valid as against collateral attack; *Clayton v. Hurt*, 86 Tex. 595, 32 S. W. 876, holding that judgment of court having jurisdiction over the persons and subject matter is not void however erroneous it may be; *Heath v. Layne*, 62 Tex. 686, holding that county court has general jurisdiction in matters relating to administration of estates; *McNally v. Haynes*, 59 Tex. 583, on same point; *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325; *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514.—holding that judgment of county court regular on its face is not subject to collateral attack; *Whitney v. Krapf*, 8 Tex. Civ. App. 304, 27 S. W. 843, holding that mere irregularities will not justify the setting aside of judgment where no effort was made to prevent its being rendered by default; *Murchison v. White*, 54 Tex. 78, on collateral attack on judgment being permissible only where record shows affirmatively want of jurisdiction; *Dunn v. Taylor*, 42 Tex. Civ. App. 241, 94 S. W. 347, on judgment valid on its face being voidable only, not void, though there may be evidence not in the record which would show it to be invalid.

Distinguished in *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820, on collateral attack on sales upon execution.

What amounts to material variance.

Cited in *Halfin v. Winkleman*, 83 Tex. 165, 18 S. W. 438, holding that variance in date of note and page of record of vendor's lien from that alleged in complaint is immaterial where only one note was executed.

Distinguished in *Battle v. Guedry*, 58 Tex. 112, holding that sale under judgment against J. P. C. execution being issued against P. B. C. does not pass any title to property owned by J. P. C.

36 AM. REP. 734, FIRST NAT. BANK v. MT. TABOR, 52 VT. 87.

Power of official body to act by majority.

Cited in *Carolina Sav. Bank v. Evans*, 28 S. C. 521, 6 S. E. 321, holding a return signed by two of the three appraisers appointed to lay off a homestead is valid; *Cowan v. Murch*, 97 Tenn. 590, 34 L.R.A. 538, 37 S. W. 393, holding the decision and findings made by two of the three judges of court of chancery

appeals, legal and valid; *Carroll v. Alsup*, 107 Tenn. 257, 64 S. W. 193, holding acts of state board of equalization composed of three members, a majority of whom is a quorum, valid where two members are present and concur; *Wells v. Austin*, 59 Vt. 157, 10 Atl. 405, holding a notice to land owners signed by two of the three tax commissioners was a valid act of the commission.

Action on coupons.

Cited in note in 64 A. D. 442, on action upon coupons.

Character of coupons.

Cited in note in 64 A. D. 430, on character of coupons.

36 AM. REP. 746, PUTNAM v. FISHER, 52 VT. 191.

Declarations as to boundaries.

Cited in *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536, on admissibility of declarations of deceased owner of land.

Cited in reference notes in 13 A. S. R. 728, as to what declarations are admissible to prove disputed boundaries; 39 A. S. R. 826, on testimony of surveyor as to boundary; 68 A. S. R. 648, on admissibility of declarations of deceased persons as to boundary.

Cited in note in 134 Am. St. R. 618, on declarations of former owners of land as evidence against their successor in title.

36 AM. REP. 751, GODEAU v. BLOOD, 52 VT. 251.

Knowledge of dangerous propensities of animal as predicate for liability.

Cited in *Reynolds v. Hussey*, 64 N. H. 64, 5 Atl. 458, holding in action for injuries received from being kicked by defendant's horse, evidence that defendant had knowledge of its propensity to kick may be received; *Cuney v. Campbell*, 76 Minn. 59, 78 N. W. 878, on evidence necessary to establish knowledge on part of owner of the vicious propensities of the animal; *O'Neill v. Blase*, 94 Mo. App. 648, 68 S. W. 764, on knowledge of animal's dangerous propensities as rendering him liable for injuries caused by it; *Johnston v. Mack Mfg. Co.* 65 W. Va. 544, 131 A. S. R. 979, 24 L.R.A. (N.S.) 1189, 64 S. E. 841, holding owner of bear not liable for injury inflicted by him unless it appears he was vicious to owner's knowledge, or unless he was trespassing at time of injury; *Staetter v. McArthur*, 33 Mo. App. 218, holding that unless dog is shown to be vicious or acted so as to indicate tendency to viciousness owner is not liable to person bitten by him.

Cited in reference note in 48 A. R. 253, on scienter in action for injury by animal.

Cited in notes in 50 A. R. 229, on imputability to master of servant's knowledge of vicious nature of animal; 24 L.R.A. (N.S.) 460, 461, on scienter necessary to owner's liability for injury by dog; 3 E. R. C. 119, on liability for keeping mischievous animal with knowledge of its propensities.

Duty and liability of keeper of ferocious animals.

Cited in *Robinson v. Marino*, 3 Wash. 434, 28 A. S. R. 50, 28 Pac. 752, on the duty cast upon the owner of ferocious domestic animals.

Cited in reference notes in 2 A. S. R. 458, on liability of owner for injuries inflicted by dog; 60 A. R. 652; 35 A. S. R. 879,—on liability for injury by vicious dog.

Cited in notes in 60 A. R. 605, 606; 16 A. S. R. 631,—on liability for injuries by vicious animals; 25 L. ed. U. S. 488, on liability of owner of animals for injuries to persons by them.

Mental suffering as an element of damages.

Cited in *Buck v. Brady*, 110 Md. 568, 132 A. S. R. 459, 73 Atl. 277, holding that in action for being bitten by dog, evidence that plaintiff feared hydrophobia, and suffered mental anguish is admissible; *Prescott v. Robinson*, 74 N. H. 460, 124 A. S. R. 987, 17 L.R.A. (N.S.) 594, 69 Atl. 522, on mental pain or suffering as an element of damages.

Cited in reference note in 40 A. S. R. 869, on right to damages for fright.

Cited in notes in 77 A. S. R. 860, on fright as an element of damages; 20 L.R.A. (N.S.) 458, 459, on apprehension of injury to health as basis of recovery for mental anguish.

Distinguished in *Trinity & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690, 46 S. W. 389, holding physician's statement as to danger to be feared from bite of dog was inadmissible, and proof should have been of fear suffered by plaintiff.

Legal status of dogs.

Cited in note in 9 E. R. C. 688, on legal status of dogs.

36 AM. REP. 754, STATE v. CHAMPEAU, 52 VT. 313.

Former jeopardy.

Cited in *State v. Whipple*, 57 Vt. 637, holding defendant not twice put in jeopardy where state's attorney files information based on same charges which grand jury had investigated but failed to find an indictment; *State v. Emery*, 59 Vt. 84, 7 Atl. 129, holding defendant in criminal action not put in jeopardy when during trial the panel was discharged because of the sickness of one of jurors; *People v. White*, 68 Mich. 648, 37 N. W. 34, on when party may be said to have been put in jeopardy.

Cited in reference note in 35 A. S. R. 231, on nolle prosequi as bar.

Cited in note in 21 L. ed. U. S. 873, on what constitutes former jeopardy.

Reindictment on quashal of indictment.

Cited in *State v. Disbrow*, 130 Iowa, 19, 106 N. W. 263, 8 A. & E. Ann. Cas. 190, holding on the setting aside of an indictment for irregularities after the discharge of the grand jury it is not error to empanel a new grand jury.

Right to have indictment quashed.

Cited in *State v. Brewster*, 70 Vt. 341, 42 L.R.A. 444, 40 Atl. 1037, holding an indictment would not be quashed because of the presence of a stenographer in the grand jury room; *State v. Collyer*, 17 Nev. 275, 30 N. W. 891; *State v. Ward*, 60 Vt. 142, 14 Atl. 187,—on irregularities in the selection of grand jurors as grounds for the quashing of indictment.

Cited in note in 35 L.R.A. 706, on limitation by will of court of power of public prosecutor to dismiss prosecution.

Drawing of grand jurors.

Cited in note in 27 L.R.A. 782, on machinery of drawing grand jurors.

36 AM. REP. 757, HADD v. UNITED STATES & C. EXP. CO. 52 VT. 235.

Contract for carriage of goods beyond end of line.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Bryant*, 36 Ind. App. 340, 75 N.

E. 829, holding mere receipt of goods for extra terminal point was not a through contract; *Berg v. Atchison, T. & S. F. R. Co.* 30 Kan. 561, 2 Pac. 639, on same point; *Ortt v. Minneapolis & St. L. R. Co.* 36 Minn. 396, 31 N. W. 519, holding the receiving of goods marked for a place beyond carrier's terminus does not import an agreement to carry to the destination named; *McConnell v. Norfolk & W. R. Co.* 86 Va. 248, 9 S. E. 1006, holding a contract by carrier to carry goods beyond end of its own line not established by proof that carrier received the goods with knowledge of their destination and named through rate therefor.

Cited in reference notes in 38 A. R. 617, on liability of one of several connecting carriers, accepting fare over entire line, without agreement as to risks, for baggage; 31 A. S. R. 59; 37 A. S. R. 776,—on liability of connecting carriers; 2 A. S. R. 62, on liability of carrier for loss or injury of goods beyond its own line; 4 A. S. R. 96, on liability to carrier who contracts to carry and deliver goods over connecting line.

Cited in notes in 72 A. D. 237, on liability of carrier under American rule for goods consigned to point beyond its line; 1 L.R.A. 703, on carrier's liability for loss or damage on connecting lines; 31 L.R.A. (N.S.) 8, 12, on liability of connecting carrier for loss beyond own line; 21 L. ed. U. S. 899, on liability of common carrier for goods to be transported beyond termination of his line.

Right of carrier to limit liability.

Cited in *Davis v. Central Vermont R. Co.* 66 Vt. 296, 44 A. S. R. 862, 29 Atl. 313, holding a stipulation in a bill of lading exempting the carrier from liability for loss by fire, which does not happen through the neglect of the carrier is reasonable.

Cited in note in 61 A. S. R. 371, on limitation of liability of express companies over connecting lines.

—Printed stipulations as limitation.

Cited in *Ranchau v. Rutland R. Co.* 71 Vt. 142, 76 A. S. R. 761, 43 Atl. 11, considering when purchaser of ticket bound by restrictions thereon.

36 AM. REP. 762, HAYWARD v. BARKER, 52 VT. 429.

Validity of contract of married woman.

Cited in *Rood v. Willey*, 58 Vt. 474, 5 Atl. 409, holding a promissory note given by a feme covert for a loan was void; *Re Perkins*, 65 Vt. 313, 26 Atl. 637, on the promises of a feme covert as being void.

Cited in reference notes in 47 A. R. 112, on right of wife to sue alone where her husband has left and made residence in another state; 33 A. S. R. 859, on married woman's contracts; 2 A. S. R. 320, on note of married woman; 1 A. S. R. 608, on invalidity of note by deserted wife for necessities used by her in her own support.

Cited in note in 49 A. R. 87, on validity of deeds and contracts of married woman living apart from her husband; 64 A. S. R. 863, 866, on effect of desertion of wife on her property rights and power to contract, etc.

Contract made during coverture as sufficient consideration for subsequent promise.

Cited in *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251, holding no action could be maintained against a woman on a promise made by her after divorce from husband to pay for goods furnished her during coverture; *Hubbard v. Bugbee*, 58 Vt. 172, 2 Atl. 594, holding same where after death of husband wife promised to pay note given by her during coverture.

Cited in notes in 39 A. S. R. 742, on moral obligation as consideration of promise by widow to pay debt contracted during coverture; 53 L.R.A. 366, on moral obligation as consideration for new promise after discovery; 7 L.R.A.(N.S.) 1054, on validity of new promise by woman after discovery to pay debt incurred in coverture.

Distinguished in *Hubbard v. Bugbee*, 55 Vt. 506, 45 A. R. 637, holding a promissory note given by a married woman for a loan of money used to improve her separate estate sufficient consideration for a promise after death of husband to pay the note.

36 AM. REP. 767, DAVIDSON v. ABBOTT, 52 VT. 570.

Right to sue for seduction.

Cited in notes in 76 A. S. R. 660, on foundation of civil action for seduction; 17 E. R. C. 362, on who can maintain action for seduction.

—**Right of parent.**

Cited in *Anthony v. Norton*, 60 Kan. 341, 62 A. S. R. 360, 44 L.R.A. 757. 56 Pac. 529; *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23,—on right of parent to maintain action for seduction of child.

36 AM. REP. 769, TILDEN v. JOHNSON, 52 VT. 628.

Measure of damages in trover.

Cited in reference notes in 6 A. S. R. 364; 10 A. S. R. 431; 64 A. S. R. 246,—on measure of damages in trover; 54 A. S. R. 164, on damages in trover for property taken by mistake.

—**For conversion of timber.**

Cited in *Ayres v. Hubbard*, 57 Mich. 322, 58 A. R. 361, 23 N. W. 829, holding measure of damages for trespass in cutting trees under mistaken idea of ownership is the value of the trees where cut; *Chappell v. Puget Sound Reduction Co* 27 Wash. 63, 91 A. S. R. 820, 67 Pac. 391, holding the measure of damages for the cutting of timber under the erroneous impression of ownership is the value of the timber standing; *Wright v. Skinner*, 34 Fla. 453, 16 So. 335; *Dwight v. Elmira, C. & N. R. Co.* 132 N. Y. 199, 28 A. S. R. 563, 15 L.R.A. 612, 30 N. E. 398; *Gaskins v. Davis*, 115 N. C. 85, 44 A. S. R. 439, 25 L.R.A. 813, 20 S. E. 188,—on the measure of damages for the wrongful cutting or destruction of timber.

Cited in reference notes in 41 A. R. 175, on measure of damages for conversion of logs taken by mistake; 1 A. S. R. 497, on measure of damages in trespass or trover for timber cut on another's land; 28 A. S. R. 567, on measure of damages for cutting and carrying away trees.

Cited in note in 19 L.R.A. 655, on measure of damages from injuring or destroying trees.

Measure of damages for trespass.

Cited in *State v. Pacific Guano Co.* 22 S. C. 50, on measure of damage for trespass.

Cited in note in 17 E. R. C. 883, on right of innocent trespasser to allowance for his labor and expense.

36 AM. REP. 771, EX PARTE MEREDITH, 33 GRATT. 110.

Duration of term of office.

Cited in *Chaddock v. Burk*, 103 Va. 694, 49 S. E. 976, holding no vacancy

existed in the office of an official whose term had been extended until a certain date and thereafter until his successor was appointed and had qualified; *Watlington v. Edmonson*, 1 Va. Dec. 587, on duration of term of office.

Cited in reference note in 49 A. D. 708, on constitutional guaranty of length of official term.

Duration of term of officer elected to fill a vacancy.

Cited in *Smith v. McConnell*, 44 S. C. 491, 22 S. E. 721, holding a judge elected to fill a vacancy held for the full term and not for the remainder of the unexpired term; *State ex rel. Little v. Wentworth*, 55 Kan. 298, 40 Pac. 648, on term of office of person elected to fill a vacancy.

Distinguished in *State ex rel. Hadley v. Burkhead*, 167 Mo. 14, 85 S. W. 901; *State ex rel. Shaw v. Ware*, 13 Or. 380, 10 Pac. 885,—holding judge elected to fill a vacancy only held for the unexpired part of term.

Overruled in *Burks v. Hinton*, 77 Va. 1, holding judge elected to fill a vacancy hold for the remainder of the unexpired term only.

Cited as overruled in *Fitzpatrick v. Kirby*, 81 Va. 467; *Howison v. Weeden*, 77 Va. 704,—on term of office of party elected to fill a vacancy; *Jameson v. Hudson*, 82 Va. 279, holding a county judge elected to fill a vacancy is elected not for the full term but for that portion of the term that may not have expired.

Power of legislature to enlarge term of office.

Cited in *State ex rel. Smith v. Askew*, 48 Ark. 82, 2 S. W. 349, on power of legislature to enlarge term of office.

—Power as to courts.

Cited in *The Judges' Cases*, 102 Tenn. 509, 46 L.R.A. 567, 53 S. W. 134 (dissenting opinion), on legislative control of courts.

36 AM. REP. 783, DAINGERFIELD v. THOMPSON, 33 GRATT. 136.

Care required in carrying firearms.

Cited in reference note in 47 A. R. 807, on care required of persons carrying firearms.

Cited in note in 14 L.R.A. 675, on negligence in respect to guns and similar dangerous agencies.

Sufficiency of bill of exceptions.

Cited in *Morgan v. Fleming*, 24 W. Va. 186, holding bill of exceptions to the judgment of the trial court granting or refusing a new trial, on the ground that it is or is not warranted by the evidence should properly state the facts proved and not the evidence.

Right to question award of damages on appeal.

Cited in *Bertha Zinc Co. v. Black*, 88 Va. 303, 13 S. E. 452, holding verdict would not be disturbed as being excessive it not appearing that jury were actuated by passion, prejudice or undue influence; *Ward v. White*, 86 Va. 212, 19 A. S. R. 883, 9 S. E. 1021; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890,—on right to question the amount of damages awarded on appeal.

Evidence considered by court on appeal.

Cited in *Payne v. Grant*, 81 Va. 164; *Hanriot v. Sherwood*, 82 Va. 1,—on appeal court as only considering the evidence introduced by the party prevailing.

Recovery against perpetrator of practical joke.

Cited in note in 40 A. R. 591, on recovery against perpetrator of practical joke.

36 AM. REP. 788, SMITH v. ALEXANDRIA, 33 GRATT. 208.**Liability of municipal corporation for damage to abutting property in the improvement of streets.**

Cited in *Terry v. Richmond*, 94 Va. 537, 38 L.R.A. 834, 27 S. E. 429, holding city not liable for damages resulting from the defective construction of a tunnel under street by railroad company under authority from city; *Home Bldg. & Conveyance Co. v. Roanoke*, 91 Va. 52, 27 L.R.A. 551, 20 S. E. 895, holding same where approach to elevated bridge built in street without actual encroachment on plaintiff's property; *Kehrer v. Richmond*, 81 Va. 745; *Powell v. Wytheville*, 95 Va. 73, 27 S. E. 805,—on liability of municipal corporation for consequential damages resulting from the improvement of streets.

Cited in reference note in 49 A. D. 421, on liability of municipality for injuries resulting from grading streets.

Cited in notes in 43 A. D. 723, on municipal liability for injury by grading or regrading street; 53 A. D. 367, on right to recover for consequential injuries though work authorized by law; 73 A. D. 751, on nonliability of municipal corporation for consequential damages accruing in grading streets; 23 L.R.A. 659, on liability for negligent or illegal act on first grading and improvement of street.

—Resultant flow of surface water.

Cited in *Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523; *Heth v. Fon du Lac*, 63 Wis. 228, 53 A. R. 279, 23 N. W. 495,—holding abutting property owner could not restrain the improvement of street by city merely because flow of surface across lot increased.

Cited in reference note in 38 A. R. 748, on city's liability for not guarding against extraordinary amount of surface water.

Cited in notes in 66 A. D. 442, on municipal liability as to surface water and drainage; 30 A. S. R. 392, on municipal liability for interference with surface waters by grading streets; 29 A. S. R. 743, on municipal liability for injury by surface water.

Liability of municipality for maintaining a nuisance.

Cited in *Suffolk v. Parker*, 79 Va. 660, 52 A. R. 640, holding property owner might recover damages where dwelling house was rendered untenable by reason of town allowing market house erected by it to become a nuisance.

Right of adjoining property owner to recover for injuries resulting from use of street.

Cited in *Fisher v. Seaboard Air Line R. Co.* 102 Va. 363, 46 S. E. 381, 1 A. & E. Ann. Cas. 622, holding abutting property owner could have no recovery for annoyances resulting from the noises, jarring of buildings and smoke where trains operated in proper manner; *Western U. Teleg. Co. v. Williams*, 86 Va. 696, 19 A. S. R. 908, 8 L.R.A. 429, 11 S. E. 106 (dissenting opinion), on property owner as having no right to recover for mere incidental injuries to property.

Liability for obstructing flow of surface water.

Cited in note in 21 L.R.A. 604, on effect of civil law on correlative rights to obstruct natural flow of surface water in improving property.

Disapproved in *Garland v. Aurin*, 103 Tenn. 555, 76 A. S. R. 699, 48 L.R.A. 862, 53 S. W. 940, holding property owner might recover damages from ad-

joining property owner who obstructed the natural flow of surface water from plaintiff's lot.

36 AM. REP. 793, CLEM v. HOLMES, 33 GRATT. 721.

Admissibility of evidence of defendant's pecuniary condition on question of damage.

Cited in *Sexson v. Hoover*, 1 Ind. App. 65, 27 N. E. 105, holding in action for malicious prosecution defendant's pecuniary condition is admissible; *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, on the admissibility of evidence of defendant's pecuniary condition.

Cited in notes in 44 A. D. 175, on evidence of pecuniary circumstances of parties; 67 A. D. 562, on admissibility of pecuniary circumstances of party in action involving exemplary damages.

— **In actions for seduction or breach of promise.**

Cited in *Wilson v. Shepler*, 86 Ind. 275; *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686; *White v. Gregory*, 126 Ind. 95, 25 N. E. 806; *Gemmell v. Brown*, 25 Ind. App. 6, 56 N. E. 691; *Watson v. Watson*, 53 Mich. 168, 51 A. R. 111, 18 N. W. 605; *Riddle v. McGinnis*, 22 W. Va. 253,—holding same in action by father for seduction of daughter; *Dent v. Pickens*, 34 W. Va. 240, 26 A. S. R. 921, 12 S. E. 698, holding in action for breach of promise to marry evidence of the pecuniary circumstances of the defendant when the breach occurred admissible.

Cited in reference note in 38 A. R. 768, on competency of defendant's pecuniary condition in action for seduction.

Right of parent to maintain action for seduction of daughter.

Cited in *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671; *Riddle v. McGinnis*, 22 W. Va. 253; *Hudkins v. Haskins*, 22 W. Va. 645,—on right of parent to maintain action for the seduction of a daughter.

Cited in note in 14 L.R.A. 707, on construction of statutes relating to parent's action for seduction of daughter.

Limitations against cause of action for seduction.

Cited in *Davis v. Boyett*, 120 Ga. 649, 102 A. S. R. 118, 66 L.R.A. 258, 48 S. E. 185, 1 A. & E. Ann. Cas. 386, holding statute of limitation begins to run against parent's cause of action for seduction of daughter at time seduction is complete; *Allebaugh v. Coakley*, 75 Va. 628, on when statute of limitations commences to run against a cause of action; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671, on operation of statute of limitations in action of seduction.

Cited in note in 44 A. R. 170, on necessity that declaration in action for seduction show relationship, etc.

36 AM. REP. 795, BACCIGALUPO v. COM. 33 GRATT. 807.

Defense of insanity.

Cited in *Danforth v. State*, 75 Ga. 614, 58 A. R. 480, on insanity as a defense in criminal actions; *Honesty v. Com.* 81 Va. 283, on insanity and intoxication as defenses in criminal action.

Burden of proof of insanity as defense to prosecution.

Cited in *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *Lovegrove v. State*, 31 Tex. Crim. Rep. 491, 21 S. W. 191; *State v. Scott*, 49 La. Ann. 253, 36 L.R.A. 721, 21 So. 271,—holding the burden rested on accused urging his insanity to prove

it; *Dejarnette v. Com.* 75 Va. 867; *State v. Douglass*, 28 W. Va. 297,—holding party setting up insanity as a defense in a criminal action must satisfy jury that he was insane when crime was committed; *State v. Hancock*, 151 N. C. 699, 66 S. E. 137, holding that insanity as defense in criminal action must be proved to satisfaction of jury.

Cited in reference notes in 83 A. D. 239; 36 A. R. 467,—on burden of proof to show sanity in criminal case.

Cited in notes in 97 A. D. 177; 76 A. S. R. 96; 36 L.R.A. 727,—on burden of proving insanity in criminal prosecution; 39 L.R.A. 738, on proof of insanity in criminal cases to satisfaction of jury.

Evidence reviewable on appeal.

Cited in *Taylor v. Com.* 77 Va. 692; *Moses v. Old Dominion, I. & N. W. Co.* 81 Va. 22,—holding on appeal court can take no cognizance of the case where evidence and not facts certified unless after rejecting all oral evidence of the excepting party and giving full faith and credit to the evidence of the adverse party the judgment still appears to be wrong; *Payne v. Grant*, 81 Va. 164, on evidence admissible on appeal of action; *Moses v. Old Dominion, I. & M. W. Co.* 82 Va. 19, on sufficiency of evidence to authorize granting of a new trial.

Cited in note in 17 L.R.A. 484, on power of appellate court to reverse holding for insufficiency of evidence.

Jurors "of county" within meaning of constitution.

Cited in *State v. Kemp*, 34 Minn. 61, 24 N. W. 349, holding jurors selected from electors of city exclusively, on trial of offense committed in county in which city is situated, were jurors of the county within meaning of constitution.

Right to summon same men when first venire quashed.

Cited in *Mitchell v. Com.* 33 Gratt. 845, holding on the quashing of the first venire, the court may summon the same men on the second venire.

36 AM. REP. 797, PRICE v. COM. 33 GRATT. 819.

Involuntary manslaughter as a misdemeanor.

Cited in *Ex parte Garrison*, 36 W. Va. 686, 15 S. E. 417, holding involuntary manslaughter a misdemeanor under code and as such punishable at the discretion of the court by fine or imprisonment in jail or both.

Necessity for personal presence of accused.

Cited in notes in 28 A. D. 631, as to when personal presence of accused is unnecessary; 5 L.R.A. 834, on right of person accused of felony to be present during trial.

36 AM. REP. 803, STATE v. BALTIMORE & O. R. CO. 15 W. VA. 362. Subsequent appeal in 24 W. Va. 783.

Amenability of corporation to indictment.

Cited in *United States v. John Kelso Co.* 88 Fed. 304, holding a corporation may be held subject to fine for violating the Federal eight hour law; *United States v. McAndrews & F. Co.* 149 Fed. 823, holding a corporation may be held criminally liable for the crime of conspiracy; *Standard Oil Co. v. State*, 117 Tenn. 618, 10 L.R.A. (N.S.) 1015, 100 S. W. 705, on corporations as having the power to commit crimes or torts through officers and agents; *State v. Baltimore & O. R. Co.* 65 W. Va. 603, 64 S. E. 735, holding railroad company not

liable criminally for obstructing crossing when evidence shows but single offense and that in violation of rules of company.

Cited in notes in 34 A. R. 497, on liability of corporation for malicious act; 7 E. R. C. 483, on liability of corporation to indictment.

— Running trains on Sunday.

Cited in reference note in 40 A. R. 418, on what work of railroad is necessary within Sunday law.

Distinguished in *State v. Norfolk & W. R. Co.* 33 W. Va. 440, 10 S. E. 913, holding by change in statute no indictment could be sustained for running trains on Sunday.

Liability of corporations for their tortious acts.

Cited in *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 611, 88 A. S. R. 895, 56 L.R.A. 804, 40 S. E. 591, on corporations being liable for their tortious acts.

Burden of proof as on state on trial for violation of Sunday law.

Cited in *State v. McBee*, 52 W. Va. 257, 60 L.R.A. 638, 43 S. E. 121, holding on trial of indictment for violating the Sunday law the burden is on the state to satisfy the jury that the labor was not household work or other work of necessity or charity.

Proof necessary on indictment of corporation.

Cited in *Murphy v. State*, 86 Ohio St. 628, holding no direct proof of the allegation in indictment that injured party was a corporation is needed.

Master's penal liability for acts of servant.

Cited in *Hall v. Norfolk & W. R. Co.* 44 W. Va. 36, 67 A. S. R. 757, 41 L.R.A. 669, 28 S. E. 754, holding railroad not liable for penalty for overcharge of freight or passenger rates, for the mere charge of it by the conductor, unless the company authorized or approved the act; *Van Camp v. Michigan C. R. Co.* 137 Mich. 467, 100 N. E. 771 (dissenting opinion), on railroad corporation as not subject to a penalty for an unauthorized act of agent; *State v. Baltimore & O. R. Co.* 24 W. Va. 783, 49 A. S. R. 290 (second appeal), on right to infer that act of servant was done with approval of master.

Necessity that indictment negative exceptions in statute.

Cited in *State v. Tapit*, 52 W. Va. 473, 44 S. E. 231, on necessity of indictment negating exceptions in statute under which indictment brought.

Validity of Sunday labor laws.

Cited in *State ex rel. Walker v. Judge of Section A*, 39 La. Ann. 132, 1 So. 437; *State v. Nichols*, 28 Wash. 628, 69 Pac. 372,—on validity of laws requiring the suspension of labor on Sunday; *Wells v. Com.* 107 Va. 834, 57 S. E. 588 (dissenting opinion), on the violation of the Sunday labor law as being a misdemeanor.

Cited in reference note in 58 A. R. 775, on constitutionality of Sunday laws.

Cited in notes in 2 L.R.A. 521, on plaintiff's violation of Sunday law as defense to action for injuries received on that day; 41 L.R.A. 658, on criminal and penal liability for Sabbath breaking by copartner, servant, or agent.

Adoption of agent's act by acceptance of benefits of contract.

Cited in *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670, holding party could not accept the benefits of contract made by his agent without making the compensation contracted for.

Acts of which appellate court will take judicial notice.

Cited in *Groves v. County Ct.* 42 W. Va. 587, 26 S. E. 460, holding court would take judicial notice of all such acts and resolutions of legislature, though local and private, as appear to have been relied on in court below.

Cited in note in 124 A. S. R. 57, on judicial notice of facts relating to corporations, associations, and members thereof.

Acts of court as grounds for new trial.

Cited in *State v. Pearis*, 35 W. Va. 320, 13 S. E. 1006, holding in criminal proceedings a refusal to allow accused to challenge four jurors peremptorily grounds for a new trial.

Incompetency of grand juror to impeach bill found.

Cited in *Gitchell v. People*, 146 Ill. 175, 37 A. S. R. 147, 33 N. E. 757, holding affidavits of grand jurors inadmissible for purpose of showing that twelve of their number were not in favor of finding a true bill, which had been reported as found.

Cited in note in 28 L.R.A. 36, on impeaching indictment by showing that twelve grand jurors did not concur.

Disqualification of grand juror.

Cited in note in 28 L.R.A. 200, on opinion and prejudice as disqualifying grand juror.

36 AM. REP. 820, BALTIMORE & O. R. CO. v. BITNER, 15 W. VA. 455.**Right of set-off.**

Cited in *Logie v. Black*, 24 W. Va. 1, holding that damages arising out of breach of same contract sued upon may be recouped, whether obligation is in same writing or not, provided it is same transaction; *Cross v. Gall*, 65 W. Va. 276, 64 S. E. 533, to the point that joint and separate demands cannot be set off one against another, save in special case provided for by our statute.

Cited in note in 40 A. D. 327, on parties between whom rights to recoupments exist.

—Right of surety to.

Cited in *Graff v. Kahn*, 18 Ill. App. 485, on right of surety to plead a set off when sued on the obligation alone.

Cited in reference note in 20 A. S. R. 547, as to what may be set off in action against principal and surety.

Cited in note in 18 L.R.A. (N.S.) 601, on right of surety to interpose independent cause of action in favor of principal against plaintiff as defense or counterclaim.

Sufficiency of pleadings to tender or join issue on replication.

Cited in *Baltimore & O. R. Co. v. Bitner*, 15 W. Va. 467, holding general rejoinder to special replication was good on appeal; *Henry v. Ohio River R. Co.* 40 W. Va. 234, 21 S. E. 863, holding there can be no issue where there is a plea of new matter, concluding with a verification, without replication.

36 AM. REP. 825, HAWKER v. BALTIMORE & O. R. CO. 15 W. VA. 628.**Admissibility of declarations as part of res gestæ.**

Cited in *Lawrence v. Du Bois*, 16 W. Va. 443, holding declarations of an

agent made while he is performing the act authorized by the principal, which qualify and characterize the act are admissible in evidence against the principal as part of *res gestæ*; *Bank of Ravenswood v. Wetzel*, 58 W. Va. 1, 70 L.R.A. 305, 50 S. E. 886, 6 A. & E. Ann. Cas. 48, on admissibility of admissions in evidence; *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305; *American Buttonhole Overseaming Sewing Mach. Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319 (dissenting opinion); *State v. Woodrow*, 58 W. Va. 527, 112 A. S. R. 1001, 2 L.R.A.(N.S.) 862, 52 S. E. 545, 6 A. & E. Ann. Cas. 180,—on admissibility of declarations as part of *res gestæ*.

Cited in reference notes in 39 A. R. 526, on competency of declaration of agent to show knowledge of principal; 47 A. R. 52, on admissibility of declarations of person injured as part of *res gestæ*; 47 A. S. R. 653, on admissibility of declarations of agent.

Cited in notes in 34 A. R. 482, on declarations of deceased as part of *res gestæ*; 58 A. R. 566, as to when declarations of agents are part of *res gestæ*; 11 E. R. C. 292, on the doctrine of *res gestæ*; 19 L.R.A. 747, on how near the main transaction declarations must be made to constitute part of *res gestæ*.

—Declarations by engineer or driver.

Cited in *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 300, holding declarations of engineer of locomotive of train which meets with an accident as to the speed at which the train was running when the accident happened, made between ten and thirty minutes afterwards not admissible against the company; *Sample v. Consolidated Light & R. Co.* 50 W. Va. 472, 57 L.R.A. 186, 40 S. E. 597, holding declarations of motorman made directly after the accident admissible as part of the *res gestæ*.

Sufficiency of declaration or complaint in action for negligent injury.

Cited in *White v. Chesapeake & O. R. Co.* 26 W. Va. 800; *Berns v. Gaston Gas Coal Co.* 27 W. Va. 285, 55 A. R. 304; *McKenzie v. Ohio River R. Co.* 27 W. Va. 306; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752,—holding in action for negligent injury to plaintiff, declaration is not bad because it does not state the particular injury; *Chicago City R. Co. v. Jennings*, 157 Ill. 274, 41 N. E. 629; *Criswell v. Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 798, 6 S. E. 31,—holding same where declaration did not state the particular acts constituting the defendants' negligence; *Searle v. Kanawha & O. R. Co.* 32 W. Va. 370, 9 S. E. 248; *Trump v. Tidewater Coal & Coke Co.* 46 W. Va. 238, 32 S. E. 1035,—holding declaration sufficiently stated cause of action; *Humphreys v. Newport News & M. Valley R. Co.* 33 W. Va. 135, 10 S. E. 39; *Unfried v. Baltimore & O. R. Co.* 34 W. Va. 260, 12 S. E. 512; *Layne v. Ohio River R. Co.* 35 W. Va. 438, 14 S. E. 123; *Gregory v. Ohio River R. Co.* 37 W. Va. 606, 16 S. E. 819; *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L.R.A. 215, 18 S. E. 782; *Robbins v. Baltimore & O. R. Co.* 62 W. Va. 535, 59 S. E. 512; *Kidd v. Beckley*, 64 W. Va. 80, 60 S. E. 1089; *Oliver v. Ohio River R. Co.* 42 W. Va. 703, 26 S. E. 444,—on sufficiency of declaration in action for negligent injury; *Sesler v. Rolfe Coal & Coke Co.* 51 W. Va. 318, 41 S. E. 216, on sufficiency of charge of negligence in declaration.

Cited in notes in 59 L.R.A. 212, on sufficiency of general allegations of negligence; 59 L.R.A. 231, 232, on sufficiency of general allegations of negligence in case of injury to stock by collision.

Distinguished in *Kniceley v. West Virginia Midland R. Co.* 64 W. Va. 278, 17 L.R.A.(N.S.) 370, 61 S. E. 811, holding that in action for negligence *var-*

Am. Rep. Vol. XVII.—76

iance of evidence from declaration in respect to matter of detail concerning manner of infliction of injury, is immaterial.

Liability of railroad company for injury to persons or property on right of way.

Cited in *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 514, 11 L.R.A. 385, 12 S. E. 553, holding in the absence of gross or wanton negligence railroad company not liable to person injured while walking on the track; *Toudy v. Norfolk & W. R. Co.* 38 W. Va. 694, 18 S. E. 896, holding railroad company not liable for the killing of a horse straying on track where it was impossible to prevent the accident; *Maynard v. Norfolk & W. R. Co.* 40 W. Va. 331, 21 S. E. 733, holding that in order to charge railroad with damages for killing stock strayed upon its tracks, negligence on the part of the company must appear.

Effect of variance between declaration and proof of act constituting wrong.

Cited in *Lawson v. Conaway*, 37 W. Va. 159, 38 A. S. R. 17, 18 L.R.A. 627, 16 S. E. 564, holding under averments in declaration that defendants carelessly, negligently and by improper treatment caused the injury, proof of abandonment of treatment by defendant admissible; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 64 A. S. R. 922, 39 L.R.A. 499, 28 S. E. 733, holding proof of a particular act as the cause of the injury cannot be received where declaration states another act as the cause; *Beyel v. Newport News & M. Valley R. Co.* 34 W. Va. 538, 12 S. E. 532, on effect of variance between declaration and proof; *Young v. West Virginia, C. & P. R. Co.* 42 W. Va. 112, 24 S. E. 615; *Hanley v. West Virginia, C. & P. R. Co.* 59 W. Va. 419, 53 S. E. 625,—on the materiality of variance between the declaration and the proof.

Interest on judgment, reckoned from what time.

Cited in *Baer's Sons Grocer Co. v. Cutting Fruit Packing Co.* 42 W. Va. 359, 26 S. E. 191, holding in action on contract interest shall be rendered on judgment from date of verdict; *Fowler v. Baltimore & O. R. Co.* 18 W. Va. 579; *Wilson v. Wheeling*, 19 W. Va. 323, 42 A. R. 780; *Talbott v. West Virginia, C. & P. R. Co.* 42 W. Va. 560, 26 S. E. 311,—holding in action in tort the judgment must bear interest from date thereof; *Campbell v. Elkins*, 58 W. Va. 308, 2 L.R.A.(N.S.) 159, 52 S. E. 220, holding a judgment rendered in an action ex delicto should bear interest from the date of the verdict and not from date of judgment; *Ohio River R. Co. v. Harness*, 24 W. Va. 511; *Triplett v. Lake*, 43 W. Va. 428, 27 S. E. 363,—on from what time interest on decree or judgment reckoned.

Charge to jury.

Cited in *Hannum v. Hill*, 52 W. Va. 166, 43 S. E. 223, holding it error to single out issues in instructing jury but that charge did not do this.

36 AM. REP. 830, ELLIS v. ESSON, 50 WIS. 138, 6 N. W. 518.

How action against joint tort feors, barred.

Cited in *Bishop v. McGillis*, 82 Wis. 120, 51 N. W. 1075, holding the commencement of an action against some of joint tort-feors is not such an election between remedies as will prevent plaintiff after discontinuance of such action from joining others of them in a subsequent action against one or more of the defendants in the prior action; *Gray v. Herman*, 75 Wis. 433, 6 L.R.A. 691, 44 N. W. 248, on recovery against one of joint wrongdoers as a bar to action against the others.

Cited in notes in 81 A. D. 731, on cotrespasgers' liability; 92 A. S. R. 875, 876, on effect of partial satisfaction by one joint tort feasor; 92 A. S. R. 882, on effect of discharge of stranger on liability of joint tort feasor; 100 A. S. R. 402, on accord and satisfaction between joint tort feasors.

— By release in full.

Cited in *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 135, holding a receipt for a discharge in full satisfaction for an injury will operate as a discharge of the other joint tort feasors.

— By release of one.

Cited in *Carey v. Bilby*, 63 C. C. A. 361, 129 Fed. 203; *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Louisville & E. Mail Co. v. Barnes*, 117 Ky. 860, 111 A. S. R. 273, 64 L.R.A. 574, 79 S. W. 261,—holding a release of one joint tort feasor by the payment of a sum of money does not preclude a recovery against the other; *Pogel v. Meilke*, 60 Wis. 248, 18 N. W. 927, holding a settlement with one joint tort feasor does not discharge the others unless it was received as satisfaction for the whole injury; *Bowman v. Davis*, 13 Colo. 297, 22 Pac. 507, on receipt of money from one of joint tort feasors as discharging the others; *Arnett v. Missouri P. R. Co.* 64 Mo. App. 368; *Jameson v. Barber*, 56 Wis. 630, 14 N. W. 859 dissenting opinion,—on discharge of one of joint wrong doers as a discharge of all; *Watkins Music Co. v. Basham*, 48 Tex. Civ. App. 505, 106 S. W. 734, holding that release of one joint obligor does not affect co-obligors where it appears that it was not intention of parties; *Musolf v. Duluth Edison Electric Co.* 108 Minn. 369, 24 L.R.A.(N.S.) 451, 122 N. W. 490, to point that receipt of money from one joint tort feasor discharges others only where money was received as accord and satisfaction for whole injury; *Ryan v. Becker*, 136 Iowa, 273, 14 L.R.A.(N.S.) 329, 111 N. W. 426, holding that release given to one joint tort feasor may be shown not to be given in satisfaction, and that money was not received as compensation.

Cited in reference note in 41 A. D. 371, on release of one of several joint trespassers discharging all.

Cited in notes in 73 A. D. 146, on release of one cotrespasser or satisfaction by one as release of all; 11 A. S. R. 907, 908, on effect of release given to, or satisfaction accepted from, one of several joint wrongdoers; 111 A. S. R. 283, 284, on reservation of right to hold others in release of one joint tort feasor; 58 L.R.A. 294, on effect of release under seal of one joint tort feasor on liability of the other; 58 L.R.A. 299, on construing release not under seal of one joint tort feasor according to intention of parties; 58 L.R.A. 301, on effect of partial satisfaction by one joint tort feasor on liability of the other; 14 L.R.A. (N.S.) 330, on right to show by extrinsic evidence that payment of judgment against, or consideration for release of, alleged joint tort feasor, was not a satisfaction of the claim.

— By release stipulating against bar.

Cited in *Commercial Nat. Bank v. Taylor*, 64 Hun, 499, 19 N. Y. Supp. 533, holding tort feasor not released by the release of other of the joint wrong doers, by an instrument stating that it shall not be construed to operate as a release of defendant.

Disapproved in *McBride v. Scott*, 132 Mich. 176, 102 A. S. R. 416, 61 L.R.A. 445, 93 N. W. 243, 1 A. & E. Ann. Cas. 61, holding a release of one or more joint tort feasors releases the others although it be agreed that they shall not be discharged.

—By agreement not to sue.

Cited in *Chicago v. Smith*, 95 Ill. App. 335, holding agreement not to sue one of two joint tort feorsors does not operate as a bar to action against other in absence of release or accord and satisfaction.

Cited in note in 36 A. S. R. 149, on agreement not to sue joint obligor.

Release of joint debtor as discharging others.

Cited in *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344, holding a release by debtor of his claim for damages against one of wrongfully attaching creditors does not operate as a release of his claim against other attaching creditors; *Gilbert v. Finch*, 173 N. Y. 455, 93 A. S. R. 623, 61 L.R.A. 807, 66 N. E. 133, holding directors of a corporation not relieved from liability by a release granted by themselves to a co-director; *Pettigrew Mach. Co. v. Harmon*, 45 Ark. 290, on release of one joint debtor as discharging the others; *Hood v. Hayward*, 124 N. Y. 1, 26 N. E. 331, 20 N. Y. Civ. Proc. Rep. 47, 26 Abb. N. C. 271 (dissenting opinion), on release of surety as affecting right of co-surety to a release.

Several actions against joint tort-feorsors.

Cited in *Olwell v. Skobis*, 126 Wis. 308, 105 N. W. 777, on right to maintain separate actions against joint tort feorsors.

Equitable release as given effect in law.

Cited in *Case Wagon Co. v. Wolfenden*, 63 Wis. 185, 23 N. W. 485, holding acts which amount to a release in equity might be interposed as such in law to save circuity of action.

Right of joint tort-feasor to plead a counterclaim.

Cited in *Stolze v. Torrison*, 118 Wis. 315, 95 N. W. 114, on right of one tort feasor in joint action to set up a counterclaim against plaintiff.

36 AM. REP. 840, CHICAGO & N. W. R. CO. v. OCONTO, 50 WIS. 189, 6 N. W. 607.

What is a town.

Cited in *Cathcart v. Comstock*, 56 Wis. 590, 14 N. W. 833, as defining the use of the word "town" as used in the statute; *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724, on town as being a civil subdivision of the state.

What territory may be designated a town.

Cited in *Smith v. Sherry*, 50 Wis. 210, 6 N. W. 561, holding an uninhabited tract of country nowhere adjoining an existing village could not be made part of such village for mere purpose of increasing the corporate revenue by taxation; *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465, on well defined boundaries as essential to existence of a town.

Cited in note in 25 L.R.A. 756, on physical characteristics necessary to municipal organization.

Distinguished in *Schriber v. Langlade*, 60 Wis. 616, 29 N. W. 547, holding an Indian reservation may be included within the boundaries of a town.

Contiguosness of territory essential to existence of town.

Cited in *Denver v. Coulehan*, 20 Colo. 471, 27 L.R.A. 751, 39 Pac. 425; *Enterprise v. State*, 20 Fla. 128, 10 So. 740,—holding an attempt to incorporate two distinct detached, tracts of land as corporate territory as one government is unauthorized and void; *Grunert v. Spalding*, 104 Wis. 193, 78 N. W.

606, holding a single tract of land surrounded by an unbroken boundary line and capable of being traversed from one extremity to the other without leaving its territory may be designated a town though it has a length of over a hundred miles and a width of from two to three.

Cited in note in 27 L.R.A. 746, on limitation on legislative power to annex territory to municipality.

36 AM. REP. 845, STATE v. GLASS, 50 WIS. 218, 6 N. W. 500.

Admissibility of previous voluntary testimony by accused.

Cited in *Preston v. State*, 41 Tex. Crim. Rep. 300, 53 S. W. 127, holding testimony of accused on a former trial admissible against him; *Steele v. State*, 76 Miss. 387, 24 So. 910; *Anderson v. State*, 133 Wis. 601, 114 N. W. 112,—holding the voluntary statement of accused party on preliminary examination may be put in evidence by the state upon his trial; *United States v. Kirkwood*, 5 Utah, 123, 13 Pac. 234, holding same where accused makes voluntary confession before the grand jury.

Admissions by accused.

Cited in *Yanke v. State*, 51 Wis. 464, 8 N. W. 276, holding admissions made freely by the accused to officers are admissible against himself; *Hintz v. State*, 125 Wis. 405, 104 N. W. 110, holding confessions made by a party under arrest, are admissible if not elicited by coercion, threats or artifice.

Cited in reference note in 41 A. S. R. 524, on admissibility of confession under oath.

Verdict delivered in writing.

Cited in *Brewer v. State*, 53 Fla. 1, 43 So. 423, 12 A. & E. Ann. Cas. 79, holding written verdicts in capital cases may be received in this state.

Distinguished in *Koch v. State*, 126 Wis. 470, 3 L.R.A.(N.S.) 1086, 106 N. W. 531, 5 A. & E. Ann. Cas. 389, holding verdict could not orally be altered or amended after the jury had separated after agreeing upon and sealing up a verdict.

Remarks by court to jury required to be in writing as part of charge.

Cited in *Moore v. Platteville*, 78 Wis. 644, 47 N. W. 1055, holding remarks to jury by court, after they had retired and been called back, on their duty as jurors, not a part of the charge required to be in writing; *Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817, on remarks of court as forming part of the charge as necessary to be in writing.

36 AM. REP. 848, BEYER v. BEYER, 50 WIS. 254, 6 N. W. 807.

Cruel and inhuman treatment as ground for divorce.

Cited in *Williams v. Williams*, 1 Colo. App. 281, 28 Pac. 726, on actual violence as necessary to constitute the "extreme" cruelty necessary; *Carpenter v. Carpenter*, 30 Kan. 712, 46 A. R. 108, 2 Pac. 122, on facts necessary to justify a divorce for cruel and inhuman treatment.

Cited in notes in 73 A. D. 629, on single act of cruelty as entitling one to divorce; 40 A. R. 463, on what constitutes cruelty within divorce law; 51 A. R. 736, on accusations of adultery as ground for divorce; 65 A. S. R. 74, on cruelty as ground for divorce; 6 L.R.A. 187, on cruelty and inhuman treatment as ground for divorce; 6 L.R.A. 188, on extent of cruelty sufficient to authorize divorce.

36 AM. REP. 850, McKESSON v. STANTON, 50 WIS. 297, 6 N. W. 881.

Validity of married woman's deed or land contract.

Cited in *Heal v. Niagara Oil Co.* 150 Ind. 483, 50 N. E. 482, holding lease by married woman of her lands, for purpose of operating gas or oil wells without joining husband therein not void.

Cited in note in 72 A. D. 515, on when separate estate of married woman chargeable with her debts and contracts.

36 AM. REP. 856, WHITTAKER v. STATE, 50 WIS. 518, 7 N. W. 431.

Degree of resistance essential in rape.

Cited in *People v. Clemons*, 37 Hun, 580, 3 N. Y. Crim. Rep. 565, holding on facts resistance was of a sufficient nature to convict of rape, the submission being to overpowering force; *Hammond v. State*, 39 Neb. 252, 58 N. W. 92, on same point; *Bohmann v. State*, 98 Wis. 617, 74 N. W. 343, holding on facts the resistance was not sufficient to convict of rape; *Beard v. State*, 79 Ark. 293, 97 S. W. 667, 9 A. & E. Ann. Cas. 409 (dissenting opinion); *Reynolds v. State*, 27 Neb. 90, 20 A. S. R. 659, 42 N. W. 903; *Sowers v. Territory*, 6 Okla. 436, 50 Pac. 257; *Brown v. State*, 127 Wis. 193, 106 N. W. 536, 7 A. & E. Ann. Cas. 258,—on the necessity of utmost resistance: *Loescher v. State*, 142 Wis. 260, 125 N. W. 459, holding that offense of rape is consummated where intercourse is had after victim is rendered insensible through fright or ceases resistance because of fear of great bodily harm.

Cited in reference notes in 65 A. D. 509, on force as essential to commission of rape; 80 A. D. 367, on consent after penetration as defense in rape; 38 A. R. 366, on degree of resistance necessary to constitute rape of woman in possession of physical and mental powers; 20 A. S. R. 661, on necessity of resistance on part of female to constitute crime of rape; 48 A. S. R. 248, on rape accomplished by force; 63 A. S. R. 164, on force necessary to constitute rape.

36 AM. REP. 862, BAILEY v. RAGATZ, 50 WIS. 554, 7 N. W. 564.

Arrest without warrant.

Cited in note in 84 A. S. R. 696, on place where arrest without warrant may be made.

Right to force entry to serve process.

Cited in reference note in 42 A. S. R. 388, on entering third person's premises to serve process.

36 AM. REP. 866, HAMILTON v. PROUTY, 50 WIS. 592, 7 N. W. 659.

Validity of agreement to extend time of payment of bill or note.

Cited in *Moulton v. Posten*, 52 Wis. 169, 8 N. W. 621, holding an agreement upon sufficient consideration to extend the time of payment of a note "until after threshing" sufficiently definite to give it validity and work a discharge on an nonassenting surety; *Fanning v. Murphy*, 126 Wis. 538, 110 A. S. R. 946, 4 L.R.A.(N.S.) 666, 105 N. W. 1056, 5 A. & E. Ann. Cas. 435, on elements essential to the validity of an agreement for the extension of the time of payment of a note.

— Sufficiency of usurious consideration for extension.

Cited in *Vary v. Norton*, 6 Fed. 808, holding payment of a usurious consideration constituted a valuable consideration for the extension of time of payment of note; *Fay v. Tower*, 58 Wis. 286, 16 N. W. 558, holding an usurious note given by the principal maker of another note to the holder thereof is a sufficient consideration for an extension for the time of payment of the latter.

Discharge of surety by extension of time of payment of bill or note.

Cited in *Niblack v. Champeny*, 10 S. D. 166, 72 N. W. 402, holding surety on note discharged by extension of the time of payment without his consent, on a usurious consideration; *Dillaway v. Peterson*, 11 S. D. 210, 76 N. W. 925; on extension of time of payment on note as discharging surety.

Cited in reference notes in 35 A. R. 585, on surety's discharge by indulgence to principal; 7 A. S. R. 372, on nature and extent of surety's liabilities.

Cited in notes in 53 L.R.A. 317, 318, on effect of payment of usury in consideration of extension of time to principal on surety's liability; 53 L.R.A. 322, on effect of contract to pay usury in consideration of extension of time to principal on surety's liability.

Usury as personal defence.

Cited in *Lemmon v. Whitman*, 75 Ind. 318, 39 A. R. 150, on who may set up usury as a defense.



